

# **IDAHO COURT RULES**

**2013**

**VOLUME 2**

**IDAHO CRIMINAL RULES  
MISDEMEANOR CRIMINAL RULES  
IDAHO INFRACTION RULES  
IDAHO JUVENILE RULES  
IDAHO COURT ADMINISTRATIVE RULES  
IDAHO RULES OF PROFESSIONAL CONDUCT  
IDAHO APPELLATE RULES  
FEDERAL RULES**



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# IDAHO CODE

# IDAHO COURT RULES

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VOLUME 2

Compiled Under the Supervision of the  
Idaho Code Commission

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COMMISSIONERS

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4231430

ISBN 978-0-7698-6456-3 (Set)

## PUBLISHER'S NOTE

The 2013 edition of the Idaho Court Rules is in two volumes. Volume 1 contains the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Volume 2 contains the Idaho Criminal Rules, Misdemeanor Criminal Rules, Idaho Infraction Rules, Idaho Juvenile Rules, Idaho Court Administrative Rules, Idaho Rules of Professional Conduct, Idaho Appellate Rules and selected federal rules affecting Idaho.

These volumes replace the Idaho Code, 2012 Idaho Court Rules volumes. They contain the Idaho Court Rules, which comprise the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Rules of Evidence (I.R.E.), the Idaho Criminal Rules (I.C.R.), the Misdemeanor Criminal Rules (M.C.R.), Idaho Infraction Rules (I.I.R.), Idaho Juvenile Rules (I.J.R.), Idaho Court Administrative Rules (I.C.A.R.), Idaho Rules of Professional Conduct (I.R.P.C.), and the Idaho Appellate Rules (I.A.R.). These rules have been adopted by the Supreme Court of Idaho with the purpose of simplifying and expediting court procedures. In addition, these volumes contain the Rules for the United States Court of Appeals, Ninth Circuit, the Local Rules for the United States District Court, District of Idaho and the Local Rules for the United States Bankruptcy Court for the District of Idaho.

The Idaho Rules of Civil Procedure, as originally adopted by the Supreme Court following a study by a committee appointed by the State Bar Commission, became effective November 1, 1958, but were amended by the court effective January 1, 1975, in accordance with Rule 86. These rules follow the Federal Rules of Civil Procedure insofar as practicable but contain modifications adopted state practice. In some instances new rules were written in order to clarify or preserve certain useful sections of the Idaho Code.

The Idaho Rules of Evidence became effective July 1, 1985; the Idaho Criminal Rules and the Misdemeanor Court Rules became effective July 1, 1980; the Idaho Infraction Rules became effective July 1, 1983; the Idaho Juvenile Rules became effective July 1, 1996; the Idaho Court Administrative Rules became effective July 1, 1980; the Idaho Rules of Professional Conduct became effective November 1, 1986, and the Idaho Appellate Rules became effective July 1, 1977.

The rules contained in these volumes are accompanied by a variety of notes designed to present the user of the rules volume with relevant information concerning the rule. These include compiler's notes, cross-references and annotations in which the rule itself or a similar rule or statute has been applied by the state or federal courts.

This publication contains annotations taken from decisions of the Idaho Supreme and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com*. These cases will be printed in the following reports:

Pacific Reporter, 3rd Series  
Federal Supplement, 2nd Series  
Federal Reporter, 3rd Series

PUBLISHER'S NOTE

United States Supreme Court Reports, Lawyers' Edition, 2nd Series

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## USER'S GUIDE

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In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of the Code. This guide contains comments and information on the many features found within the Idaho Code intended to increase the usefulness of this set of laws to the user.



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## Rule 1. Scope — Courts — Exceptions.

These rules apply to all criminal proceedings in the district courts and the magistrates divisions thereof of the state of Idaho with the following exceptions:

- (a) Extradition and fugitives from justice;
- (b) Forfeiture of property for violation of a statute of the State of Idaho;
- (c) Collection of fines and penalties;
- (d) Juveniles under the Youth Rehabilitation Act;
- (e) Juveniles under the Child Protective Act;
- (f) Habeas corpus;
- (g) Uniform post-conviction proceedings, except as provided in rule 57;
- (h) Coroner and coroner's inquests;
- (i) Proceedings in quo warranto. (Adopted December 27, 1979, effective July 1, 1980; amended March 18, 1998, effective July 1, 1998.)

## STATUTORY NOTES

**Compiler's Notes.** The Supreme Court order of December 27, 1979, effective July 1, 1980, adopting the Idaho Criminal Rules read:

"The report of the Idaho Criminal Rules Committee, which was appointed by the

Court to review all existing criminal rules of the State of Idaho, having been received and reviewed in detail by the court, and proposed copies of the Idaho Criminal Rules and the Misdemeanor Criminal Rules having been circulated to members of the bench and bar

throughout the state, and the Court having received recommendations and suggestions regarding said rules,

“NOW THEREFORE, IT IS HEREBY ORDERED, that the Idaho Criminal Rules (I.C.R.) be, and the same are hereby, approved and adopted by the Court, a copy of which is attached hereto and on file with the Clerk of the Court.

“IT IS FURTHER ORDERED, that the Misdemeanor Criminal Rules, (M.C.R.) be, and the same are hereby, approved and adopted by the Court, a copy of which is attached hereto and on file with the Clerk of the Court.

“IT IS FURTHER ORDERED, that the Rules of Criminal Practice and Procedure heretofore adopted January 1, 1972, and thereafter amended, be, and the same are hereby, rescinded.

“IT IS FURTHER ORDERED, that the Rules of the Court for the Magistrates Division of the District Court and the District Court heretofore adopted effective January 11, 1971, and thereafter amended, be, and the same are hereby, rescinded.

“IT IS FURTHER ORDERED, that the Rules of Procedure in Traffic Cases adopted by the Court on October 20, 1969, and thereafter amended, be, and the same are hereby, rescinded.

“IT IS FURTHER ORDERED, that the Criminal Appellate Rules, dealing with appeals from the magistrates division to the district court in criminal actions be, and the same are hereby, rescinded.

“IT IS FURTHER ORDERED, that the Uniform District Court Rules adopted by the Court May 3, 1965, and published in the Idaho State Bar Desk Book be, and the same are hereby, rescinded.

“IT IS FURTHER ORDERED, that this Order and these rescissions of rules and adoptions of new rules shall be effective on the first of July, 1980; provided, however, in the event a trial court determines that the application of the new Idaho Criminal Rules or the Misdemeanor Criminal Rules adopted herein to any action pending on July 1, 1980, would prejudice any party, the trial court shall apply those rules which would have been applicable to that action immediately prior to the effective date of the Idaho Criminal Rules and the Misdemeanor Criminal Rules on July 1, 1980.”

**Cross References.** Child Protective Act, §§ 16-1601 — 16-1643.

Coroner's inquests, §§ 19-4301 — 19-4310.  
Disposition of fines, forfeitures, and costs, §§ 19-4701 — 19-4708.

Proceedings against fugitives from justice, §§ 19-4501 — 19-4534.

Search warrants, §§ 19-4401 — 19-4403, 19-4406 — 19-4420.

Uniform Post-Conviction Procedure Act, §§ 19-4901 — 19-4911.

Writ of habeas corpus, §§ 19-4201 — 19-4226.

Juvenile Corrections Act, § 20-501 et seq.

## **Rule 2. Purpose and construction — Title — District court rules.**

(a) **Purpose and construction.** These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.

(b) **Title.** These rules shall be known and cited as the Idaho Criminal Rules (I.C.R.).

(c) **District court rules.** No district court or magistrate division of the state shall make rules of procedure except as expressly authorized by these rules. The district courts of each judicial district by a majority vote of all district judges may make rules governing the internal case management and procedure of the district court including procedures for setting the time and place for trial of criminal actions and the hearing of all other proceedings and motions. Such rules shall be consistent with these rules, and must be approved and published by order of the Supreme Court before the effective date thereof, except in cases declared by the Supreme Court to be an emergency, in which case the order may be declared to be effective immediately. (Adopted December 27, 1979, effective July 1, 1980; amended June 15, 1987, effective November 1, 1987.)



## JUDICIAL DECISIONS

## ANALYSIS

Dismissal of Information.  
 Psychological Evaluation.  
 Sanctions.  
 Sentence Reduction.

**Dismissal of Information.**

Where prosecution exceeded the time limit for filing the information for burglary and theft charges by seven days, dismissal was not required where the defendant failed to show how he was prejudiced by the delay. Dismissal of the charges would have disserved interests identified in Idaho Crim. R. 2(a) by increasing expense and delay and adding complexity and inefficiency in the overall handling of the charges. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

**Psychological Evaluation.**

Trial court erred under subsection (d) in denying defendant's motion for a presentence psychological evaluation during the sentencing phase of trial, because the record demonstrated that defendant's mental condition was a significant factor in determining the sentence; the trial court had explicitly stated its

beliefs that "certain mental factors" existed and that defendant needed psychological treatment. *State v. Hanson*, 152 Idaho 314, 271 P.3d 712 (2012).

**Sanctions.**

In criminal prosecution, trial court erred in sanctioning defense attorney for requesting continuance after pre-trial conference without citing any specific rule violation or finding that attorney acted bad faith. *State v. Rogers*, 143 Idaho 320, 144 P.3d 25 (2006).

**Sentence Reduction.**

The appellate court correctly construed I.C.R. 35 in accordance with I.C.R. 2(a) where it concluded that the terms "made" and "filed" are used interchangeably in Rule 35. *State v. Hurst*, 151 Idaho 430, 258 P.3d 950 (Ct. App. 2011), review denied, 2011 Ida. App. LEXIS 68 (Idaho Ct. App. Aug. 17, 2011).

**Cited in:** *State v. Ruiz*, 196 Idaho 336, 678 P.2d 1109 (1984); *State v. Parrish*, 110 Idaho 599, 716 P.2d 1371 (Ct. App. 1986); *State v. Cahoon*, 116 Idaho 399, 775 P.2d 1241 (1989); *State v. Loomis*, 146 Idaho 700, 201 P.3d 1277 (2009).

**Rule 2.1. Declarations.**

Whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406. (Adopted April 24, 2013, effective July 1, 2013.)

**Rule 2.2. Jurisdiction of magistrates.**

(a) **Jurisdiction of all non-attorney magistrates.** The jurisdiction over the following criminal proceedings, when approved by a majority of the district judges in a judicial district, may be assigned to any magistrate pursuant to section 1-2208, Idaho Code:

- (1) The arraignment, trial and sentencing of any misdemeanor.
- (2) Proceedings pertaining to warrants for arrest or for searches and seizures when a certified non-attorney magistrate, as defined by subsection (b) of this rule, or an attorney magistrate is not available.
- (3) The first appearance and setting of bail in other misdemeanor complaints or in a felony complaint when a certified non-attorney magistrate, as defined in subsection (b) of this rule, or an attorney magistrate is not available.

(b) **Jurisdiction of certified non-attorney magistrates.** The jurisdiction over the following criminal proceedings, when approved by a majority of the district judges in a judicial district, may be assigned to non-attorney magistrates pursuant to section 1-2208, Idaho Code, when such magistrate has received written certification by the Supreme Court that said non-



attorney magistrate is qualified to handle criminal proceedings involving incarceration:

(1) The arraignment and trial of any misdemeanor and sentencing upon conviction, whether or not incarceration is involved.

(2) The first appearance, the setting of bail, and the preliminary examination on a criminal complaint for a felony to determine probable cause, commitment prior to trial, or the release on bail of persons charged with a felony.

(3) Proceedings pertaining to warrants for arrest or for searches and seizures.

(c) **Assignment of additional cases to attorney magistrates.** The jurisdiction of an attorney magistrate is the same as that of a district judge, but the cases assignable to an attorney magistrate shall be those assignable to magistrates in subsections (a) and (b) above and the following additional cases may be assigned to attorney magistrates when approved by the administrative district judges of a judicial district:

(1) The trial and related hearings, and sentencing upon conviction, of felony proceedings when approved by order of the Supreme Court upon application by the administrative judge of a judicial district.

(2) Extradition proceedings.

(3) Proceedings regarding fugitives from justice.

(4) The performance of any function of a United States magistrate when requested by federal authorities or courts as provided by law. The assignment of this authority and jurisdiction shall be recommended by order of the administrative district judge to specific attorney magistrates and shall be effective when approved by order of the Supreme Court.

(d) **Objection to assignment to magistrates.** Any irregularity in the method or scope of assignment of a criminal proceeding or action to any magistrate under this Rule 2.2 and sections 1-2208 and 1-2210, Idaho Code, and all objections to the propriety of an assignment to a magistrate are waived unless a written objection is filed not later than 7 days after a notice setting the action for trial, pre-trial or hearing on a contested motion and before any contested matter has been submitted to the judge for decision. No order or judgment is void or subject to collateral attack merely because rendered pursuant to an improper assignment to a magistrate.

(e) **Special assignment to attorney magistrates.** The administrative district judge of a judicial district may by order appoint a specific attorney magistrate to hear and try one or more specific actions which are otherwise triable only by a district judge. The appointed magistrate shall cause an order of the assignment to be served upon all parties to that action.

(f) **Enlargement of cases assignable.** The administrative district judge of a judicial district may by order enlarge categories of cases assignable under Rule 2.2(c) as to the attorney magistrates of the judicial district or of a county within the district, or as to specified attorney magistrates. (Adopted December 27, 1979, effective July 1, 1980; amended March 23, 1983, effective July 1, 1983; amended March 28, 1986, effective July 1, 1986;

amended June 15, 1987, effective November 1, 1987; amended April 2, 1991, effective July 1, 1991; amended April 2, 2008, effective July 1, 2008.)

### STATUTORY NOTES

**Compiler's Notes.** A former subsection (c) was rescinded and a new subsection (c) adopted by Supreme Court Order of June 15, 1987, effective November 1, 1987.

**Cross References.** Local jurisdiction of public offenses, §§ 19-301 — 19-316.

Proceedings in magistrate's division of district court, §§ 19-3901 — 19-3946.

### JUDICIAL DECISIONS

#### ANALYSIS

Trial of Felony Proceedings.  
Waiver.

#### **Trial of Felony Proceedings.**

The only aspects of felony cases that are usually assignable to a magistrate are the first appearance, the setting of bail and the preliminary hearing, however, the trial and related hearings of felony proceedings may be assigned to attorney magistrates when approved by the administrative district judge of

the district and when approved by order of the supreme court upon application of the administrative district judge. *State v. Smith*, 117 Idaho 891, 792 P.2d 916 (1990).

#### **Waiver.**

Defendant waived any objection to the assignment of the magistrate judge where he failed to challenge the judge's jurisdiction in the trial court. *State v. Morrison*, 130 Idaho 85, 936 P.2d 1327 (1997).

**Cited in:** *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

### **Rule 3. Complaint — Initiation and prosecution.**

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate; provided, a prosecuting attorney may, without oath or affirmation, sign a complaint before a magistrate based upon the sworn affidavit of a complainant, which shall be filed with the court. Except as otherwise provided by law or rule, all criminal proceedings shall be initiated by complaint or indictment and prosecuted thereafter by complaint, indictment or information as hereinafter provided by these rules. (Adopted December 27, 1979, effective July 1, 1980; amended March 9, 1999, effective July 1, 1999.)

### STATUTORY NOTES

**Cross References.** Complaint and warrant of arrest, §§ 19-501 — 19-519.

Time of commencing criminal actions, §§ 19-401 — 19-405.

### JUDICIAL DECISIONS

#### ANALYSIS

Essential Facts.  
Sufficiency of Description.

#### **Essential Facts.**

A legally sufficient complaint need only be a simple and concise statement of the essential facts constituting the offense charged. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

#### **Sufficiency of Description.**

Where criminal complaint described stolen cow as "one horned, brindle, heifer cow, being the property of Jeannine Martin" and the time as "between the middle of October, 1974, and the end of February, 1975", the complaint was legally sufficient under this rule and § 19-3901, since it is not necessary for the complaint to contain a formal or detailed description of the offense charged and defendant was given a fair opportunity to know the

general character and outline of the offense charged. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

**Cited in:** *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct. App. 1986); *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989).

### **Rule 3.1. Idaho uniform citation.**

Any misdemeanor may be charged and prosecuted by an Idaho Uniform Citation (Summons and Complaint) as provided in the Misdemeanor Criminal Rules (M.C.R.). (Adopted December 27, 1979, effective July 1, 1980.)

### **Rule 3.2. Additional service on the court.**

If the office of a presiding judge or magistrate judge in any action is outside the county in which an action is pending, each party to such action shall, when reasonably possible, lodge with the presiding judge, at least five (5) days prior to the trial or hearing, at his or her office, respective briefs and copies of motions, notices, orders to show cause, proposed instructions, or any other pleadings or documents which are reasonably necessary to advise the court of the nature of any proceeding or hearing to be held in the action. The lodging of copies of such pleadings or documents with the presiding judge shall be in addition to the lodging or filing of the originals with the court of record and the service of copies upon the parties if required by these rules. (Adopted March 9, 1999, effective July 1, 1999.)

### **Rule 4. Warrant — Summons — Determination of probable cause.**

(a) **Issuance of warrant.** After a complaint is laid before a magistrate, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate may issue a warrant for the arrest of the defendant only after making a determination that there is probable cause to believe that an offense has been committed and that the defendant committed it.

(b) **Issuance of summons.** After a complaint is filed with a court, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate, or the clerk of the court, may issue a summons requiring the defendant to appear before the court at a time certain without first making a determination of whether there is such probable cause.

(c) **Issuing warrant or summons, preference for summons.** If the magistrate finds such probable cause for a complaint, in determining whether a warrant or summons should issue, the magistrate shall give preference to the issuance of a summons. In making such determination as to whether a warrant or summons shall issue, the magistrate shall consider the following factors:

- (1) The residence of the defendant.
- (2) The employment of the defendant.
- (3) The family relationships of the defendant in the community.
- (4) The past history of response of the defendant to legal process.
- (5) The past criminal record of the defendant.
- (6) The nature of the offense charged.



(7) Whether there is reasonable cause to believe that the defendant will flee prosecution or will fail to respond to a summons.

(d) **Determination of probable cause after arrest without warrant, or upon appearance or failure to appear by a defendant pursuant to a summons.** If a defendant is arrested without a warrant or appears before the court pursuant to a summons, the magistrate before whom the defendant first appears shall not order the defendant retained or ordered into custody nor require the defendant to post bond unless the magistrate shall determine there is such probable cause as defined in subsection (a) of this Rule at or before the time of the first appearance of the defendant. The defendant must be released upon the defendant's own recognizance unless and until such determination of probable cause has been made by a magistrate or unless immediate disposition of the complaint has been made; but the complaint shall not be dismissed pending such determination or disposition. If a defendant fails to appear in response to a summons a warrant shall issue if probable cause has been shown.

(e) **Hearing to determine probable cause.** The probable cause hearing is an informal nonadversary proceeding. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing that there is a factual basis for the information furnished. It shall not be necessary for the defendant to be present at such hearing or to have the right to confrontation and cross-examination of witnesses, nor shall it be necessary to permit the defendant to have or to provide the defendant with counsel. Before making the determination of whether there is such probable cause, the magistrate may require any person, other than the defendant, who appears likely to have knowledge relevant to the offense charged to appear personally and give testimony under oath. The facts which the magistrate considers in determining probable cause shall be placed either in affidavit form and attached to the complaint or shall be testimony under oath placed upon the record. In making the determination of probable cause, the magistrate shall consider all facts as to whether an offense has been committed and whether the defendant has committed it.

(f) **Disposition on finding of no probable cause.** If the magistrate finds there is no such probable cause, the magistrate shall refuse to issue a warrant, and shall exonerate any bond posted, and shall order the release of the defendant if the defendant is in custody. A finding of a lack of probable cause shall not require the dismissal of the complaint.

(g) **Form.**

(1) **Warrant.** The warrant shall be signed by the magistrate and shall set forth the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall identify the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate. The amount of bail may be fixed by the issuing magistrate and endorsed on the warrant at the time of its issuance.

(2) **Telegraphic or facsimile copy of a warrant of arrest.** After the issuance of a warrant in the form set forth in sub-paragraph (g)(1) above, a copy of that warrant of arrest may be sent by telecommunication process or by facsimile process to any peace officer or other officer serving the warrant. A telegraphic copy should be in the following form:

WARRANT OF ARREST  
TELEGRAPHIC COPY

IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF .....

TO ANY SHERIFF, CONSTABLE, MARSHAL, OR PEACE OFFICER OF  
THE STATE OF IDAHO:

A COMPLAINT, UPON OATH, HAVING BEEN LAID THIS DAY BE-  
FORE ME BY ....., STATING THAT THE CRIME OF  
.....  
HAS BEEN COMMITTED IN THE COUNTY OF ..... AND AC-  
CUSING .....

.....  
THEREOF, THE ABOVE-NAMED DEFENDANT, AND PROBABLE  
CAUSE HAVING BEEN FOUND,

YOU ARE, THEREFORE, COMMANDED TO FORTHWITH ARREST  
THE SAID DEFENDANT NAMED ABOVE AND BRING THE DEFEN-  
DANT BEFORE ME AT MY OFFICE IN SAID COUNTY OF .....,  
OR IN CASE OF MY ABSENCE OR INABILITY TO ACT, OR ARREST  
OUTSIDE OF THIS COUNTY, BEFORE THE NEAREST AVAILABLE  
MAGISTRATE WITHIN THE JUDICIAL DISTRICT WHERE THE DE-  
FENDANT IS ARRESTED.

DATED AT MY OFFICE IN SAID COUNTY OF .....  
THIS ..... DAY OF ....., 20....

.....  
MAGISTRATE

BOND ..... FELONY ..... MISDEMEANOR .....  
DAY ONLY ..... DAY OR NIGHT .....

THIS TELEGRAPHIC COPY IS AN ABSTRACT OF AN OFFICIAL  
SIGNED WARRANT ON FILE IN ..... COUNTY.

(3) **Summons.** The summons shall be signed by either the magistrate  
or the clerk of the court and shall contain the same information as the  
warrant except that it shall summon the defendant to appear before a  
magistrate at a stated time and place and advise the defendant that if the  
defendant fails to appear at said time and place that a warrant will issue  
for the defendant's arrest.

(h) **Execution or service, and return.**

(1) **By whom.** The warrant shall be executed by a peace officer or other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action, or by mail.

(2) **Territorial limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the state of Idaho.

(3) **Manner of service of warrant.** The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in possession at the time of the arrest, but the officer shall show the warrant to the defendant as soon as possible. A telegraphic or other copy of the warrant of arrest may be used by the officer at the time of the arrest or for the purpose of showing the warrant to the defendant after the defendant's arrest. If the officer does not have the warrant in possession at the time of arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

(4) **Manner of service of summons.** The summons shall be served upon a defendant by delivering a copy of the summons and complaint to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein, or by mailing it to the defendant by mail to the defendant's last known address. A summons to a corporation shall be served in the same manner as service of a summons on a corporation in a civil action.

(5) **Return on warrant.** The officer executing a warrant shall make return thereof to the issuing magistrate or any other magistrate before whom the defendant is brought pursuant to Rule 5. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be canceled by the magistrate.

(6) **Return on summons.** On or before the return date, the person who made service of a summons shall make return thereof to the magistrate before whom the summons is returnable. At the request of the prosecuting attorney, made at any time while the complaint is pending, a warrant returned unexecuted and not canceled, or an unserved summons or a duplicate original thereof, may be delivered by the magistrate to an officer or other authorized person for execution or service. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989.)

**STATUTORY NOTES**

**Compiler's Notes.** The words in parentheses so appeared in the rule as promulgated.

**Cross References.** Actions against corporations, §§ 19-3601 — 19-3608.

Arrest, by whom and how made, §§ 19-601 — 19-625.



## JUDICIAL DECISIONS

## ANALYSIS

Hearing.  
Probable Cause.

**Hearing.**

Where defendant in custody was released by the sheriff's office without having to post any bond under this rule, the magistrate was not required to conduct any probable cause hearing; when the magistrate, in the exercise of extra-judicial caution, decided to hold a probable cause hearing without notice either to defendant or to his counsel, after defendant appeared with counsel, he did not deprive defendant of any right afforded by this rule. *State v. Brown*, 109 Idaho 981, 712 P.2d 682 (Ct. App. 1985).

A magistrate erred when he conducted a second probable cause hearing and then dismissed the charges against a misdemeanor defendant, since such a defendant is not permitted a second contested hearing after an initial finding of probable cause has already been made by a magistrate. *State v. Hogan*, 132 Idaho 412, 973 P.2d 764 (Ct. App. 1999).

**Probable Cause.**

Although police officers must routinely make probable cause assessments, subject to later review by a court, when they are contemplating making an arrest themselves, the courts will not cast upon police officers the judicial role of determining whether there was probable cause for a citizen's arrest before conducting a search incident to the ar-

rest. Persons arrested by private citizens as well as those arrested by police officers are protected by the requirement that a probable cause determination be made promptly by a neutral, detached magistrate. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

The information concerning the autopsy and opinions of the two pathologists, as well as the information that defendant was the only person with the child when the child required emergency medical care, met the requisite level of substantial evidence for probable cause for a warrant. *State v. Elison*, 135 Idaho 546, 21 P.3d 483 (2001).

Detective indicated in an affidavit that he was informed by pharmacy employees that defendant and his co-actors were purchasing large amounts of pseudoephedrine that they obtained from the pharmacies and that the detective had personally observed the names of defendant and the co-actors in the pharmacies' written pseudoephedrine logs; thus, under the Fourth Amendment, Idaho Const. art. I, § 17, and subsection (e) of this rule, the requisite probable cause established that defendant was involved in illegal drug activity and that there was a fair probability that contraband or evidence of that activity would be found at defendant's residence. *State v. Harper*, 152 Idaho 93, 266 P.3d 1198 (2011).

**Cited in:** *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct. App. 1986); *State v. Schumacher*, 136 Idaho 509, 37 P.3d 6 (Ct. App. 2001).

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Probable Cause Hearing.**

Considering that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained indefinitely under the provisions of the pre-requisition detention statutes, and that such a person is not a candidate for either a pre-

liminary hearing or for a speedy trial in Idaho, such a person is entitled to the safeguard of a probable cause hearing. *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), cert. denied and appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

**Rule 5. Initial appearance before magistrate — Advice to defendant — Plea in misdemeanors — Initial appearance on grand jury indictment.**

(a) **Initial appearance.** The "initial appearance" before a magistrate shall be the first appearance of the defendant before any magistrate. In the event a defendant appears before more than one magistrate, the first appearance before the first magistrate shall constitute the "initial appearance."

(b) **Place of initial appearance.** A defendant arrested, whether or not pursuant to a warrant, shall be taken before a magistrate in that judicial district without unreasonable delay. In no event shall the delay be more than twenty-four (24) hours following the arrest excluding Saturdays, Sundays, and holidays. Provided, the court may delay the initial appearance if the defendant is hospitalized or otherwise in a condition which prevents the defendant being taken before the magistrate. The court may immediately, in such instances, appoint counsel for the defendant. In the event it is not possible to take a defendant before a magistrate within the county where the alleged offense occurred within the said time limit, then the defendant shall be taken to any available magistrate within the judicial district without unnecessary delay within the time limit described above.

(c) **Determination of probable cause.** In the event the defendant was arrested without a warrant, the magistrate before whom the defendant first appears shall not hold the defendant in custody nor require bail without first making a determination as to whether there is probable cause to believe that an offense has been committed and that the defendant committed it as provided in Rule 4 unless such a finding has been made by a magistrate in a county in which the offense is alleged to have been committed. The probable cause hearing may be an ex parte hearing which does not require the presence of the defendant and shall be held within forty-eight (48) hours, including Saturdays, Sundays, and holidays, after a defendant is arrested without a warrant. The magistrate may hold the hearing on sworn statements without the officer or witness present.

(d) **Advice to defendant on initial appearance outside.** In the event a defendant is taken before a magistrate in a county other than the county in which the alleged offense occurred, the magistrate shall advise the defendant:

- (1) That the defendant is not required to make a statement and that any statement made may be used against the defendant;
- (2) The charge or charges against the defendant;
- (3) Defendant's right to bail;
- (4) Defendant's right to counsel as provided by law;
- (5) Defendant's right to proceed under Rule 20 of these rules;
- (6) That defendant has a right to communicate with counsel and immediate family, and that reasonable means will be provided for the defendant to do so.

(e) **Setting bail.** Upon advising the defendant of the above rights, the magistrate shall set bail for the defendant, and in the event the arrest is pursuant to a warrant, said bail shall be in the amount endorsed upon the warrant unless the magistrate finds good cause to alter the amount of the bail. In the event the defendant posts bail, the magistrate shall certify that fact upon the warrant, order the defendant to appear before the court issuing the warrant at a time and place certain, discharge the defendant, and transmit the warrant and undertaking of bail to the court in which the defendant is required to appear.



**(f) Advice to defendant on initial appearance in county where alleged offense occurred.** In the event a defendant is taken before a magistrate in the county where the alleged offense occurred, the magistrate shall advise the defendant:

- (1) That the defendant is not required to make a statement and that any statement made may be used against the defendant;
- (2) The charge or charges against the defendant;
- (3) Defendant's right to bail;
- (4) Defendant's right to counsel as provided by law;
- (5) Defendant's right to a preliminary hearing, if provided by law, the nature of a preliminary hearing and the effect of a waiver thereof;
- (6) That the defendant has a right to communicate with counsel, or immediate family, and that reasonable means will be provided for the defendant to do so.

**(g) Arraignment on misdemeanor complaint.** The arraignment upon a misdemeanor complaint is the reading of the complaint to the defendant, unless waived by the defendant, and taking a plea of the defendant to the complaint. The arraignment upon a complaint for a misdemeanor may take place at the initial appearance, or at such later time as ordered by the court. A plea of the defendant at the arraignment in a county other than the county where the alleged offense occurred may be taken by the magistrate only as provided by Rule 20. The defendant may appear in person at the arraignment and enter a plea to the complaint or the defendant may appear at the arraignment through counsel who shall either appear in person or shall file, at or before arraignment, a written appearance and plea on behalf of the defendant.

**(h) First appearance on indictment by grand jury.** A defendant arrested on a warrant issued pursuant to an indictment by grand jury shall be taken before a magistrate judge or district court judge in that judicial district without unreasonable delay. In no event shall the delay be more than twenty-four (24) hours following the arrest excluding Saturdays, Sundays and holidays. The magistrate judge or district court judge shall have the authority to set bail and shall advise the defendant:

- (1) That the defendant is not required to make a statement and that any statement made by defendant may be used against the defendant;
- (2) The charge or charges against the defendant;
- (3) The defendant's right to bail;
- (4) The defendant's right to counsel as provided by law;
- (5) The date that defendant will be arraigned in the district court.

(Adopted December 27, 1979, effective July 1, 1980; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended effective August 21, 1991; amended February 10, 1993, effective July 1, 1993; amended effective July 1, 2004; amended March 28, 2007, effective July 1, 2007; amended March 19, 2009, effective July 1, 2009.)

## STATUTORY NOTES

**Cross References.** Actions against corporations, §§ 19-3601 — 19-3608.

Examination of case, §§ 19-801 — 19-866.  
Fresh pursuit law, §§ 19-701 — 19-707.

## JUDICIAL DECISIONS

## ANALYSIS

Determination of Probable Cause.  
Due Process.  
Improperly Delayed Appearance.  
Inculpatory Evidence.

**Determination of Probable Cause.**

Even though there is no requirement of corroboration in rape cases under § 18-6101, the state must still show that a crime has been committed and that there is probable cause that defendant committed it, and the court should grant a judgment of acquittal under I.C.R. 29 where the evidence is found insufficient to support a guilty verdict. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

**Due Process.**

The magistrate erred in holding that the probable cause determination made in the misdemeanor proceeding sufficed to meet the *Morrissey* requirement for a preliminary probable cause determination on the reported parole violations, because the procedures set forth in (c) for a post-arrest determination of probable cause in a misdemeanor case that were applied do not require notice to the defendant that his continued status on parole is in question, and the defendant is not entitled to be present, to examine witnesses, or to present evidence. *Brandt v. State Comm'n For Pardons & Parole*, 135 Idaho 208, 16 P.3d 305 (Ct. App. 2000).

**Improperly Delayed Appearance.**

An uncooperative motorist was improperly held in county jail for four days following her arrest before being brought before a magistrate, despite her repeated demands to see a magistrate, where county officials made no showing that the delay was justified by reasonable and prompt administrative procedures, or that the delay was anything other than a coercive measure imposed to gain her cooperation in answering booking questions. *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir.), cert. denied, 510 U.S. 991, 114 S. Ct. 549, 126 L. Ed.2d 450 (1993).

**Inculpatory Evidence.**

In the 27 hours between defendant's arrest and his initial appearance before a magistrate all of the inculpatory evidence secured by the police was obtained within the 24 hours allowed by this Rule and was collected within the confines of the rule, and as defendant did not demonstrate prejudice, the district court's admission of such inculpatory evidence was appropriate. *State v. Knapp*, 120 Idaho 343, 815 P.2d 1083 (Ct. App. 1991).

**Cited in:** *State v. Brown*, 109 Idaho 981, 712 P.2d 682 (Ct. App. 1985); *Gawron v. Roberts*, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987); *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996); *State v. Molen*, 148 Idaho 950, 231 P.3d 1047 (Ct. App. 2010).

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

Delay in Arraignment.  
Probable Cause Hearing.

**Delay in Arraignment.**

The voluntary character of a confession obtained prior to arraignment is placed in doubt when there is an unreasonable delay between arrest and arraignment; however, the confession is not per se inadmissible. *State v. Wyman*, 97 Idaho 486, 547 P.2d 531 (1976), overruled on other grounds, *State v. McCurdy*, 100 Idaho 683, 603 P.2d 1017 (1979).

**Probable Cause Hearing.**

Considering that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained indefinitely under the provisions of the pre-requisition hearing or for a speedy trial in Idaho, such a person is entitled to the safeguard of probable cause hearing. *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), cert. denied and appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

**Rule 5.1. Preliminary hearing — Probable cause hearing —  
Discharge or commitment of defendant — Procedure.**

(a) **Preliminary hearing.** Unless indicted by a grand jury, a defendant, when charged in a complaint with any felony, is entitled to a preliminary hearing. If the defendant waives the preliminary hearing, the magistrate shall forthwith file a written order in the district court holding the defendant to answer. If the defendant does not waive the preliminary hearing, the magistrate shall fix a time for the preliminary hearing to be held within a reasonable time, but in any event not later than fourteen (14) days following the defendant's initial appearance if the defendant is in custody and no later than twenty-one (21) days after the initial appearance if the defendant is not in custody. With the consent of the defendant and upon showing of good cause, taking into account the public interest and prompt disposition of criminal cases, time limits in this subsection may be extended. In the absence of such consent by the defendant, time limits may be extended only upon a showing that extraordinary circumstances exist, including disqualification of the magistrate by the defendant pursuant to Rule 25.

(b) **Probable cause finding.** If from the evidence the magistrate determines that a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall forthwith hold the defendant to answer in the district court. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged; provided that hearsay in the form of testimony, or affidavits, may be admitted to show the existence or nonexistence of business or medical facts and records, judgments and convictions of courts, ownership of real or personal property and reports of scientific examinations of evidence by state or federal agencies or officials or by state-certified laboratories, provided the magistrate determines the source of said evidence to be credible. Provided, nothing in this rule shall prevent the admission of evidence under any recognized exception to the hearsay rule of evidence. The defendant shall be entitled to cross-examine witnesses produced against the defendant at the hearing and may introduce evidence in defendant's own behalf. Motions to suppress must be made in a trial court as provided in Rule 12; provided, if at the preliminary hearing the evidence shows facts which would ultimately require the suppression of evidence sought to be used against the defendant, such evidence shall be excluded and shall not be considered by the magistrate in his determining probable cause. A record of the proceedings shall be made by stenographic means or recording devices. Affidavits under this rule may have the signature of the affiant and the person who administered the oath in electronic form, as well as the notary seal.

(c) **Discharge of defendant.** If from the evidence the magistrate does not determine that a public offense has been committed or that there is not probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall dismiss the complaint and discharge the defendant.



(d) **Records.** After concluding the proceeding, the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 9, 1999, effective July 1, 1999; amended November 20, 2012, effective January 1, 2013.)

### STATUTORY NOTES

**Cross References.** Actions against corporations, §§ 19-3601 — 19-3608.

Examination of case, §§ 19-801 — 19-866.

### JUDICIAL DECISIONS

#### ANALYSIS

Affidavits and Reports.  
Appellate Review.  
Burden of Proof.  
Circumstantial Evidence.  
Construction.  
Corroboration.  
Cross-Examination.  
Delay.  
Evidence Sufficient.  
Extensions.  
Preliminary Hearing.  
Probable Cause.  
—Second Hearing.

#### **Affidavits and Reports.**

An affidavit from the director of a private laboratory reporting the results of DNA-based genetic tests on body fluids was not admissible under this rule as showing the existence or nonexistence of medical facts or records. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Where the report at issue in rape prosecution did not purport to relate to the investigation, diagnosis, treatment, correction or prescription for any disease, ailment, injury, infirmity, deformity or other condition, physical or mental, but rather, it compared the genetic identity of the blood of rape suspect and the victim with that of the victim's vaginal secretions containing sperm from the perpetrator of the rape, where the director of the laboratory who signed the affidavit to which the report was attached did not purport to be a medical doctor, and where the report dealt with the results of scientific examinations and not medical facts or reports, the report was not admissible under this rule or under IRE 803(24). *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Report by private laboratory wherein the results of DNA-print identification test regarding rape suspect were contained, was a

report of a scientific examination of evidence, not a report showing the existence or nonexistence of medical facts. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

A magistrate did not err when it admitted blood test results by affidavit at a preliminary hearing, where the test was a part of the defendant's medical records created to aid in the diagnosis and treatment of her injuries, and where the affidavits containing her medical records were admissible pursuant to the rationale behind this Rule. *State v. Gilpin*, 132 Idaho 643, 977 P.2d 905 (Ct. App. 1999).

#### **Appellate Review.**

The denial of a motion to dismiss following a preliminary hearing will not be disturbed on appeal if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

#### **Burden of Proof.**

The state at a preliminary examination is not required to show the defendant guilty beyond a reasonable doubt; it need only prove that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

#### **Circumstantial Evidence.**

The finding of probable cause must be based upon substantial evidence upon every material element of the offense charged, and this test may be satisfied through circumstantial evidence and reasonable inferences to be drawn therefrom. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

#### **Construction.**

At a preliminary hearing, the State is required to present evidence upon every mate-

rial element of the offense charged, and while Idaho Crim. R. 5.1 does not refer to the “offense as charged,” the State presents its theory of the charge, both through argument and by the complaint filed; the magistrate is required to examine the charge from the State, along with the evidence presented, and determine whether public offense has been committed and if there is probable or sufficient cause to believe that the defendant committed such offense; in doing so, the magistrate is entitled to rely on the theory and argument set forth by the State, and there is no requirement that the magistrate search the record and the law to find alternate theories of the case for the State to proceed under. *State v. McLellan*, — Idaho —, 294 P.3d 203 (Ct. App. 2013).

#### **Corroboration.**

Because there exists no requirement of corroboration at preliminary hearings, corroborative evidence beyond testimony of defendant’s daughters was not required at preliminary hearing charging defendant with lewd and lascivious conduct with a minor. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

#### **Cross-Examination.**

Where there was no indication in the record that counsel’s opportunity to cross-examine was curtailed in any way by the magistrate, and whether counsel chose to utilize that opportunity fully was more a matter of tactics or strategy than opportunity, district court did not err in deciding that defendant’s counsel had an opportunity to develop the testimony by cross-examination at the preliminary hearing. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

#### **Delay.**

Although extraordinary circumstances did not justify 51-day lapse between initial appearance and defendant’s preliminary hearing, absent oppressive conduct or actual prejudice to defendant, dismissal of charges against defendant was not mandated. *State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Ct. App. 1997).

#### **Evidence Sufficient.**

Although the law in effect at the time of defendant’s prosecution for lewd conduct with a minor under 16 required corroboration of the victim’s testimony, the corroboration could be either direct evidence or evidence of surrounding circumstances clearly corroborating her statements; therefore, where the character or reputation of the minor victim was unimpeached for truth and chastity and her testimony was not contradictory nor in-

consistent with the admitted facts, sufficient corroborating evidence to show that defendant was the perpetrator of the crime was supplied by his ownership of a car described by the minor victim, the identification of defendant by another girl who was victimized by defendant in an almost identical crime, and evidence of other surrounding circumstances clearly corroborating the victim’s description of the acts making up the crime. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

Where an officer involved in a vehicle search performed at the police station testified that he had extensive experience in drug enforcement, where he stated that in his opinion, the chemicals and equipment found in the vehicle could be used to manufacture methamphetamine, where the chemicals and equipment were found in a vehicle occupied by defendants, and where the state submitted evidence that in preparation for departure, defendant and co-defendant had left with an empty vehicle and had returned to retrieve another co-defendant with a vehicle loaded with the “stuff,” the state produced sufficient evidence to support the probable inference that there was an “agreement” between the parties, and the magistrate did not err in finding probable cause to bind defendant over to district court for trial on charges of conspiracy to manufacture a controlled substance. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

Where defendant picked up his wife and threw her to the floor, causing injury to her arm, the magistrate erred in reducing a charge of felony domestic violence to misdemeanor domestic battery. Idaho Code § 18-918(3) requires the accused to commit a battery and that the accused willfully inflict a traumatic injury; the magistrate erred when it determined that probable cause did not exist to establish that defendant willfully inflicted a traumatic injury. *State v. Reyes*, 139 Idaho 502, 80 P.3d 1103 (Ct. App. 2003).

#### **Extensions.**

Although this rule expressly limits the period within which defendant’s preliminary hearing must be held, it permits an extension of those limits for good cause; “good cause” can occur in a variety of circumstances, including delays brought on by factors not in direct control of the prosecutor or law enforcement officials. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

Where, in a prosecution for aggravated assault, the 51-day delay between the defendant’s initial appearance and preliminary hearing resulted from the defendant’s incarceration in another county on a probation

violation, these circumstances constituted a good cause for extending the date of preliminary hearing. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

### **Preliminary Hearing.**

Even if the magistrate errs in relying on evidence at the preliminary hearing that is ultimately determined to be inadmissible, the error is not a ground for vacating a conviction where the defendant receives a fair trial and is convicted, and there is sufficient evidence to sustain the conviction. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983), cert. denied, 461 U.S. 934, 103 S. Ct. 2101, 77 L. Ed. 2d 308 (1983).

So long as the probable cause determination actually has been made by a neutral and detached magistrate, no substantial right of the accused is affected by the identity of the magistrate who signs the commitment order; moreover, if an accused receives a fair trial, errors connected with the preliminary hearing will afford no basis for disturbing the judgment of conviction. *State v. Garza*, 109 Idaho 40, 704 P.2d 944 (Ct. App. 1985).

Subsection (a) of this rule requires a defendant to first request a preliminary hearing before invoking the time limits. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986) (decided on facts prior to 1985 amendment).

Nothing in this rule requires a preliminary hearing to be completed within a specified time. *State v. Wuthrich*, 112 Idaho 360, 732 P.2d 329 (Ct. App. 1986).

A proceeding initiated by information entitles the accused the right to a preliminary hearing before an impartial magistrate to determine whether a crime has been committed and whether there is probable cause to believe that the accused committed it. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

Where, at a fair trial, the accused is found guilty upon sufficient evidence to sustain the verdict, the judgment will not be overturned for defects in proof at the preliminary hearing. *State v. Streeper*, 113 Idaho 662, 747 P.2d 71 (1987).

Where the state initially commenced prosecution of the defendant by way of a criminal complaint and scheduled a preliminary hearing, but subsequently filed a motion to dismiss the pending complaint on the grounds that the defendant had been indicted by the grand jury, the appellate court's application of this section showed the defendant's objection to the state's decision to proceed by indictment rather than information and his argument that he was improperly deprived of a preliminary hearing to be without merit.

*State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995).

When the State charges a person with a felony, unless he is indicted by a grand jury, the defendant is entitled to a preliminary hearing to determine if there is sufficient evidence to warrant holding him to answer in the district court. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

### **Probable Cause.**

Where the evidence produced by the State at the preliminary hearing established that a murder had been committed and a reasonable person would believe that defendant had probably or likely participated in the commission of the offense charged, there was no abuse of the discretion of the magistrate in his finding of probable cause. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

When a defendant has been convicted following a fair trial, the court will not examine, on appeal, the sufficiency of the evidence presented at a preliminary examination upon which a magistrate determined there was probable cause to bind the defendant over to the district court for trial. *State v. Maylett*, 108 Idaho 671, 701 P.2d 291 (Ct. App. 1985).

Where defendant was convicted of first degree murder, lewd and lascivious conduct with a minor, and first degree kidnapping, there was competent evidence to show probable or sufficient cause that the crimes charged had been committed and that the defendant was guilty of their commission where an automobile matching the description of defendant's uniquely painted automobile was seen in the vicinity of the abduction prior to the victim's disappearance, where the child's abductor was described as having "long, brown hair and a beard," and which description matched that of the defendant, where an acquaintance of defendant testified that defendant had asked him, "What would you say if I told you I killed someone?" and where a sample of defendant's pubic hair was found to be similar to pubic hairs found on the victim. *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989).

If there is substantial evidence to conclude that the defendant committed each of the acts or elements constituting the charged crime, the sum of those elements establishes probable cause that the defendant has committed a crime. Probable cause, is not an element of the offense, but a finding of probability that the defendant has committed the offense based upon all the facts considered as a



whole. *State v. Zubizareta*, 122 Idaho 823, 839 P.2d 1237 (Ct. App. 1992).

Where defendant was originally charged with trafficking in marijuana, failure to affix a controlled substance tax stamp and possession of marijuana with intent to deliver, on appeal defendant asserted that, pursuant to § 19-815A, it was error for the district court to deny his pre-trial motion to dismiss where there was no reasonable or probable cause to believe that defendant had committed the crimes of trafficking and failure to affix a tax stamp. The court of appeals held that an officer's testimony that the evidence found in defendant's bedroom included zig zag papers, a bong pipe with burnt residue, twenty-six baggies containing green leafy residue, four baggies beside twenty dollar bills, books about growing marijuana and numerous pieces of paper bearing only first names and telephone numbers, was sufficient to allow the magistrate to conclude there was probable cause to believe the crimes charged had occurred and that defendant had participated in the manufacture and possession of a controlled substance as a finding of probable cause need only be based on substantial evidence under Idaho Crim. Rule 5.1(b). *State v. Wengren*, 126 Idaho 662, 889 P.2d 96 (Ct. App. 1995).

At the preliminary hearing the State is not required to prove the defendant guilty beyond a reasonable doubt. Rather, it need only show that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Court, in defendant's aggravated assault case, erred by dismissing the charge where there was probable cause to try defendant on the charge as there was substantial evidence that defendant intended to make a threat to a roommate during a game of Russian roulette. *State v. Pole*, 139 Idaho 370, 79 P.3d 729 (Ct. App. 2003).

Prosecution alleged that defendant violated I.C. § 18-6609 based on the theory that a previously recorded video was "obtained" when editing and captions were added with the intent to degrade or abuse the victim; because the State limited itself to this theory, the trial court properly limited its review on probable cause to the prosecution's theory. *State v. McLellan*, — Idaho —, 294 P.3d 203 (Ct. App. 2013).

#### —Second Hearing.

A magistrate erred when he conducted a second probable cause hearing and then dismissed the charges against a misdemeanor defendant, since such a defendant is not permitted a second contested hearing after an initial finding of probable cause has already been made by a magistrate. *State v. Hogan*, 132 Idaho 412, 973 P.2d 764 (Ct. App. 1999).

**Cited in:** *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982); *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982); *State v. McNeely*, 104 Idaho 849, 664 P.2d 277 (Ct. App. 1983); *State v. Fairchild*, 108 Idaho 225, 697 P.2d 1239 (Ct. App. 1985); *State v. Byerly*, 109 Idaho 242, 706 P.2d 1353 (Ct. App. 1985); *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987); *State v. Elisondo*, 114 Idaho 412, 757 P.2d 675 (1988).

## Rule 5.2. Transcript of hearings — Copies for parties.

(a) **Transcript of proceedings.** On timely motion to the district court by either the prosecuting attorney or the defendant or defendant's attorney the court shall order a typewritten transcript and copies of exhibits or affidavits to be made for such party. The cost for the preparation of such a transcript on motion of the defendant shall be at the cost of the defendant, unless the court finds the defendant to be an indigent or needy person and orders the preparation of the transcript at county expense in the same manner as a transcript on appeal. Transcripts may be requested of any hearing or proceeding before the court including the following:

- (1) The record of any probable cause hearing for the issuance of a complaint, a warrant for arrest or a search warrant.
- (2) The record of any preliminary hearing.
- (3) The record of any hearing on a motion to suppress evidence.

(b) **Listening to a recording.** In the event that a record was made by a recording device, upon request by any party, the court shall order that the recorded tape or other recorded means be replayed for the benefit of counsel,



and the court may fix the time and place and set the conditions under which such replay may be afforded.

(c) **Preparation of transcript, costs, number of copies, filing with court and service upon parties.** Whenever a transcript of a hearing or proceeding is ordered by the court to be prepared under this rule, such transcript shall be prepared in the same manner, with the same number of copies and at the same costs as a transcript in an appeal from the magistrate's division to the district court under Rule 54.1 of these rules. After the original and two copies of the transcript are lodged with the clerk of the court, the clerk shall file the original in the court file and forthwith serve the copies on the parties to the proceeding as provided by Rule 54.9, but there shall be no settlement of the transcript as provided by Rule 54.9 of these rules. In the event of a subsequent appeal, no party shall be precluded from raising objections as to the form and content of such transcript.

(d) **Requesting recording in lieu of transcript.** Should any counsel desire a copy of the record made by a recording device, the provisions concerning written transcripts shall be applicable to the furnishing of such copy, but the district court shall determine, in its discretion, whether a recording will be furnished in lieu of a written transcript.

(e) **Certification of transcripts.** All typewritten transcripts shall be duly certified by the appropriate magistrate or the clerk. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981.)

#### STATUTORY NOTES

**Cross References.** Actions against corporations, §§ 19-3601 — 19-3608.

Examination of case, §§ 19-801 — 19-866.

#### JUDICIAL DECISIONS

**Cited in:** State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982); State v. Brazzell, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### **Transcript of Record.**

Where a preliminary hearing is held, a record of the proceeding is required and a

verbatim transcript is mandatory. State v. Ruddell, 97 Idaho 436, 546 P.2d 391 (1976).

#### **Rule 5.3. Initial appearance on probation violations.**

(a) **Time and Place for Initial Appearance.** A probation violator may be arrested on an arrest warrant issued by the sentencing court after a finding of probable cause to believe the probationer has violated a condition of probation, or on an agent's warrant pursuant to I.C. § 20-227. In either case, the probationer shall be taken before a magistrate or district judge in that judicial district without unreasonable delay. In no event shall the delay

be more than twenty-four (24) hours following the arrest excluding Saturdays, Sundays, and holidays. Provided, the court may delay the initial appearance if the probationer is hospitalized or otherwise in a condition which prevents the probationer being taken before the court. The court may immediately, in such instances, appoint counsel for the probationer.

(b) **Determination of Probable Cause – Agent’s Warrant.** In the event the probationer is arrested pursuant to an agent’s warrant, the court before whom the probationer first appears shall not hold the probationer in custody nor require bail without first making a determination as to whether there is probable cause to believe that a probation violation has been committed and that the probationer committed it. The court shall determine probable cause in a manner consistent with I.C.R. 4(e). The agent’s warrant shall contain the underlying offense for which the probationer was placed on probation, the name of the sentencing judge, the date the probationer was placed on probation and the length of probation, the term of probation that was violated and a brief description of how it was violated and the date the probationer was taken into custody.

(c) **Initial Appearance.** At the arraignment on the alleged probation violation, the court shall:

(1) Advise the probationer that he or she is not required to make a statement and that any statement made may be used against the probationer;

(2) Advise as to the nature of the probation violation(s) filed against the probationer and ensure the probationer receives written notice of the alleged violation(s);

(3) Advise that the probationer has a right to counsel as provided by law, and if requested and appropriate, appoint counsel;

(4) Advise that the probationer has a right to communicate with counsel and immediate family, and that reasonable means will be provided for the probationer to do so;

(5) Determine what form of release, if any, is appropriate;

(6) If the probationer is arrested in the county where placed on probation, set a time certain for the probationer to appear before the sentencing court.

(7) If the probationer is arrested outside the county where placed on probation, advise that:

(a) If the probationer remains in custody, he or she will be transported and arraigned in the sentencing county within a reasonable time not to exceed fourteen (14) days. This time period may only be extended upon a showing of good cause.

(b) If the probationer posts bond, he or she will be given a date to appear before a magistrate for arraignment in the county of sentencing. At the arraignment in the sentencing county, counsel will be appointed if requested and appropriate, and the probationer will be given a time to appear before the sentencing court.

(d) **Setting Bail.** Upon advising the probationer of the above rights, the court may set bail for the probationer.

(1) In the event the arrest is pursuant to a warrant issued by the sentencing court any direction of the sentencing court endorsed upon the warrant shall be followed as to the denial of bail or the setting of bail in a certain amount. In the event the probationer posts bail, that fact shall be certified upon the warrant, the probationer discharged and the warrant and undertaking of bail transmitted to the court in which the probationer is required to appear. Bail set at the initial appearance may only be altered upon motion pursuant to I.C.R. 46(l).

(2) In the event the arrest is pursuant to an agent's warrant, or no amount of bail is endorsed on the warrant issued by the sentencing court, then the court may set bail and, if set, bail may only be altered upon motion pursuant to I.C.R. 46(l). In the event the probationer posts bail, that fact shall be certified upon the warrant, the probationer discharged, and the warrant and undertaking of bail shall be transmitted to the court in which the probationer is required to appear. (Adopted March 19, 2009, effective July 1, 2009; amended effective October 2, 2009.)

#### JUDICIAL DECISIONS

**Cited in:** State v. Ligon-Bruno, 152 Idaho 274, 270 P.3d 1059 (2011).

#### **Rule 6.1. Formation of the grand jury.**

(a) **Number of Jurors.** A grand jury shall consist of sixteen (16) qualified jurors of the county wherein the grand jury is sitting, but twelve (12) or more members constitute a quorum. A grand jury can deliberate and take action if a quorum is present.

(b) **Summoning Grand Juries.** Upon motion by the prosecuting attorney to summon a grand jury, a district judge assigned by the Administrative District Judge may order that a grand jury be impaneled within any county of the judicial district at such times as the public interest requires. Sixteen (16) grand jurors shall be selected as provided in the Uniform Jury Selection and Service Act, Chapter 2 of Title 2, Idaho Code. The selection of the grand jury shall take place in a closed session with only a district judge, the prosecuting attorneys, the prospective jurors, the reporter or recorder, a clerk of the court, and any required interpreter present.

(c) **Impaneling a Grand Jury.** A district judge shall impanel a grand jury of sixteen (16) jurors. The district judge shall preside over the impaneling of the grand jury and in doing so shall have the power and duty to:

(1) Administer, or direct the clerk to administer, an oath or affirmation to all prospective jurors that each of them will truthfully answer all questions propounded to them as to their qualifications to sit as jurors on the grand jury.

(2) Select, or direct the clerk to select, at random the names of sixteen (16) prospective jurors.



(3) Inquire of the prospective grand jurors to determine whether they are qualified to act as jurors and whether there are any facts which would constitute grounds for challenge against any of such jurors. In the event the court finds any prospective juror to be unqualified or subject to challenge as provided by the Uniform Jury Selection and Service Act, Chapter 2, of Title 2 and Section 19-1003, Idaho Code, the court shall dismiss such prospective juror and choose another prospective juror at random from the panel summoned for the grand jury. The sixteen (16) selected jurors shall be sworn to the following oath:

Do each of you, as jurors of the grand jury, affirm that you will diligently inquire into and true presentment make of all public offenses against the state of Idaho, committed or triable within this county, of which you shall have or can obtain legal evidence? That you will keep your own counsel, and that of the other members of the grand jury, and of the government and will not, except when required in the due course of judicial proceeding, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said nor the manner in which you or any other grand juror may have voted in any matter before you? That you will present no person through malice, hatred, or ill will, nor leave any unpresented through fear, favor or affection, or for any reward or the promise of hope thereof? Do you therefore affirm that you will in all your presentments follow these instructions and present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God?

(4) The impaneling of the grand jury shall be recorded, either stenographically or electronically.

(d) **Grand Jury Presiding Juror — Oath — Duties.** After the grand jury is impaneled, the court shall select one of the jurors as the presiding juror of the grand jury and administer an oath in the form of the oath in Rule 6.1(c)(3), only it will refer to the person as the presiding juror of the grand jury. The presiding juror shall have the following powers and duties:

- (1) Preside over the grand jury until it is adjourned and discharged.
- (2) Determine the time and place of commencement of each session of the grand jury and the time of adjournment of each session.
- (3) Take roll of the jurors of the grand jury at the commencement of each session.
- (4) Rule upon the disqualification of a grand juror.
- (5) Convey to the court any requests of the grand jury for further advice or instructions during the sessions of the grand jury.
- (6) Upon majority vote of the grand jury, direct the issuance of subpoenas for additional witnesses called to testify before the grand jury.
- (7) Determine the sequence of the witnesses to be examined by the grand jury, with the advice of the prosecuting attorney, and discharge the witness when no further testimony of the witness is desired by the grand jury.

(8) Administer an oath or affirmation to all witnesses appearing before the grand jury by asking the witness, "Do you solemnly swear or affirm that the testimony that you shall give in the issue pending before this jury shall be the truth, the whole truth and nothing but the trust, so help you God?"

(9) Advise target witnesses prior to testifying, or as soon as their status becomes known, by reading the following advice:

You are advised that you are one of the subjects or suspects in this grand jury investigation. You therefore have the right against self incrimination which includes the right to remain silent and the right to refuse to answer any question which might incriminate you. You have the right to request permission to leave the jury and consult with your attorney or counsel at any time, but you do not have the right to have your counsel with you before the grand jury. Any statements made by you may be used against you in any subsequent prosecution. If you give any false answers to questions you may be prosecuted for the felony crime of perjury. Do you understand these rights?

(10) Prepare or cause to be prepared and sign any indictment found by the grand jury and transmit the same to the court.

(11) Perform such other duties as prescribed by these rules or as directed by the court.

(e) **Deputy Presiding Juror — Oath — Duties.** The court shall select one or more deputy presiding jurors and administer the presiding juror's oath to them as deputy presiding jurors. In the absence of the presiding juror, the deputy presiding juror shall act as the presiding juror in the sequence directed by the district judge, if more than one has been selected, without further order of the court.

(f) **Charge to Jury.** After the grand jury has been sworn, the court shall give a charge to the jury setting forth in detail their powers, duties and authority and any other information which the court deems proper. Such charge shall be given orally to the jurors and a written copy shall be given to the presiding juror.

(g) **Excuse of a Juror.** At any time, for good cause shown, the court or the presiding juror may excuse a juror temporarily or permanently. (Adopted March 30, 1994, effective July 1, 1994.)

#### STATUTORY NOTES

**Compiler's Notes.** Former Rule 6 (Adopted December 27, 1979, effective July 1, 1980) was rescinded by Supreme Court Order of March 30, 1994, effective July 1, 1994. For present rule see Rules 6.1 through 6.9.

**Cross References.** Actions against corporations, §§ 19-3601 — 19-3608.

Formation of grand jury, §§ 19-1001 — 19-1018.

Grand jury defined, § 2-103.

Grand jury, impaneling, §§ 2-501 — 2-503.  
Powers and duties of grand jury, §§ 19-1101 — 19-1115.

Presentment and proceedings thereon, §§ 19-1201 — 19-1207.

Uniform Jury Service and Selection Act, §§ 2-201 — 2-221.

## JUDICIAL DECISIONS

## ANALYSIS

Discretion of Court.  
Grand Jury Denied.  
Small Town Grand Jury.

**Discretion of Court.**

The decision not to call a grand jury falls within the judge's discretionary authority; such a decision will not be disturbed unless an abuse of discretion has occurred. *Parsons v. Idaho State Tax Comm'n*, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986).

**Grand Jury Denied.**

The district court did not abuse its discretion in denying the defendant's request for a grand jury where the court found the defendant's claims against the State Tax Commission to be without merit, and the defendant did not make any showing that he was barred

from the alternative remedy of presenting his evidence to the prosecutor or the state attorney general's office. *Parsons v. Idaho State Tax Comm'n*, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986).

**Small Town Grand Jury.**

In denying the defendant's motion to dismiss, the court ruled that use of first names by people in a small town did not characterize them as having a relationship. The court found credible the deputy prosecuting attorney's characterization of his relationship with the juror as a professional and casual one, and under the totality of the circumstances, these contacts did not make the juror an improper juror, nor was the formation of the grand jury improper either procedurally or substantively. *State v. Bujanda-Velazquez*, 129 Idaho 726, 932 P.2d 354 (1997).

**Rule 6.2. Prosecuting attorney.**

**Powers and Duties.** The prosecuting attorney of the county wherein the grand jury is sitting, or one or more deputies, or a special prosecuting attorney may attend all sessions of the grand jury, except during the deliberations of the grand jury after the presentation of evidence. The prosecuting attorney shall have the power and duty to:

(a) Present to the grand jury evidence of any public offense, however, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of the subject of the investigation the prosecutor must present or otherwise disclose such evidence to the grand jury.

(b) At the commencement of a presentation of an investigation to the grand jury, inquire as to whether there are any grounds for disqualification of any grand juror and advise the presiding juror of the possible disqualification of a juror.

(c) List the elements of an offense being investigated by the grand jury, before, during or after the testimony of witnesses.

(d) Advise the grand jury as to the standard for probable cause, and tell them that if a person refuses to testify this fact cannot be used against him or her.

(e) Issue and have served grand jury subpoenas for witnesses.

(f) Present opening statements and/or instruct jury on applicable law.

(g) Prepare an indictment for consideration by or at the request of the grand jury. (Adopted March 30, 1994, effective July 1, 1994.)

**Rule 6.3. Transcript of grand jury proceedings.**

(a) **Reporting Grand Jury Proceedings.** All proceedings of the grand jury, except deliberations, shall be recorded, either stenographically or electronically.



(b) **Record of Proceedings.** The district judge or the presiding juror shall designate someone to report or electronically record all of the proceedings of the grand jury, except its deliberations. Such person shall be sworn to correctly report all of such proceedings and not to divulge any of such information to any person except on order of the district judge. Upon taking such an oath, such person shall be permitted to attend all sessions, except deliberations, of the grand jury. Upon the conclusion of each matter presented to the grand jury the court clerk shall seal the record of the grand jury proceedings which shall not be examined by any person or transcribed except upon order of the district judge.

(c) **Availability of Record of Grand Jury Proceedings.** The district judge by motion shall permit a prosecuting attorney, a person charged in an indictment or the attorney for the person charged, or a person charged with perjury by reason of the person's testimony before the grand jury to listen to the record of the proceedings of the grand jury or to obtain a transcript of such proceedings, in the same manner as a transcript of a preliminary hearing. The district judge may place conditions upon the use, dissemination or publication of the proceedings of the grand jury, and any violation of any such condition by a party granted access to the record shall constitute contempt of the order of the district judge. (Adopted March 30, 1994, effective July 1, 1994.)

#### JUDICIAL DECISIONS

##### **Witnesses.**

In a prosecution of defendant on three counts of lewd conduct with a minor, defendant failed to demonstrate that the limitation imposed by the trial court upon the testimony of a defense witness who had received a copy of the grand jury transcript impacted defendant's constitutional right to present a com-

plete defense; the trial court advised defendant that the witness's testimony would be admitted so long as defendant could demonstrate through an offer of proof that there was a basis for the testimony independent of the grand jury hearing transcript. *State v. Dutt*, 139 Idaho 99, 73 P.3d 112 (Ct. App. 2003).

#### **Rule 6.4. Secrecy and confidentiality of grand jury proceedings.**

(a) **Who May be Present at Grand Jury Sessions.** The grand jury may, at all reasonable times, request the presence and advice of the district judge but unless such advice is asked, the district judge shall not be present during any session of the grand jury after it has been impaneled. No other person shall be permitted to be present during the sessions of the grand jury except:

- (1) Jurors of the grand jury.
- (2) The prosecuting attorney of the county in which the grand jury is sitting, or a designated deputy or specially appointed deputy.
- (3) A witness physically present before the grand jury and under questioning and such person requested by the prosecuting attorney as authorized by section 19-3023, Idaho Code.
- (4) The person designated by the district judge or the presiding juror to report the proceedings.



(5) An interpreter designated by the district judge or presiding juror and sworn to correctly interpret the proceedings and sworn to secrecy.

(b) **Presence of Persons During Jury Deliberations Prohibited.** No person other than the acting grand jurors shall be permitted to be present during the deliberations of the grand jury.

(c) **Secrecy of Proceedings and Disclosure.** Every member of the grand jury must keep secret whatever was said or done in the grand jury proceedings and which manner each grand juror may have voted on a matter before them; but a grand juror may be required by the district judge to disclose matters occurring before the grand jury which may constitute grounds for dismissal of an indictment or grounds for a challenge to a juror or the array of jurors. No other person present in a grand jury proceeding shall disclose to any other person what was said or done in the proceeding, except by order of any court for good cause shown.

(d) **Disclosure of Indictment.** The court may seal the indictment and while sealed, no person shall disclose the finding of the indictment. (Adopted March 30, 1994, effective July 1, 1994.)

JUDICIAL DECISIONS

**Cited in:** State v. Dutt, 139 Idaho 99, 73 P.3d 112 (Ct. App. 2003).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Presence of Unauthorized Personnel.  
Purpose of Secrecy.

**Presence of Unauthorized Personnel.**  
The presence of deputy clerk of district court or the state attorney general in the grand jury room will not require a dismissal of the indictment. State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).

**Purpose of Secrecy.**

The purpose of § 19-1111 and subsection (d) of this rule is to guard the secrecy of the grand jury proceedings and assure that the jurors are free from undue influence and intimidation thereby allowing them to make an independent determination of probable cause. State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).

**Rule 6.5. Grand jury proceedings.**

(a) **Grand Jury Subpoenas.** A grand jury subpoena or subpoena duces tecum may be issued by either the presiding juror or the prosecutor in the manner provided by law.

(b) **Questioning of Witnesses.** Witnesses may be questioned by the prosecuting attorney, the presiding juror, and other members of the grand jury under the direction of the presiding juror.

(c) **Evidence for Defendant.** The grand jury is not bound to hear evidence for the defendant, but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the prosecuting attorney to issue process for the witnesses. (Adopted March 30, 1994, effective July 1, 1994.)

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Evidence.**

Where legally sufficient evidence will sustain an indictment, improperly admitted

hearsay evidence will not overturn the indictment. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

**Rule 6.6. Indictment.**

(a) **Sufficiency of Evidence to Warrant Indictment.** If it appears to the grand jury after evidence has been presented to it that an offense has been committed and that there is probable cause to believe that the accused committed it, the jury ought to find an indictment. Probable cause exists when the grand jury has before it such evidence as would lead a reasonable person to believe an offense has been committed and that the accused party has probably committed the offense.

(b) **Multiple Charges of Indictment.** There may be two or more separate charges in a grand jury indictment, but each shall be voted upon separately by the grand jury.

(c) **Finding and Return of Indictment.** An indictment may be found only upon the concurrence of twelve (12) or more jurors, shall be signed by the presiding juror, and shall be returned by the grand jury to a district judge. The indictment shall be in writing and have endorsed thereupon the names of all witnesses examined before the grand jury with regard to the subject matter of the indictment.

(d) **[Listing of Juror's Vote.]** The presiding juror shall prepare a separate list of all jurors voting in favor and against the indictment which shall remain sealed but can be disclosed to the prosecuting attorney, the defendant and defendant's counsel by order of the court.

(e) **Return of no bill.** If the grand jury concludes that probable cause is lacking and no indictment shall be returned, that fact shall be placed in writing and maintained under seal by the court as part of the record of that proceeding. (Adopted March 30, 1994, effective July 1, 1994; amended February 9, 2012, effective July 1, 2012.)

## STATUTORY NOTES

**Compiler's Notes.** The bracketed heading in subsection (d) was inserted by the compiler.

## JUDICIAL DECISIONS

## ANALYSIS

Appellate Review.  
Prosecutorial Misconduct.  
Requirements to Set Aside.

**Appellate Review.**

When conducting a review of the propriety of the grand jury proceeding, an appellate court's inquiry is two-fold. First, the court must determine whether, independent of any inadmissible evidence, the grand jury re-

ceived legally sufficient evidence to support a finding of probable cause. In making this determination, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment. Second, even if such legally sufficient evidence was presented, the indictment must be dismissed if prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial. "Prejudicial effect" means the defendant would not have been indicted but for the

misconduct. *State v. Marsalis*, 152 Idaho 872, 264 P.3d 979 (2011).

Alleged defects in the grand jury process generally will not be reviewed on appeal at all after a defendant has been convicted in a fair trial on the merits. *State v. Marsalis*, 151 Idaho 872, 264 P.3d 979 (2011).

#### **Prosecutorial Misconduct.**

There was no error in denying defendant's motion to dismiss an indictment for rape where the grand jury was presented with abundant proper evidence to find probable cause to believe that intercourse occurred and that the victim was unconscious and/or incapable of resisting at the time, since she was intoxicated to the point of unconsciousness or had been given a drug, or both. Defendant did not show that, "but for" alleged prosecutorial

misconduct, he would not have been indicted. *State v. Marsalis*, — Idaho —, 264 P.3d 979 (2011).

#### **Requirements to Set Aside.**

In a grand jury proceeding, the District Court may set aside the indictment if, given the evidence before the grand jury, the court concludes that the probable cause is insufficient to lead a reasonable person to believe that the accused committed the crime; however, in the course of that determination, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment. *State v. Davila*, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995).

**Cited in:** *State v. Brandstetter*, 127 Idaho 885, 908 P.2d 578 (Ct. App. 1995).

### **Rule 6.7. Motion to dismiss indictment.**

**Grounds for Motion.** A motion to dismiss the indictment may be granted by the district court upon any of the following grounds:

- (a) A valid challenge to the array of grand jurors.
- (b) A valid challenge to an individual juror who served upon the grand jury which found the indictment; provided, the finding of the valid challenge to one or more members of the grand jury shall not be grounds for dismissal of the indictment if there were twelve or more qualified jurors concurring in the finding of the indictment.
- (c) That the charge contained within the indictment was previously submitted to a magistrate at preliminary hearing and dismissed for lack of probable cause.
- (d) That the indictment was not properly found, endorsed and presented as required by these rules or by the statutes of the state of Idaho. (Adopted March 30, 1994, effective July 1, 1994; amended March 1, 2000, effective July 1, 2000.)

### **Rule 6.8. Discharge of jury.**

A grand jury shall serve until discharged by the court but no grand jury shall serve more than six (6) months unless specifically ordered by the court which summoned the grand jury. (Adopted March 30, 1994, effective July 1, 1994.)

## **JUDICIAL DECISIONS**

#### **Effect of Indictment Returned Expiration of Jury.**

Where there was no request for an extension of the term of the grand jury, nor was the term extended by the district court, and where the defendant's case was not the continuation of an investigation commenced prior to the expiration of the grand jury's term, but rather, it was first presented to the

grand jury three weeks after the expiration of its term, at which time the grand jury had lost its legal status empowering it to meet, review evidence and return indictments, the indictment against defendant was invalid. *State v. Dalling*, 128 Idaho 203, 911 P.2d 1115 (1996).

Where a grand jury that indicted defendant was acting without authority because its term had expired, the district court erred in deny-



ing defendant's Idaho Crim. R. 35 motion for correction of an illegal sentence, and his conviction was accordingly vacated. Because the

grand jury's term had expired, no valid indictment or information was returned. *State v. Lute*, 150 Idaho 837, 252 P.3d 1255 (2011).

### **Rule 6.9. Other prosecution.**

The fact that a grand jury is in session in a county shall not bar prosecution of other offenses by way of complaint or information in that county. (Adopted March 30, 1994, effective July 1, 1994.)

### **Rule 7. Indictment and information.**

(a) **Use of indictment or information.** All felony offenses shall be prosecuted by indictment or information.

(b) **Nature and contents.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. The information shall be signed by the prosecuting attorney. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement and it shall not contain any reference to the procedural history of the action. Allegations made in one (1) count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specific means. The indictment or information shall state for each count the official or customary citation of the statute, rule or regulation or other provision of law which the defendant is alleged to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(c) **Two-part informations.** In all cases wherein an extended term of imprisonment is sought as the result of a prior conviction or convictions, the indictment or information shall set forth the facts on which the extended term of imprisonment is sought. The facts so alleged shall not be read to the jury unless the defendant has been found guilty of the primary charge. If the defendant is found guilty of the primary charge, the issue or issues involving the extended term of imprisonment shall then be tried.

(d) **Surplusage.** The court on motion by either party may strike surplusage from the indictment or information.

(e) **Amendment of information or indictment.** The court may permit a complaint, an information or indictment to be amended at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) **Filing of information.** The prosecuting attorney must file an information within fourteen (14) days after an order has been filed by the magistrate in the district court holding the defendant to answer, unless more time is granted by the court for good cause shown. (Adopted December 27, 1979, effective July 1, 1980; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990.)

## STATUTORY NOTES

**Cross References.** Indictment, §§ 19-1401 — 19-1433.

Information and proceedings thereon, §§ 19-1301 — 19-1309.

Mode of prosecution of public offenses, §§ 19-901 — 19-903.

Setting aside indictment, §§ 19-1601 — 19-1605.

## JUDICIAL DECISIONS

## ANALYSIS

Amended Information.

Construction.

Discretion of Court.

Enhancement.

—Amendment.

—Sufficiency of Description.

—Time of Offense.

Indictment.

—Amendment.

—Sufficient.

Indictment or Information.

Information.

—Amendment.

—Sufficient.

—Timeliness.

Jurisdiction.

Persistent Violator Status.

Variance.

Waiver of Objection to Late Filing.

**Amended Information.**

Where the defendant in a rape prosecution had been aware of the victim's age before the filing, one day prior to trial, of an amended information alleging statutory rape and did not make a claim that he could have disputed her age, the defendant's rights were not prejudiced from the amendment, and therefore, there was no abuse of discretion. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

**Construction.**

Subsection (f) of this rule is not intended to present a defendant with a windfall as a result of a prosecutor's oversight; rather, it provides the prosecution with a standard to meet for the timely prosecution of criminal cases. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

Idaho Code. § 19-1430 and Idaho Crim. R. 7 can be reasonably interpreted so that there is no conflict between them. Rule 7(b) requires the charging document be a plain, concise and definite written statement of the essential facts constituting the offense charged. Idaho Code § 19-1430 then provides that in the case of aiding and abetting, the "essential facts" are only those facts that are required in charging the principal. *State v. Johnson*, 145 Idaho 970, 188 P.3d 912 (2008).

**Discretion of Court.**

Subdivision (e) of this rule authorizes the amendment of an information any time before the prosecutor rests, as long as no new offense is charged and the defendant is not prejudiced; subject to those caveats, the determination of whether the prosecutor should be allowed to amend the information rests in the trial court's discretion. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

**Enhancement.**

An enhancement is not an offense; an enhancement should be added to the information containing the underlying criminal charges. *State v. Lopez*, 107 Idaho 826, 693 P.2d 472 (Ct. App. 1984).

**—Amendment.**

Where state filed on amended information prior to the trial but subsequent to the preliminary hearing and the filing of the original information and such amended information added one witness and supplemented description of the heifer taken but did not alter the criminal charge, the parties or the property in question, and where there was no showing of prejudice caused to the defendant thereby, the filing of the amended information did not deny defendant's right to a preliminary hearing. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Where the property was stolen at the same time from one individual, and, on the same day, the defendant and her associates transported all of the stolen property to the city outside of the Indian reservation, pawned one item there, and proceeded to the reservation where they were arrested, the defendant committed but one offense of possession of stolen property; accordingly, she was properly charged in the information with but one offense, and the amendment to the information adding the property recovered from the pawn shop under the same offense was permissible. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

Defendant charged with rape by means of force was not unfairly prejudiced by amendment of information to include the phrase "of

the age of 15" following the victim's name before the closing of the state's case-in-chief where defendant had knowledge of the victim's age, where the court offered to permit recall of the complaining witness, and where defendant was unable to specify how the amendment materially impaired his defense. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

Since each circumstance in § 18-6101 merely describes an alternative element of the crime of rape, or nonconsensual sexual intercourse, for the purpose of subsection (e) of this rule amendment to information to include the phrase "of the age of 15 years" following the victim's name did not charge defendant with an additional or different offense. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

There was no error in allowing a prosecutor in a burglary case to amend that portion of an information which alleged persistent violator status, after the state had rested its case on the burglary charge, where the state's amendment did not alter the charge or charge any new offenses; rather, the state merely enlarged its list of prior convictions upon which the persistent violator allegation was based. *State v. Smith*, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989).

Where defendant received adequate notice of the charges, and an amendment charging him as a persistent violator was filed several weeks before trial, the trial judge did not abuse his discretion by allowing the amendment. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

This rule permits the state to amend its criminal complaint, indictment or information any time before resting its case so long as no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

The trial court did not err in permitting prosecutor to amend an information against defendant to include the charge of grand theft by obtaining control of stolen property where he was originally charged with grand theft. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

The decision to allow the state to amend an information is a matter within the discretion of the trial court. In exercising this discretion, the trial court must be sure that no substantial rights of the defendant are prejudiced. In the absence of a showing of prejudice arising from the amendment, the filing of an amended information does not constitute error. The defendant bears the burden of showing prejudice resulting from the amendment.

*State v. Tribe*, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994).

Where State's amendment to the information, enlarging the time frame within the alleged crime of lewd conduct took place, otherwise complied with the requirements of subsection (e) of this Rule, defendant failed to show that his substantive rights were prejudiced by the amendment where his alibi defense, consisting of employment records, was unconvincing and defendant was able to produce such records covering the time included by the amendment. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995).

#### —Sufficiency of Description.

Information which stated that one horned, brindle, heifer cow being the property of Jean-nine Martin was allegedly stolen by defendant between the middle of October, 1974, and the end of February, 1975, was sufficient to adequately set out the nature and circumstances of the offense charged and gave a sufficient description of the animal alleged to have been taken so as to enable a person of ordinary understanding to adequately know the details of the crime the state charged and intended to prove at the trial. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

A legally sufficient information must adequately set forth the nature and circumstances of the offense charged to enable a person of ordinary understanding to know what is intended in the charge. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

The sufficiency of an indictment or information ultimately depends on whether it fulfills the basic functions of the pleading instrument. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

An information must be specific in its content, both to protect the defendant from subsequent prosecution based on the commission of the same act and so the accused has a means to prepare a proper defense. This requirement is rooted in both state and federal guarantees of due process. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

An information may not merely state the general crime for which a defendant is charged. An information is legally sufficient only if it contains a plain, concise and definite written statement of the essential facts constituting the offense charged, in such a manner as to enable a person of common understanding to know what is intended in the charge. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

Where an information charged defendants



with conspiracy to manufacture a controlled substance in violation of § 37-2732(f), and stated as the basis for such that they did so “by conspiring with each other to manufacture a controlled substance, to wit: Methamphetamine, a Schedule II(D) Controlled Substance by they, the said defendants, obtaining and possessing glassware and other lab equipment for the manufacture of Methamphetamine and chemicals necessary for said manufacture,” although the phrasing of the information could have been improved, it adequately notified defendants of the criminal acts with which they were charged. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

Where state’s evidence showed that adopted daughter had been sexually abused by defendant while she was seven years old, and adopted daughter was seven years old from January 29, 1988, to January 28, 1989, but the information recited that the abuse occurred between March and September, 1988, only the month of February 1988 was excluded from the information, and omission of only the month of February from the information was not a material variance from the proof offered at trial. *State v. Marks*, 120 Idaho 727, 819 P.2d 581 (Ct. App. 1991).

#### —Time of Offense.

In child sexual abuse cases involving a continuous course of sexual abuse, and evidence of frequent, secretive offenses over a period of time, credibility, not alibi, is the only issue, and detailed specificity in the information as to the times of the offenses is not required. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

#### Indictment.

##### —Amendment.

Indictment charging defendant with murdering his wife by giving her an overdose of drugs was not impermissibly amended to allege murder by overdose or suffocation because the amendment did not charge defendant with a new offense, but merely alleged an alternative way that defendant might have committed the crime. Further, the amendment did not prejudice defendant’s substantial rights because it was made nearly one whole year before trial and, thus, gave defendant more than adequate time to prepare his defense relating to the allegation of murder by suffocation. The amendment did not subject defendant to double jeopardy because, if the jury had convicted or acquitted defendant under the original indictment, he could not later be tried on the amended indictment. *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).

##### —Sufficient.

The information included all of the elements of the offense and sufficiently informed defendant of those acts for which he was accused, and where the pleading identified the substance that defendant was alleged to have possessed and the date and place of possession, in the absence of any suggestion in the information that the state was charging defendant with possession of only a portion of the cocaine found on that date, defendant was on notice that he must be prepared to present a defense regarding all of the cocaine so found. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

#### Indictment or Information.

Informations are of equal dignity with indictments, subject to the limitations that a defendant may only be accused by information after commitment by a magistrate and that an information cannot be issued if the charge has been previously brought, and ignored by, a grand jury. *Warren v. Craven*, 152 Idaho 327, 271 P.3d 725 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 49 (Idaho Feb. 15, 2012).

#### Information.

##### —Amendment.

Where request was made to amend count 15 of the information during the state’s case-in-chief and when the court asked defendant for her comments to the proposed amendment, she answered that she did not have an attorney and objected to anything without her attorney present, whereby the court postponed ruling on the state’s request until defendant’s attorney could be present and then during the defense’s case the court realized it had failed to rule on the request and when it revisited the issue, neither defendant nor her attorney lodged any objection on the ground that the amendment violated subsection (e) of this rule, the court did not abuse its discretion in permitting the amendment. *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997).

Defendant showed no prejudice under subsection (e) from the court allowing the state to file an amended information to add a persistent violator sentence enhancement on the first day of trial. The record showed that the defendant did, in fact, have an opportunity to engage in plea negotiations after learning that the state would file or had filed the persistent violator enhancement. *State v. Herrera*, — Idaho —, 266 P.3d 499 (2011).

##### —Sufficient.

Because time is not a material element of the offense of lewd and lascivious conduct with a minor, because child abuse cases in-



volve evidence of a number of secretive offenses over a period of time, and because an information need only be specific enough to enable a defendant to prepare a defense, apprise him of the statute violated and protect him from subsequent prosecution for the same offense, the information charging defendant with lewd and lascivious act or acts with each of this two daughters between 1976 and 1979 at which time his daughters were minors was sufficiently specific as to time and not flawed. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

Allegations of an information of lewd conduct with a minor child under 16, though general, were sufficient where defendant was fully apprised of the acts he was charged with committing at the preliminary hearing where the State presented the victims' testimony about the surrounding circumstances and the manner in which the offenses were alleged to have been committed. *State v. Jones*, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003).

#### —Timeliness.

Where prosecution exceeded the time limit for filing the information for burglary and theft charges by seven days, dismissal was not required because the defendant failed to show how he was prejudiced by the delay. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

#### Jurisdiction.

A jurisdictional defect exists when the alleged facts are not made criminal by statute, or where there is a failure to state facts essential to establish the offense charged; further, jurisdictional defects exist where the alleged facts show on their face that the court has no jurisdiction of the offense charged, or the allegations fail to show that the offense charged was committed within the territorial jurisdiction of the court. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Jurisdictional defects are not waived by the entry of a guilty plea; on the other hand, a valid guilty plea admits all essential allegations including jurisdictional facts, thus relieving the government of the burden of making proof. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

#### Persistent Violator Status.

Although the State must allege persistent violator status in the prosecutor's information, that allegation is not read to the jury unless the defendant is found guilty of the crime(s) charged. *State v. Smith*, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989).

Persistent violator status is not a separate crime; it is simply a determination that broadens a judge's sentencing options. *State v. Smith*, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989).

#### Variance.

Regarding the issue of variance between crimes charged and proof at trial, a determination of whether a variance is fatal depends on whether the basic functions of the pleading requirement have been met; a variance is held to require reversal of the conviction only when it deprives the defendant of his or her right to fair notice or leaves him or her open to the risk of double jeopardy. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), *cert. denied*, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Where the information charged the defendant only with the crime of "premeditated murder" and the jury found her "guilty of the offense of first-degree murder in perpetration of, or attempt to perpetrate, a burglary," but there was no evidence in the record to suggest that the defendant was either misled or embarrassed at trial by the fact that the prosecution's theory of the case included a felony murder theory, there was no fatal variance between the crime charged and the proof at trial. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), *cert. denied*, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

#### Waiver of Objection to Late Filing.

Where following preliminary examination magistrate entered order that state had shown probable cause to bind defendant over, but prosecutor did not file information for more than 20 days, defendant by not moving for dismissal for lack of compliance with rule requiring filing of information within 10 days after entry of order waived the objection. *State v. McNeely*, 104 Idaho 849, 664 P.2d 277 (Ct. App. 1983).

**Cited in:** *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984); *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988); *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989); *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989); *McKeeth v. State*, 139 Idaho 639, 84 P.3d 575 (Ct. App. 2004).

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

Filing of Information.  
Irregularity in Procedure.  
Waiver of Objections.

**Filing of Information.**

Since defendant in a murder prosecution had no unqualified right to have the former rules of procedure applied to his case before the rules went into effect, the trial court's determination that dismissing the information, which was not filed until 97 days after the execution of the order committing defendant, would work an undue hardship on the prosecution would not be disturbed. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975).

**Irregularity in Procedure.**

Mere irregularity in procedure with regard to summoning grand jury by which indictment is found is not ground for quashing indictment, unless prejudice to substantial rights of defendant is shown. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920); *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

**Waiver of Objections.**

Where defendant failed to timely object that the information against him was filed more than 10 days (now 14 days) after he was held to answer, his objection was deemed waived on appeal. *State v. Morris*, 97 Idaho 273, 543 P.2d 498 (1975).

## RESEARCH REFERENCES

**A.L.R.** Power of court to make or permit amendment of indictment with respect to allegations as to time, 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place, 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations, 14 A.L.R.3d 1358.

Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein, 15 A.L.R.3d 968.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money, 15 A.L.R.3d 1357.

Inconsistency of criminal verdict, with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Power of court to make or permit amendment of indictment with respect to allegations as to money, 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment with respect to allegations

as to criminal intent or scienter, 16 A.L.R.3d 1093.

Power of court to make or permit amendment of indictment, 17 A.L.R.3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions, 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances, 17 A.L.R.3d 1285.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

Effect of grand jury indictment on issue of probable cause, 28 A.L.R.3d 748.

Necessity of alleging in indictment or information limitation — tolling facts, 52 A.L.R.3d 922.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

**Rule 8. Joinder of offenses and of defendants.**

(a) **Joinder of offenses.** Two (2) or more offenses may be charged on the same complaint, indictment or information and a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) **Joinder of defendants.** Two (2) or more defendants may be charged on the same complaint, indictment or information if they are alleged to have

participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (Adopted December 27, 1979, effective July 1, 1980.)

## JUDICIAL DECISIONS

### ANALYSIS

Acts Part of One Continuing Transaction.  
Common Scheme or Plan.  
Joinder Improper.  
Joinder Permissible.  
Joinder Prejudicial.

#### **Acts Part of One Continuing Transaction.**

The trial court did not err by refusing to require the prosecution to elect which of the four acts of sexual intercourse forcibly committed upon the victim it would rely on in seeking to prove the crime of rape, where the four acts of sexual penetration were part of one continuing transaction, and it was clear from the jury instruction that, regardless of the number of specific instances of sexual penetration, the defendant was tried on, and convicted of, one count of rape. *State v. Estes*, 111 Idaho 423, 725 P.2d 128 (1986).

#### **Common Scheme or Plan.**

Three counts of lewd and lascivious conduct with two 14-year-old boys were properly joined where the facts demonstrated a common scheme or plan, in that the defendant frequented areas where young boys could be found, befriended boys with no father figure in the home, enticed them from their homes, lowered their natural inhibitions through the use of drugs and alcohol, and committed sex acts upon them. *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984).

Joinder of one count of grand theft with two counts of grand theft by possession of stolen property was proper where all three counts related to possession of stolen property and all the offenses charged arose out of a series of events showing defendant possessed property stolen in recent burglaries and thefts. *State v. Cirelli*, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989).

The trial court did not abuse its discretion in refusing to sever three charges of robbery where the evidence pointed to a common scheme as, among other things, the perpetrator made his getaway on a ten-speed bicycle—a unique fact providing a virtual “signature” of a distinctive modus operandi. *State v. Hoffman*, 116 Idaho 689, 778 P.2d 811 (Ct. App. 1989).

Defendant’s convictions for the attempted procurement of prostitution and the procurement of prostitution were proper because her argument that her cases were improperly joined was not preserved for appellate review since she made no citation to authority. Her actions were all part of the common scheme or plan, which was that of managing an adult entertainment business, and were properly joined. *State v. Grazian*, 144 Idaho 510, 164 P.3d 790 (2007).

#### **Joinder Improper.**

Defendant’s battery and resisting arrest offenses were improperly joined for trial because they lacked a sufficient nexus to be joined under I.C.R. 8(a), given in part that the offenses occurred on separate occasions and did not have overlapping evidence; however, the misjoinder was harmless pursuant to I.C.R. 52 because, given the overwhelming evidence against defendant, the jury would have found defendant guilty of both offenses regardless of joinder. *State v. Anderson*, 138 Idaho 359, 63 P.3d 485 (Ct. App. 2003).

Joinder of defendant’s sexual offenses was erroneous because the similarities that both girls were only temporarily in the household, that the acts occurred in defendant’s home, and that the abuse began with “innocent” touching were insufficient to prove a common scheme or plan. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).

#### **Joinder Permissible.**

Court did not err by joining defendant’s case with a co-defendant because the prosecutor charged the conspiracy crime in good faith by providing evidence that the parties agreed to deliver the drugs to others, and, in any event, there did not exist any law in the jurisdiction making that element a requirement. Accordingly, the court did not err in joining the cases despite the fact that the conspiracy charge was later dismissed. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Court did not err by joining defendant’s case with a co-defendant because there was no Bruton violation present. The co-defendant’s denial that he knew the drugs were in the bag did not necessarily implicate defen-



dant in knowing the drugs were present in the bag. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

#### **Joinder Prejudicial.**

A defendant seeking a severance of parties properly joined has the burden of showing that a joint trial would be prejudicial. *State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985).

Court improperly joined drug delivery and possession charges with a statutory rape charge because the proscribed conduct giving rise to each charge was distinct and occurred at various times and locations, and except for one minor overlap--the victim of the rape was

one of five persons to whom defendant was accused of delivering methamphetamine--the parties involved, other than defendant, were different. There was also no allegation that any offense was the predicate to completing any other offense such that defendant's actions were part of an overall design or continuing course of conduct--rather, they were distinct and self-contained. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

**Cited in:** *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991); *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); *State v. Lepage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

#### **Joinder Permissible.**

Since the propriety of joinder is determined by what is alleged and not what the proof eventually shows, failure of a kidnapping count against defendant husband who was charged with kidnapping and issuing insufficient funds checks was not an indication of

misjoinder with defendant wife who was charged with kidnapping, and conviction on the charge of issuing insufficient funds checks would not be reversed for failure to sever in the absence of prejudice. *State v. Cochran*, 97 Idaho 71, 539 P.2d 999 (1975).

### **Rule 9. Warrant or summons upon indictment.**

The form of a warrant or summons upon an indictment, and their issuance, execution, service and return shall be made in the same manner and upon the same conditions as a warrant or summons upon a complaint as provided in Rule 4 of these rules. (Adopted December 27, 1979, effective July 1, 1980.)

### **Rule 10. Arraignment on indictment or information.**

(a) **In general.** After an indictment or an information has been filed with the district court, the defendant must be arraigned thereon by the court. The defendant must appear in person at such arraignment.

(b) **Right to counsel.** If the defendant appears for arraignment without counsel, before arraigned, the defendant must be informed by the court that it is defendant's right to have counsel either of defendant's own selection, or if indigent, by court appointment. The defendant must be asked if defendant desires counsel and if defendant is able to provide such counsel. If the defendant desires counsel and is found to be a needy person as defined by section 19-854, Idaho Code, the court shall appoint counsel to represent the defendant. No proceedings may take place prior to the appointment of counsel or until the defendant has had a reasonable period of time to obtain counsel, or unless the defendant waives the right to counsel.

(c) **Arraignment.** Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the reading of the indictment or information. The defendant shall be given a copy of the



indictment or information before the defendant is called upon to plead. The defendant must be informed that if the name which appears on the indictment or information is not defendant's true name, the defendant must then declare defendant's true name or be proceeded against by the name in the indictment or information. If on the arraignment the defendant requires time to enter a plea, the defendant must be allowed a reasonable time, not less than one (1) day, within which to answer the indictment or information.

**(d) Method of securing defendant's appearance.**

(1) When the defendant's appearance is necessary, and the defendant is in custody, the court may direct the officer who has custody of the defendant to produce the defendant.

(2) If the defendant is at liberty on defendant's own recognizance or on bail pursuant to a court order issued in the same criminal action, the prosecuting attorney must, upon at least three (3) days' notice to the defendant and to defendant's attorney, notify the defendant and defendant's attorney that an information or indictment has been filed against the defendant and the time and place set before the court for arraignment. Notice shall be given to the defendant either in person or by mail at the defendant's last known address.

(3) If the defendant, who is at liberty on defendant's own recognizance or on bail pursuant to a previous court order issued in that same criminal action, does not appear to be arraigned, the court, in addition to the forfeiture of the undertaking or bail, may issue a bench warrant for defendant's arrest. Upon taking the defendant into custody pursuant to such bench warrant, the executing peace officer must, without unnecessary delay, bring the defendant into such district court for arraignment. (Adopted December 27, 1979, effective July 1, 1980.)

### STATUTORY NOTES

**Cross References.** Arraignment, §§ 19-1501 — 19-1516.

### JUDICIAL DECISIONS

**Reasonable Time.**

Under subsection (c) of this rule, a criminal defendant must be allowed a reasonable time, which is defined as not less than one day, in which to answer the indictment or information. *State v. Garner*, 122 Idaho 371, 834 P.2d 888 (Ct. App. 1992).

No violation of this rule occurred where a trial court failed to inform defendant that he

was entitled to have at least 24 hours to consider a plea on an amended information, as the defendant did not indicate that he needed any additional time to plead not guilty. *State v. Herrera*, 152 Idaho 24, 266 P.3d 499 (2011).

**Cited in:** *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

### RESEARCH REFERENCES

**A.L.R.** Delay in taking before magistrate or denial of opportunity to give bail as support-

ing action for false imprisonment, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

## **Rule 11. Pleas.**

### **(a) Alternatives.**

(1) **In general.** A defendant may plead guilty or not guilty. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall direct the entry of a plea of not guilty.

(2) **Conditional pleas.** With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving in writing the right, on appeal from the judgment, to review any specified adverse ruling. If the defendant prevails on appeal, the defendant shall be allowed to withdraw defendant's plea.

(b) **Inadmissibility of pleas, offers of pleas, and related statements.** The admissibility of pleas, offers of pleas, and related statements shall be governed by Rule 410 of the Idaho Rules of Evidence.

(c) **Acceptance of plea of guilty.** Before a plea of guilty is accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:

(1) The voluntariness of the plea.

(2) The defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.

(3) The defendant was advised that by pleading guilty the defendant would waive the right against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses against the defendant.

(4) The defendant was informed of the nature of the charge against the defendant.

(5) Whether any promises have been made to the defendant, or whether the plea is a result of any plea bargaining agreement, and if so, the nature of the agreement and that the defendant was informed that the court is not bound by any promises or recommendation from either party as to punishment.

(d) **Other advisories upon acceptance of plea.** The district judge shall, prior to entry of a guilty plea or the making of factual admissions during a plea colloquy, instruct on the following:

(1) The court shall inform all defendants that if the defendant is not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal status in the United States, or denial of an application for United States citizenship.

(2) If the defendant is pleading guilty to any offense requiring registration on the sex offender registry, the court shall inform the defendant of such registration requirements.

(3) If the defendant is waiving his right to appeal or other post-conviction proceedings as part of his guilty plea, and such condition of the plea has been called to the attention of the court, the court shall confirm

with the defendant his awareness of the waiver of appeal or other proceedings.

(e) **Plea advisory form.** As an aid in taking a plea of guilty, the court may require the defendant to fill out and submit the plea advisory form found in Appendix A of these rules. In addition to the form, the court must make a record showing:

(1) The defendant understands the nature of the charge(s), including any mental element such as intent, knowledge, state of mind;

(2) The defendant understands the maximum and minimum punishments, and any other direct consequences which may apply;

(3) The defendant understood the contents of the guilty plea advisory form, and the defendant's plea is voluntary.

(f) **Plea agreement procedure.**

(1) **In general.** The prosecuting attorney and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement, which may include a waiver of the defendant's right to appeal the judgment and sentence of the court, that upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case; or

(D) agree to any other disposition of the case.

The court may participate in any such discussions.

(2) **Notice of such agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (f)(1)(A), (C) or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (f)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) **Acceptance of a plea agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will implement the disposition provided for in the plea agreement.

(4) **Rejection of a plea agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the defendant's plea, and advise the defendant that if the defendant persists in the guilty plea the disposition of the case may be less favorable to the defendant than that



contemplated by the plea agreement. (Adopted December 27, 1979, effective July 1, 1980; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended March 21, 1991, effective July 1, 1991; amended March 28, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008.)

## STATUTORY NOTES

**Cross References.** Pleadings by defendant, §§ 19-1701 — 19-1720.

## JUDICIAL DECISIONS

### ANALYSIS

#### Appeal.

—Conditional Plea.

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—Waiver of Double Jeopardy Objection.

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Right of Confrontation.

Voluntariness of Plea.

Waiver Not Presumed.

Warnings to Defendant.

—Misdemeanor Cases.

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—Denial of Factual Guilt.

—Denied.

#### Appeal.

The defendant's appeal from a conditional plea of guilty to possession of a controlled substance with intent to deliver in violation of

I.C. § 37-2732 was denied; the defendant was arrested for failure to maintain insurance, in violation of I.C. § 49-1229 and a subsequent search of his automobile uncovered cocaine and other drug paraphernalia. The defendant sought to suppress the evidence seized, contending that the search of his vehicle was an unconstitutional search and seizure and that the Idaho Constitution provided more protection than afforded by the Fourth Amendment of the U.S. Constitution; the trial court properly denied the suppression motion. *State v. Wheaton*, 121 Idaho 404, 825 P.2d 501 (1992).

Where district court accepted defendant's conditional plea of guilty pursuant to I.C.R. 11(a)(2) to felony possession of marijuana in excess of three ounces under § 37-2732(e), defendant was allowed to reserve certain adverse rulings for appeal. *State v. Wengren*, 126 Idaho 662, 889 P.2d 96 (Ct. App. 1995).

#### —Conditional Plea.

Where it was not shown that a guilty plea was tainted by defendant's "confession" even if the confession was improperly obtained and the guilty plea was entered about four months after the confession, when the defendant was represented by counsel, the plea was not a conditional plea under this rule for the purpose of preserving the right to have the adverse rulings of the District Court reviewed on appeal and consequently, the defendant has shown no nexus between the confession and the guilty plea. *State v. Rodriguez*, 118 Idaho 957, 801 P.2d 1308 (Ct. App. 1990).

The question of which county in the State of Idaho should be the situs for prosecution of a crime occurring in this state is no longer a jurisdictional question. It is simply a question of venue, and a valid plea of guilty waives all nonjurisdictional defects and defenses including any defense of improper venue, the exception to this rule being created by the entry of a written conditional guilty plea, meeting the



requirements of subdivision (a)(2) of this rule, which expressly reserves specific issues for review on appeal. *State v. Magill*, 119 Idaho 218, 804 P.2d 947 (Ct. App. 1991).

Where defendant, a refugee, was charged with first degree murder and subsequent to the appointment of a court appointed physician defendant entered a general plea of guilty to a reduced charge of second degree murder and did not condition his plea to the amended charge on the right to appeal the court's order appointing the physician rather than allowing for defendant to utilize a physician familiar with refugees; the Court of Appeals held that defendant was not permitted to challenge the district court's prior adverse ruling, court appointing a physician, since defendant had failed to condition his general plea of guilty pursuant this rule. *State v. Sengthavisouk*, 126 Idaho 881, 893 P.2d 828 (Ct. App. 1995).

Where the court vacated, rather than reversed, the decision to deny defendant's motion to suppress, defendant was properly denied the right to withdraw his guilty plea because a plea agreement is contractual in nature and must be measured by contract law standards, and under the clear terms of his plea agreement, defendant could not withdraw his plea unless the decision denying his motion to suppress was reversed. *State v. Hosey*, 134 Idaho 883, 11 P.3d 1101 (2000).

#### —Reservation of Right.

Under this rule, when a defendant pleads guilty, he or she may, with the approval of the court and the consent of the prosecuting attorney, reserve the right to appeal from a prior adverse ruling of the trial court; however, where defendant presented no evidence of the facts underlying the suppression motion in question and no record from the criminal proceedings showing the grounds on which the motion was denied, then, without such evidence there was no showing that an appeal of the order denying the motion would have had even arguable merit; therefore, defendant did not make a prima facie showing that his attorneys were deficient for failing to attempt to preserve the right to appeal. *Banuelos v. State*, 127 Idaho 860, 908 P.2d 162 (Ct. App. 1995).

Non-jurisdictional defects can be preserved for appeal by entering a conditional plea of guilty under subdivision (a)(2) of this rule, reserving in writing the right to review any specified adverse ruling; failure to comply with this rule results in a waiver of any issues not properly preserved for appellate review. *State v. Kelchner*, 130 Idaho 37, 936 P.2d 680 (1997).

If the defendant had wished to appeal the

district court's ruling which found him competent to stand trial, he should have sought to enter a conditional plea of guilty to preserve the right to appeal pursuant to subdivision (a)(2) of this rule, as opposed to entering an unconditional guilty plea, and because he did not do so his claim of error was waived. *State v. Green*, 130 Idaho 503, 943 P.2d 929 (1997).

The reviewing court refused to consider the defendant's claim of violation of his speedy trial rights where, although he had entered a conditional guilty plea with the agreement of the prosecution, specifically reserving his right to appeal the denial of his suppression motion, he failed to mention or preserve any right to raise on appeal a violation of his speedy trial rights. *State v. Salinas*, 134 Idaho 362, 2 P.3d 747 (Ct. App. 2000).

#### Conditional Plea.

A plea of guilty, if voluntarily and knowingly made, is conclusive as to the defendant's guilt and waives all non-jurisdictional defects in prior proceedings against the defendant. However, a defendant may preserve such defects or issues by entering a conditional guilty plea pursuant to paragraph (a)(2). *State v. Manzanares*, 152 Idaho 410, 272 P.3d 382 (2012).

#### Consequences of the Plea.

The acceptance of the plea was not rendered defective as a result of failing to explain possibilities of parole to the defendant. *State v. Vasquez*, 107 Idaho 1052, 695 P.2d 437 (Ct. App. 1985).

The "consequences" of a plea, under subdivision (c)(2) of this rule, are defined in terms of maximum and mandatory minimum sentences. Restrictions upon parole eligibility under § 20-223 are not included among the enumerated "consequences". *Brooks v. State*, 108 Idaho 855, 702 P.2d 893 (Ct. App. 1985).

Jurisdictional defects are not waived by the entry of a guilty plea; on the other hand, a valid guilty plea admits all essential allegations including jurisdictional facts, thus relieving the government of the burden of making proof. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

The defendant was fully aware that he was admitting the jurisdictional facts alleged in the information, including the state in which the crime was committed, and his guilty plea precluded him from collaterally attacking the court's jurisdiction. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), *overruled on*

other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Before a guilty plea can be accepted, the defendant must be informed of the consequences of his or her plea, but subsection (c) does not require that the defendant be informed of the collateral consequences of his or her guilty plea, and a contingent possibility resulting from a guilty plea is not a direct consequence embraced by this rule. *State v. Miller*, 134 Idaho 458, 4 P.3d 570 (Ct. App. 2000).

The use of defendant's Idaho guilty pleas in Washington was not a "definite, immediate, and largely automatic" consequence of his guilty pleas in Idaho, therefore, defendant did not show that the district court failed to comply with subsection (c) when it accepted his guilty pleas. *State v. Miller*, 134 Idaho 458, 4 P.3d 570 (Ct. App. 2000).

Inmate was entitled to an evidentiary hearing on his claim that his counsel did not inform him that upon conviction he could be required to pay restitution, as a transcript confirmed that he was not informed on the record at the plea hearing that his guilty plea could result in an order of restitution and the inmate asserted that he was not so informed at any other time before his plea. *Hayes v. State*, 143 Idaho 88, 137 P.3d 475 (Ct. App. 2006).

Defendant was entitled to withdraw his plea of guilty to the charge of aggravated battery where there was no mention at his plea hearing of the possibility of a consecutive sentence or of a restitution order, and nothing indicated that defendant had learned of these consequences earlier. *State v. Shook*, 144 Idaho 858, 172 P.3d 1133 (Ct. App. 2007).

#### —Basis of Felony DUI Charge.

Where defendant's guilty pleas to two prior misdemeanor DUI charges were made knowingly, intelligently, and voluntarily and where the trial court complied with the requirements of this Rule in both instances, prior convictions could serve as the basis for a felony DUI charge. *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

#### —Persistent Violator Status.

I.C.R. Rule 11 requires that the defendant be informed of direct consequences of a guilty plea, not collateral consequences; the future possibility of persistent violator status is a collateral, rather than direct, consequence of a guilty plea. *Carter v. State*, 116 Idaho 468, 776 P.2d 830 (Ct. App. 1989).

#### —Sex Offender Registration.

Because sex offender registration is a collateral consequence of a guilty plea, the dis-

trict court judge's failure to inform the defendant prior to entry of his plea that he would be required to register did not invalidate his plea. *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (1999).

The fact that sex offender registration is something that indirectly results from the fact of having a felony or sexual abuse conviction on one's record takes it out of the direct consequences aspect of this Rule. *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (1999).

#### —Waiver of Double Jeopardy Objection.

Although non-jurisdictional defects can be preserved for appellate review by entering a conditional guilty plea pursuant to this rule, defendant's plea was not so conditioned, and absent an agreement under subsection (a)(2) of this rule, a defendant may not retain the benefits of a plea bargain in the form of concessions from the state without waiving any double jeopardy objection to the resulting conviction or sentences. *State v. Wilhelm*, 135 Idaho 111, 15 P.3d 824 (Ct. App. 2000).

#### Construction with Other Laws.

Section 19-857 is procedural and not substantive law. The subject of the statute is how a trial court will consider and rule on the waiver of the right to counsel. The statute does not create, define, or regulate any primary rights. Therefore, this Rule takes precedence over I.C. § 19-857. *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

#### Factual Basis of Plea.

Unless a defendant seeking to have his guilty plea accepted by the court (a) does not recall the facts of the incident which resulted in the offense charged, or (b) is unwilling or unable to admit his participation in the acts constituting the crime, or (c) couples his plea with continued assertion of innocence, the court presented with a plea of guilty need not inquire into the underlying factual basis before accepting the plea; however, this does not diminish a court's obligation to conduct such an inquiry if — after a plea is entered but before sentence is imposed — the court receives information raising an obvious doubt as to whether the defendant is in fact guilty. *Schmidt v. State*, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982).

Given the defendant's voluntary entry of pleas of guilty and express admission of guilt to the first degree burglary charges, the court was not obliged to establish a further factual basis for the charges and did not err in accepting defendant's pleas of guilty to first degree burglary charges at arraignment hearing. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983).



There is currently no requirement in Idaho that the trial court must establish a factual basis prior to accepting a guilty plea. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983).

In Idaho, there is no general obligation to inquire into factual basis of a guilty plea. However, such an inquiry should be made if a plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, (1970), is accepted, or if the court receives information before sentencing which raises an obvious doubt as to guilt. *Amerson v. State*, 119 Idaho 994, 812 P.2d 301 (Ct. App. 1991).

#### **Failure to Comply with Probation Terms.**

Because their testimony was relevant to show that defendant had not complied with the terms of probation requiring him to give a comprehensive and accurate sexual history, district court did not err in admitting testimony at probation revocation hearing of minor children who were the subjects of dismissed charges pursuant to Rule 11 plea agreement. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

#### **Failure to Inform of Rights.**

Trial court correctly held that prosecution failed to present necessary proof that defendant had been validly convicted of two previous driving under the influence charges within the previous five years; defendant's prior judgment of conviction did not demonstrate on its face that the defendant in that proceeding was informed of his rights as required under this rule and the form of the judgment entered failed to incorporate the information mandated by I.M.C.R. 5. *State v. Mesenbrink*, 115 Idaho 850, 771 P.2d 514 (1989).

A guilty plea may be constitutionally accepted without the court informing a defendant of parole eligibility requirements. However, defendant's claim that he had not been informed as to any mandatory minimum sentence he must serve constituted an allegation that entitled him to relief. *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

Where magistrate did not specifically inquire of defendant pleading guilty to driving without privileges as to the existence of a plea bargain, yet no such agreement existed and defendant was informed of his right to seek a continuance, plead not guilty or guilty and was aware that he might receive the maximum penalty, there was no reversible error in accepting defendant's plea. *State v. McCutcheon*, 129 Idaho 168, 922 P.2d 1094 (Ct. App. 1996).

Violation of I.C.R. 11(c) did not provide an independent basis to collaterally attack the validity of a prior conviction used in a subsequent enhancement proceeding. *State v. Weber*, 140 Idaho 89, 90 P.3d 314 (2004).

The failure to comply with this rule does not, by itself, constitute manifest injustice, as this rule is not constitutionally mandated in order to fulfill the requirement of a voluntary, knowing, and intelligent plea. *State v. Flowers*, 150 Idaho 568, 249 P.3d 367 (2011).

Due process and this rule require that a defendant be informed, prior to the entry of a guilty plea, of the minimum and maximum potential sentence, not of the actual sentence that the court will impose within that range. *Steele v. State*, — Idaho —, 291 P.3d 466 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 241 (Idaho Dec. 12, 2012).

#### **—Acceptance Generally.**

Where the defendant agreed to plead guilty to the charge of first degree murder in exchange for the prosecutor's agreement to dismiss pending charges of robbery, grand larceny and illegal possession of a firearm, and to refrain from requesting the death penalty, such guilty plea was properly accepted by the court where the judge made a full record concerning the matters governed by subsection (c) of this rule pertaining to the acceptance of a guilty plea, took special care to ensure that the defendant understood the elements of first degree murder, and found that there was a strong factual basis for pleading guilty to the offense as charged and that the plea was entered knowingly, voluntarily and intelligently. *State v. Hoffman*, 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985).

Before a trial court accepts a plea of guilty, the record must show that the plea has been made knowingly, intelligently and voluntarily, and the validity of a plea is to be determined by considering all the relevant circumstances surrounding the plea as contained in the record. *State v. Hawkins*, 117 Idaho 285, 787 P.2d 271 (1990).

There is no requirement that the trial court must establish a factual basis for the crimes charged prior to accepting a guilty plea. *State v. Hawkins*, 117 Idaho 285, 787 P.2d 271 (1990).

By accepting defendant's plea of guilty, the court unless it otherwise complied with the requirements of this rule, was limited to the terms of the plea agreement, including the sentence to be imposed, as such the sentence which the court originally could have pronounced, upon acceptance of defendant's plea of guilty, was a three-year unified sentence with a one-year minimum period of confine-

ment. *State v. Wilson*, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995).

To be valid, a guilty plea must be knowingly, intelligently and voluntarily made, if entered in reliance upon a false premise, the guilty plea may be set aside. *State v. Harris*, 127 Idaho 376, 900 P.2d 1387 (Ct. App. 1995).

When a Rule 11(d)(1)(B) agreement is presented, the court has no duty to inform the defendant whether it accepts or rejects the agreement and is in no way bound by the sentencing recommendation; however, if the plea agreement falls under subsection 11(d)(1)(A), (C) or (D), the court must advise the defendant whether it accepts or rejects the agreement and if the agreement is rejected, the court must allow the defendant an opportunity to withdraw the plea. *State v. Harris*, 127 Idaho 376, 900 P.2d 1387 (Ct. App. 1995).

When a plea agreement is of the type specified under I.C.R. 11(d)(1)(B), the court is not required to accept or reject the agreement or to offer the defendant an opportunity to withdraw his plea if the sentencing recommendation is not adopted. *State v. Harris*, 127 Idaho 376, 900 P.2d 1387 (Ct. App. 1995).

#### —Advice Upon Pleading Guilty.

The trial court's failure to engage in a dialogue reminding defendant once again of his rights at the time of entry of a guilty plea is not required, nor does failure to contemporaneously advise entitle defendant to withdraw his plea as a matter of law. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

Although there is no requirement that the trial court go through any particular litany before accepting a defendant's guilty plea, to ensure a valid plea, the trial court must inform a defendant that by pleading guilty he waives his rights to a jury trial, to confront witnesses, his right against self-incrimination, and that he waives any defenses he may have to the charges; this practice is necessary to develop an adequate record before the trial court to ensure the entry of a valid guilty plea. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

Nothing in subdivision (c)(5) of this rule requires that the defendant be advised that, if the plea agreement involves a recommendation by the prosecutor regarding sentencing, and if the court does not follow that recommendation, that the defendant nevertheless has no right to withdraw his plea. Subdivision (c)(5) of this rule only requires the court to advise the defendant that the court is not bound by any promises or recommendation from either party as to punishment. *State v. Mauro*, 121 Idaho 178, 824 P.2d 109 (1991).

If the plea agreement falls under subdivi-

sions (d)(1)(A), (C) or (D) of this rule, the district court must advise the defendant whether it accepts or rejects the agreement; if the court rejects the agreement, it must advise the defendant of this in open court and allow the defendant the opportunity to withdraw the plea. On the other hand, if the plea agreement falls under subdivision (d)(1)(B) of this rule, the district court has no duty to inform the defendant whether it accepts or rejects the plea and is in no way bound by the sentencing recommendation. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

Before accepting defendant's guilty plea on a sex offense, the court is only required to inform defendant of the direct consequences of the plea. Sex offender registration is a collateral consequence of a guilty plea; therefore, a district judge's failure to inform defendant that he would be required to register as a sex offender does not invalidate his plea. *State v. Flowers*, 150 Idaho 568, 249 P.3d 367 (2011).

Where there exists a written plea agreement which does not mention the issue of restitution, and where the defendant was not otherwise clearly informed on the record that restitution was part of the agreement, it is a breach of that agreement for the state to later seek restitution. *State v. Gomez*, — Idaho —, — P.3d —, 2011 Ida. App. LEXIS 16 (Mar. 25, 2011).

#### —Alford Plea.

An *Alford* guilty plea properly fell under subdivision (d)(1)(A) of this section where, according to the transcript of the arraignment, prior to the filing of any charges, the prosecutor and the defense counsel investigated and negotiated the facts of the case, finally agreeing that in the exchange for the guilty plea, the charge would be filed in magistrate court as a misdemeanor. By filing the charge as a misdemeanor in a magistrate court, the state limited the maximum possible punishment that defendant could receive to one year in jail and a \$2,000 fine. *State v. Horkley*, 125 Idaho 860, 876 P.2d 142 (Ct. App. 1994).

Defendant's *Alford* guilty plea to one count of sexual abuse of a minor did not exempt him from completing his probation, including compliance with the requirement of full disclosure of his sexual history deemed essential to successful participation in sexual abuse counseling and rehabilitation; district court did not abuse its discretion in finding that he had violated his probation as a basis for revoking defendant's probation. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).



**In General.**

It would be difficult to imagine a clearer statement of the policy of the Supreme Court and the bench and bar of this state than that embodied in this Rule. *State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994).

Defendant argued that the State breached the plea agreement and that he was entitled to specific performance of the agreement at a new sentencing hearing; however, commission of a crime subsequent to entering a plea agreement and before sentencing was a change in circumstances amounting to a breach of that implied promise and was sufficient to excuse the State from fulfilling its promised recommendation. *State v. Tyler*, 139 Idaho 631, 84 P.3d 567 (Ct. App. 2003).

**Ineffective Assistance of Counsel.**

The defendant's claims that his counsel was ineffective in failing to inform him of the possibility of entering into a plea agreement under this rule which would have also included a minimum sentence failed because there was no indication that such an agreement was possible in this case. The state had already secured an agreement from the other state not to prosecute other charges as part of the plea bargain, and the mere speculation that the defendant might have been able to secure such an agreement was not sufficient to warrant post-conviction relief. *Bjorklund v. State*, 130 Idaho 373, 941 P.2d 345 (Ct. App. 1997).

Defendant who entered a plea of guilty to first-degree murder in exchange for the state's agreement under this rule not to seek an aggravated circumstance under § 18-4004 was entitled to post-conviction relief due to counsel's erroneous advice that he would receive a fixed life sentence if he went to trial and only 10 years if he pled guilty. *Booth v. State*, 151 Idaho 612, 262 P.3d 255 (2011).

**Nature of Charge.**

A reasonable inference could be drawn from the fact that a defendant had been adequately advised of the nature of the charge and the requisite intent required for voluntary manslaughter where although the element of intent was not specifically defined, the definition of manslaughter was discussed and the evidence available to the state to prove the homicide was disclosed. *State v. Vasquez*, 107 Idaho 1052, 695 P.2d 437 (Ct. App. 1985).

Where the record disclosed no statement by the district judge informing the defendant of the malice element, and there was nothing in the record refuting the defendant's allegation that his attorney also failed to advise him of the essential elements necessary to the charge of assault with intent to commit murder,

there existed at least a material issue of fact whether the defendant understood the nature of the charge against him; consequently, summary dismissal of the defendant's petition for post-conviction relief was reversed. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

A voluntary plea cannot be made without disclosure to the accused of the intent element of a specific intent crime. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

**Nolo Contendere Plea**

Magistrate properly refused to accept defendant's nolo contendere plea to a charge of vehicular manslaughter because nolo pleas are no longer accepted in Idaho. *State v. Salisbury*, 143 Idaho 476, 147 P.3d 108 (Ct. App. 2006).

**Order for Restitution.**

An order for restitution of costs incurred by law enforcement agencies in an investigation is a direct consequence of entering a guilty plea and the sentencing court may not impose restitution upon a defendant who pleads guilty, unless defendant is advised of that possibility prior to entering the plea. *State v. Banuelos*, 124 Idaho 569, 861 P.2d 1234 (Ct. App. 1993), cert. denied, 510 U.S. 1098, 114 S. Ct. 936, 127 L. Ed. 2d 227 (1994).

**Plea Bargaining Agreement.**

A guilty plea involves the waiver of several fundamental rights, but only a knowing and voluntary plea will constitute such an important waiver; mere silence or the failure to object will not suffice; when a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Although defendant argued that the trial court should not have accepted the guilty plea to two counts of felony injury to a child under § 18-1501 if the trial court felt that the recommended sentences were inappropriate, defendant offered no authority to support this, plus if the parties wanted the trial court to be bound by their sentencing recommendations, this rule provides a mechanism to do so. *State v. Halbesleben*, 147 Idaho 161, 206 P.3d 867 (2009).

**—Withdrawal.**

State was free to withdraw plea agreement until defendant actually entered a guilty plea; the parties were, thereupon, free to renegotiate, and defendant's plea and subsequent judgment of conviction were validly entered. *State v. Pierce*, 150 Idaho 725, 249 P.3d 1180 (Ct. App. 2011).

**Plea Bargaining Negotiations.**

There was no merit to the defendant's contention that, by entering into negotiations for a plea agreement, his constitutional right to a jury trial had been violated where no agreement was reached. *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990).

**Post-Conviction Procedure.**

The Uniform Post-Conviction Procedure Act, §§ 19-4901 — 19-4911, provides a mechanism by which a person convicted of a crime may show that his conviction was in violation of the Constitution, that the conviction should be vacated in the interest of justice, or that the conviction is otherwise subject to collateral attack. As such, the act provides an appropriate mechanism for considering claims of ineffective assistance of counsel and claims that a plea of guilty was accepted in violation of the requirements set forth in this Rule. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

A breach of a plea bargain agreement by the state affects the voluntariness of the guilty plea and is fundamental error. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Where the state has breached a plea bargain agreement a defendant may be entitled to specific performance of the plea bargain agreement, which would entail resentencing by a different district judge or a defendant may also be permitted to withdraw his guilty plea and go to trial on all the original charges. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

It is incumbent upon the attorneys to state the plea bargain agreement in its entirety on the record, and in a clear and coherent manner. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Where the terms of the plea bargain agreement are merely orally stated on the record by one of the attorneys the court should — by specific inquiries to the defendant — establish that the defendant both understands and agrees to the terms and the sentencing court should inform the defendant that the court is not bound by any recommendation from the prosecutor as to the sentence to impose. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Where the nature of the plea bargain is disputed and the record on appeal does not clearly disclose the terms of the plea bargain, it would be appropriate for an appellate court to remand to the district court for an evidentiary hearing and specific findings. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

The failure of the state to live up to its

agreement in a plea bargain was fundamental error and where such an error was not harmless beyond a reasonable doubt defendant was entitled to relief. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Where as a result of a plea bargain defendant pled guilty and the state agreed to drop certain charges and agreed not to affirmatively recommend a life sentence, but at the sentencing hearing a different prosecutor specifically recommended a determinate life sentence and the district court sentenced defendant to an indeterminate life sentence, the defendant was entitled to specific performance of his plea bargain. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

The failure of the state to live up to its agreement arising out of a plea bargain is fundamental error and does not preclude the defendant from raising the issue on appeal even where defendant failed to object to the state's failure at the time of sentencing. *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Where any alleged breach of the plea bargain agreement occurred before the guilty pleas were entered and accepted, the defendant was not induced to plead guilty, and the guilty plea was voluntary and valid. *Svenson v. State*, 110 Idaho 161, 715 P.2d 374 (Ct. App. 1986).

Where the prosecution did all that it promised, it could not be found that there was a breach of plea negotiations so as to render guilty plea invalid. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

The state may make recommendations for a particular sentence, or agree not to oppose the defendant's request for a particular sentence, or agree that a specific sentence is the appropriate disposition of the case; however, unless the court accepts the disposition agreed to, any recommendations shall not be binding upon the court. *State v. Staha*, 114 Idaho 119, 753 P.2d 1265 (Ct. App. 1988).

In a sexual abuse action in which a plea agreement provided that if the court found the defendant to be a pedophile or a danger to society, the court was not bound by the prosecutor's recommendation of probation and could impose any appropriate sentence, the agreement was not rejected when the court sentenced the defendant to an indeterminate term not to exceed 16 years based upon a presentence investigative report and a psychological report; the specific terms of the agreement granted the court this power. *State*

v. Whitehawk, 116 Idaho 827, 780 P.2d 149 (Ct. App. 1989), *aff'd*, 117 Idaho 1022, 793 P.2d 695 (1990).

Agreements made pursuant to subdivision (d)(1)(B) of this Rule do not bind the court to any particular course of action. The prosecution, on the other hand, is bound by its agreement to make a certain recommendation or to not oppose a defendant's request. *State v. Fertig*, 126 Idaho 364, 883 P.2d 722 (Ct. App. 1994).

Since issue of whether district court erred in denying defendant's motion to dismiss charge of DUI felony was not reserved for review in plea agreement that was filed, district court did not err in denying the motion. *State v. Kelchner*, 130 Idaho 37, 936 P.2d 680 (1997).

#### —Constitutional Rights.

Because of the grant of immunity accorded defendant pursuant to his Rule 11 plea agreement, defendant was not denied his Fifth Amendment right against self-incrimination by being required in treatment to admit to his sexual activities with the minor children who were victims of the charges that were dismissed pursuant to his Rule 11 plea agreement. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

#### Presentence Investigation Report.

District court did not err in denying defendant's motion to redact the suppressed statements from the 2003 Presentence Investigation Report because it did not have the authority to correct the document after the final judgment was issued, defendant did not invoke his Fifth Amendment privilege against self-incrimination in regard to the presentence investigation, and inclusion of the statements did not violate his Idaho Crim. R. 11 plea agreement with the State. *State v. Person*, 145 Idaho 293, 178 P.3d 658 (Ct. App. 2007).

#### Record on Appeal.

A plea of guilty cannot stand unless the record of the entire proceedings on appeal indicates that the plea was entered voluntarily, knowingly and intelligently. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

It is well settled that the trial court is not specifically required to follow any prescribed litany or to enumerate rights which a defendant waives by pleading guilty, so long as the record as a whole, and all reasonable inferences drawn therefrom, affirmatively show that the plea was made voluntarily, knowingly, and intelligently. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

#### Rejected Agreement.

The district court's comments at the change

of plea hearing indicated that it considered the portion of the plea agreement regarding retained jurisdiction to be non-binding; moreover, a review of the record shows that defendant understood the prosecutor's recommendation was not binding on the court. Because the plea agreement was non-binding, and was of the type specified under subdivision (d)(1)(B), the court was not required to advise defendant that it rejected the agreement or to offer him the opportunity to withdraw his plea. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

#### Revocation of Acceptance by the Court.

After a conditional plea of guilty has been accepted by a trial court pursuant to subdivision (d)(2) of this rule, the trial court cannot thereafter revoke the acceptance of the conditional plea of guilty. *Holland v. Woodland*, 116 Idaho 184, 774 P.2d 894 (1989).

#### Right of Confrontation.

This rule does not treat advice concerning the right to a jury trial as a substitute for advice on the right to confrontation; it requires that the defendant be advised of each right. A guilty plea cannot be accepted unless the record (including reasonable inferences drawn therefrom) shows that the defendant was advised of the rights enumerated by this rule — including confrontation of witnesses against him — which are waived by the plea. *State v. Browning*, 107 Idaho 870, 693 P.2d 1072 (Ct. App. 1984).

A waiver of the right of confrontation cannot be inferred from the record because defendant had been previously involved in the criminal justice system or because a guilty plea was entered during a recess while the jury was being selected to try his case. *State v. Browning*, 107 Idaho 870, 693 P.2d 1072 (Ct. App. 1984).

#### Voluntariness of Plea.

Where the district judge explained to the defendant the nature and circumstances of the charge against him, the consequences of his guilty plea, including his waiver of the right to a speedy trial before a jury, the right to confront witnesses called against him, and the right to present evidence, where defendant was advised that in the event of a trial he would not have to take the witness stand or give any testimony unless he chose to do so, of his right to an attorney, and that the state must prove to the jury his guilt beyond a reasonable doubt, and where the trial court advised him of the maximum sentence that could be imposed, and that if he had been previously convicted of a crime, especially a felony, it would weigh heavily against him,



after that explanation, defendant voluntarily entered his plea of guilty. *State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980).

A plea of guilty cannot stand unless the record on appeal indicates in some manner that the plea was entered voluntarily and understandingly; a voluntary and understanding plea is indicated when the record, including reasonable inferences that can be drawn from the record, affirmatively shows that the plea was voluntary, that the defendant understood the consequences of pleading guilty, and that the defendant waived the right to jury trial, the right to confront his accusers, and the right to refrain from self-incrimination. The record must also show that the defendant understood the possible maximum penalty that could be imposed. *State v. Curtis*, 103 Idaho 557, 650 P.2d 699 (Ct. App. 1982).

Where the record revealed that the district judge, in accepting guilty plea, conscientiously inquired upon all points covered by the standards, specifically ascertained that the plea was not based upon any promises, and informed defendant that the court would not be bound by sentencing recommendations based upon plea negotiations, the plea of guilty was validly made and was properly accepted. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct. App. 1983).

Where, at the sentencing hearing, the court noted its concern that defendant pleaded guilty to first degree burglary while maintaining his innocence and was given ample opportunity to withdraw his plea, but nevertheless made a reasoned decision to continue with his plea of guilty as charged, consistently with the terms of his plea bargain, this was clearly a case in which the defendant intelligently concluded that it was in his own best interest to enter a plea of guilty to the crimes charged and to take his chances that the trial court would exercise leniency in sentencing, as opposed to facing the additional charges which were dismissed upon the court's acceptance of his plea and, having struck a plea bargain with the prosecutor and insisted upon following that bargain when given the opportunity to withdraw his plea, defendant could not be heard to complain that the district court's acceptance of his plea of guilty to the first degree burglary charges was in error. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983).

A defendant must be informed of the intent element before a guilty plea can be regarded as voluntary; this requirement may be met when the information, referring to the intent element, is read to the defendant. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

There was a material question of fact concerning whether the defendant's plea was involuntary because he did not understand the consequences of his plea, where when the defendant entered his plea of guilty he was not informed that any enhancement of the sentence was possible or would be sought by the prosecutor, and when the court commenced the sentencing hearing two weeks later, it attempted to inform the defendant about determinate time under § 19-2520B but the explanation, as reported in the record, was anything but clear. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

Before accepting a guilty plea, the court must satisfy itself that the plea is offered voluntarily, knowingly and intelligently. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

Where although the judge did not explicitly define the intent element of the alleged crime but did state the offense charged and enunciated defendant's rights, including the right to insist that the state meet its burden of proof and also asked the prosecutor to narrate the underlying facts which he did, defendant was informed of the gravamen of the charge against him and was adequately informed of the nature of the charge, aggravated assault, therefore, the plea was entered voluntarily. *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988).

If the record indicates the trial court followed the requirements of subsection (c), this is a prima facie showing that the plea is voluntary and knowing. The defendant then has the burden of persuasion to demonstrate a manifest injustice by establishing that the plea was induced by misapprehension, inadvertence or ignorance. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

Where the defendant had a full understanding of his rights, the nature of the offense, the possible punishments, and the consequences of the plea and at no time prior to his motion to withdraw did he indicate confusion as to the above points, nor had he provided facts demonstrating that his plea was coerced or that he did not understand what was taking place, the record revealed that the magistrate followed the requirements of subsection (c) establishing a prima facie showing that the plea was voluntary and knowing. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

Failure to advise a defendant that he would be required to serve at least one-third of his sentence before he became eligible for parole consideration did not affect the voluntariness of his guilty plea. *LaBarge v. State*, 116 Idaho 936, 782 P.2d 59 (Ct. App. 1989).



Whether a plea is voluntary and understood by a defendant requires inquiry into three basic areas; first is whether defendant's pleas was voluntary in the sense that he understood the nature of the charges and was not coerced, second, whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself, and third, it must be determined whether the defendant understood the consequences of pleading guilty. *State v. Hawkins*, 117 Idaho 285, 787 P.2d 271 (1990).

The voluntariness of a guilty plea can be determined by considering all the relevant surrounding circumstances contained in the record. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

Although defendant who spoke little English signed a written plea agreement form, this was not found to be dispositive regarding the underlying issue of whether defendant acted voluntarily, knowingly and intelligently; in fact, given the circumstances of defendant's plea, there had not been an affirmative showing that defendant's plea satisfied these requirements. *State v. Ayala*, 118 Idaho 94, 794 P.2d 1150 (Ct. App. 1990).

The stress and anxiety that defendant's girlfriend might experience, if called upon to testify at trial, are external pressures not attributable to the state, and as such, did not render defendant's plea involuntary. *Amerson v. State*, 119 Idaho 994, 812 P.2d 301 (Ct. App. 1991).

The district court did not err when it concluded that defendant voluntarily pled guilty to a charge of aggravated assault upon a law enforcement officer where defendant entered his plea to avoid the prosecutor's threat of an enhanced sentence and where the prosecutor's threat was allegedly mentioned for the first time during the hearing at which defendant was to enter his plea. *State v. Storm*, 123 Idaho 228, 846 P.2d 230 (Ct. App. 1993).

Conduct by a trial court inducing a defendant to plead guilty in reliance upon promises that are later dishonored by the court would be fundamental error, and issues not presented to the trial court cannot be considered on appeal unless a question of fundamental error is involved; consequently, if the trial court coerced or falsely induced a defendant to plead guilty, the defendant may challenge the voluntariness of his plea for the first time on appeal. *State v. Harris*, 127 Idaho 376, 900 P.2d 1387 (Ct. App. 1995).

Trial transcript demonstrated that defendant understood the nature of the charges, understood the purpose of the hearing, understood that he was admitting that the charges

were true and entering a plea of guilty, and understood the consequences of doing so; defendant did not demonstrate an issue of material fact regarding his actual entry of a guilty plea. *Workman v. State*, 144 Idaho 518, 164 P.3d 798 (2007).

#### **Waiver Not Presumed.**

Fundamental rights are involved with regard to a plea of guilty, and a valid waiver will not be presumed but must be demonstrated by the record. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

#### **Warnings to Defendant.**

The trial court is not required to inform a defendant of the State's burden of proof, or that by pleading guilty, he waives defenses such as insanity or mental disability. *State v. Curtis*, 103 Idaho 557, 650 P.2d 699 (Ct. App. 1982).

Where the district judge, at both the arraignment and presentence hearings, fully advised defendant of his right to plead not guilty, of the protections he would enjoy in that event, and of the consequences of a plea of guilty, these admonitions were in conformity with subsection (c) of this rule. *Russell v. State*, 105 Idaho 497, 670 P.2d 904 (Ct. App. 1983).

Where the court record showed that when defendant entered his guilty plea the trial court did not attempt to re-advise him of the rights he was waiving and the consequences of his plea, and where, although defendant had been previously advised of that information at the district court level, the record did not affirmatively show that defendant understood that information, on such a record the order of the district court denying the defendant's motion to withdraw his guilty plea was reversed. *State v. Rodriguez*, 117 Idaho 292, 787 P.2d 278 (1990).

When a defendant enters a guilty plea, a waiver of his rights will not be valid unless the record, on the whole, indicates that such a plea is knowingly, intelligently and voluntarily made, and where the record revealed that the district judge at the initial arraignment informed defendant with regard to the waiver of his rights if he pled guilty, and that defendant acknowledged that he understood these rights, under these circumstances it cannot be held that defendant was uninformed regarding his Sixth Amendment rights. *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990).

#### **—Misdemeanor Cases.**

The judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement

that the trial court must advise the defendant of the problems inherent in entering a plea without consent. *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

### **Withdrawal of Plea.**

Even absent any prejudice to the state, the accused must present some specific reason for withdrawing his or her plea. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

In granting or denying a motion to withdraw a guilty plea before sentencing has occurred, the district court is empowered with broad discretion, liberal exercise of which is encouraged. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

Where, when the guilty plea was entered, the defendant had not been told that if the case went to trial the state would have to prove the specific intent and knowledge required for a conviction under § 18-2408, and no prejudice to the state was shown, the defendant was permitted to withdraw his guilty plea. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

Where, in prosecution for grand theft and petit theft, the court followed the requirements of subsection (c) of this rule in accepting the defendant's plea, the defendant was advised by the court of the requisite element of intent for grand theft, the defendant acknowledged the intent element and admitted that he had the intent to deprive the owner of his property, the defendant did indicate doubt concerning his guilt as to the petit thefts but elected to plead guilty to gain the benefit of plea negotiations, and even if the counsel's performance were deficient, the defendant did not show how he was prejudiced thereby, the defendant did not prove a manifest injustice requiring the withdrawal of his guilty plea. *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (Ct. App. 1988).

Pursuant to subdivision (a)(2), defendant was allowed to withdraw his conditional guilty pleas to robbery on all counts where it was shown because of police misconduct defendant's involuntary confession had to be suppressed. *State v. Davis*, 115 Idaho 462, 767 P.2d 837 (Ct. App. 1989).

The record demonstrates that in denying defendant's motion to withdraw his guilty plea, the trial court reviewed the colloquy that initially took place between the court and the defendant at the time he entered his guilty plea; the trial court noted that to accept defendant's contention that he was assured that the presiding judge would honor the terms of the plea bargain, including an indeterminate sentence, would require the reviewing court to ignore the record and defen-

dant's own statements contained therein regarding the extent of the plea arrangement. The trial court properly rejected defendant's contentions and determined that denying his motion to withdraw his guilty plea would not constitute a manifest injustice under the circumstances of this case. *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

Ordinarily, a plea of guilty may not be withdrawn after sentencing. Court of appeals will look to the whole record to determine whether it would be manifestly unjust to preclude the defendant from withdrawing his plea. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Failure of the defendant to present and support a plausible reason for withdrawing the guilty plea, even absent prejudice to the prosecution, militates against granting the motion. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Under an agreement pursuant to subdivision (d)(1)(B) of this Rule, the court need not give the defendant an opportunity to withdraw his or her plea. *State v. Fertig*, 126 Idaho 364, 883 P.2d 722 (Ct. App. 1994).

### **—Denial of Factual Guilt.**

A denial of factual guilt is not a just reason for the later withdrawal of a plea in cases where there is some basis in the record of factual guilt; therefore, the Supreme Court of Idaho's holding in *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975) is overruled with respect to all guilty pleas entered after the date of the present case to the extent that it conflicts with this holding. *State v. Dopp*, 124 Idaho 481, 861 P.2d 51 (1993).

### **—Denied.**

Defendant's motion to withdraw guilty plea was denied where mental therapist testified that defendant was neither severely depressed nor mentally ill and that the plea was thereby intelligent, knowing and voluntary. *State v. Dopp*, 124 Idaho 481, 861 P.2d 51 (1993).

Where defendant tried to withdraw a guilty plea because prosecutor allegedly breached plea agreement, no breach occurred since the prosecutor essentially informed the court in the presence of defendant and his counsel that the state's ultimate recommendation on a sentence was subject to the development of further information through a presentence investigation. *State v. Robles-Rivas*, 125 Idaho 160, 868 P.2d 488 (Ct. App. 1993).

District court properly denied defendant's motion to withdraw a plea of guilty to two counts of forgery, where defendant failed to show error in the district court's determination that defendant's guilty plea was entered

with knowledge of the potential consequences. *State v. Huffman*, 137 Idaho 886, 55 P.3d 879 (Ct. App. 2002).

**Cited in:** *State v. Geier*, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985); *State v. Rice*, 109 Idaho 985, 712 P.2d 686 (Ct. App. 1985); *State v. Rusho*, 110 Idaho 556, 716 P.2d 1328 (Ct. App. 1986); *State v. Albright*, 110 Idaho 748, 718 P.2d 1186 (1986); *State v. Barnhouse*, 111 Idaho 673, 726 P.2d 785 (Ct. App. 1986); *State v. Mason*, 111 Idaho 916, 728 P.2d 1325 (Ct. App. 1986); *State v. Biggs*, 113 Idaho 595, 746 P.2d 1054 (Ct. App. 1987); *State v. Scroggie*, 114 Idaho 188, 755 P.2d 485 (Ct. App. 1988); *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988); *State v. Law*, 115 Idaho 769, 769 P.2d 1141 (Ct. App. 1989); *State v. Wright*, 115 Idaho 1043, 772 P.2d 250 (Ct. App. 1989); *Gee v. State*, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990); *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990); *State v. Way*, 117 Idaho 594, 790 P.2d 375 (Ct. App. 1990); *State v. Beaty*, 118 Idaho 20, 794 P.2d 290 (Ct. App. 1990); *State v. Whitehawk*, 117 Idaho 1022, 793 P.2d 695 (1990); *State v. Irving*, 118 Idaho 673, 799 P.2d 471 (Ct. App. 1990); *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990); *State v. Hastings*, 118 Idaho 854, 801 P.2d 563 (1990); *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991); *State v. Oakley*, 119 Idaho 1006, 812 P.2d 313 (Ct. App. 1991); *State v. Knapp*, 120 Idaho 343, 815 P.2d 1083 (Ct. App. 1991); *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct. App. 1991); *State v. Dorr*, 120 Idaho 441, 816 P.2d 998 (Ct. App.

1991); *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (Ct. App. 1991); *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991); *State v. Gallegos*, 120 Idaho 894, 821 P.2d 949 (1991); *State v. Bulgin*, 120 Idaho 878, 820 P.2d 1235 (Ct. App. 1991); *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); *State v. Crisman*, 123 Idaho 277, 846 P.2d 928 (Ct. App. 1993); *State v. Wade*, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994); *State v. Walker*, 126 Idaho 508, 887 P.2d 53 (Ct. App. 1994); *State v. Book*, 127 Idaho 352, 900 P.2d 1363 (1995); *State v. Garcia*, 126 Idaho 836, 892 P.2d 903 (Ct. App. 1995); *State v. Johnson*, 126 Idaho 859, 893 P.2d 806 (Ct. App. 1995); *State v. Johnson*, 127 Idaho 279, 899 P.2d 989 (Ct. App. 1995); *State v. Leach*, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995); *State v. Soto*, 127 Idaho 324, 900 P.2d 800 (Ct. App. 1995); *State v. Rodriguez*, 128 Idaho 521, 915 P.2d 1379 (Ct. App. 1996); *State v. Owsley*, 128 Idaho 786, 918 P.2d 1231 (Ct. App. 1996); *State v. McGough*, 129 Idaho 371, 924 P.2d 633 (Ct. App. 1996); *State v. Ross*, 129 Idaho 380, 924 P.2d 1224 (1996); *State v. Etherington*, 129 Idaho 463, 926 P.2d 1310 (Ct. App. 1996); *State v. Slater*, 133 Idaho 882, 994 P.2d 625 (Ct. App. 1999); *State v. Dunn*, 134 Idaho 165, 997 P.2d 626 (Ct. App. 2000); *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001); *State v. Rounsville*, 136 Idaho 869, 42 P.3d 100 (Ct. App. 2002); *McKeeth v. State*, 139 Idaho 639, 84 P.3d 575 (Ct. App. 2004); *State v. Al-Kotrani*, 141 Idaho 66, 106 P.3d 392 (2005); *State v. Jacobson*, 150 Idaho 131, 244 P.3d 630 (2010).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Joint Representation of Codefendants.  
Voluntariness of Plea.  
Warnings to Defendant.

##### Joint Representation of Codefendants.

Absent a showing that there was at least a possible conflict of interest between the codefendants at the time the joint representation existed which may have inhibited the attorney's ability to act for the best interests of each codefendant at all times during that representation, there was no basis for the defendant's claim that his sixth amendment right to effective counsel was abridged. *Roles v. State*, 100 Idaho 717, 604 P.2d 731 (1979).

##### Voluntariness of Plea.

Guilty plea was voluntary where defendant was informed of the seriousness of the offense and of his right to counsel, giving warning that he would not receive a more lenient

sentence because he did not request counsel, where defendant answered in the affirmative when the court asked him if he had heard discussion with previous defendant regarding as to what was necessary before the court could accept a plea of guilty, in which discussion the court had advised another defendant of his right to a trial by jury and the presumption of innocence, and where defendant when asked if he was proceeding under any influence answered in the negative. *State v. Mooneyham*, 96 Idaho 145, 525 P.2d 340 (1974).

##### Warnings to Defendant.

Although present standards require that the trial court inform a defendant of the possible consequences of his guilty plea, those standards would not have been applied retroactively where there was no allegation or evidence of coercion. *State v. Alldredge*, 96 Idaho 7, 523 P.2d 824 (1974).



## RESEARCH REFERENCES

**A.L.R.** Presentence withdrawal of plea of nolo contendere or non vult contendere under state law-Awareness of collateral consequences of plea, and competency to enter plea. 10 A.L.R.6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant-State cases. 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law-Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo con-

tendere or non vult contendere under state law-Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law-Newly discovered or available evidence, and possible defense. 14 A.L.R.6th 517.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law-Sentencing and punishment issues; ineffective assistance of counsel. 15 A.L.R.6th 173.

## **Rule 12. Pleadings and motions before trial — Form of pleadings — Defenses and objections.**

(a) **Pleadings and motions.** Pleadings in criminal proceedings shall be the complaint, indictment or the information, and the pleas of guilty and not guilty. All other pleas, and demurrers and motions to quash are abolished, and the defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief as provided in these rules.

(b) **Pretrial motions.** Any defense objection or request which is capable of determination without trial of the general issue may be raised before the trial by motion. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the prior proceedings in the prosecution; or

(2) Defenses and objections based on defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge an offense which objection shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence on the ground that it was illegally obtained; or

(4) Request for discovery under Rule 16; or

(5) Request for a severance of charges or defendants under Rule 14; or

(6) Motion to dismiss based upon former jeopardy.

(c) **Form of pleading and documents.** Every pleading, motion, notice, or judgment or order of the court shall be typed with black ribbon or produced by a computer or word processor type printer of letter quality on white paper and contain a caption setting forth the names of the parties, the title of the district court, together with the assigned number of the action, the designation of the document or pleading and the names, addresses and phone numbers of the attorneys appearing of record for the party filing the document or pleading. All pleadings, motions, notices, judgments, or other documents must be filed with the court and must be typed on 8½ x 11 inch paper. The body of all such documents may be typed with double line spacing



or one-and-one-half (1½) line spacing with pica standard typing of not more than 10 letters to the inch. Every pleading shall have the name or designation thereof typed at the bottom of each page, and all attached exhibits must be legible and subject to reproduction by copying processes or be accompanied by a typewritten duplicate, and all handwritten exhibits shall be accompanied by a typewritten duplicate. The title of the court shall commence four (4) inches from the top of the first page. The name, address and telephone number of the attorney, or person appearing in propria persona, shall be typewritten or printed above the title of the court in the space to the left of the center of the page and beginning at least two (2) inches below the top edge thereof. This rule does not apply to printed forms approved by the Supreme Court or the Administrative District Judge or distributed through the Court Assistance Office in the county where the lawsuit is pending. Such forms may be completed by legibly hand-printing in black ink or by typing.

(d) **Motion date.** Motions pursuant to Rule 12(b) must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier. In felony cases, such motions must be brought on for hearing within fourteen (14) days after filing or forty-eight (48) hours before trial whichever is earlier. The court in its discretion may shorten or enlarge the time provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule.

(e) **Ruling on motion.** A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) **Effect of failure to raise defenses or objections.** Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, or at the time set by the court pursuant to subsection (d), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) **Records.** A verbatim record shall be made of all proceedings at the hearings including such findings of fact and conclusions of law as are made orally. (Adopted December 27, 1979, effective July 1, 1980; amended March 23, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 27, 1989, effective July 1, 1989; amended March 30, 1994, effective July 1, 1994; amended April 3, 1996, effective July 1, 1996; amended March 9, 1999, effective July 1, 1999; amended effective July 1, 2004.)

#### STATUTORY NOTES

**Cross References.** Dismissal of action, §§ 19-3501 — 19-3506. Pleadings by defendant, §§ 19-1701 — 19-1720.

## JUDICIAL DECISIONS

## ANALYSIS

Challenges to Information.  
 Constitutionality.  
 Discretion of Court.  
 Double Jeopardy.  
 Due Process Challenges.  
 Failure of Counsel to Move to Suppress Evidence.  
 Failure to Raise Issue.  
 Findings of Fact.  
 Incorrect Case Numbers.  
 Motion to Suppress.  
 Multiplicity.  
 Notice.  
 Records.  
 Time of Filing.  
 Voluntariness.  
 Waiver of Defenses.

**Challenges to Information.**

Defendant's due process challenges to the information were waived because he did not raise them before the commencement of trial as required by Idaho Crim. R. 12(b)(2). *State v. Quintero*, 141 Idaho 619, 115 P.3d 710 (2005).

Trial court lacked jurisdiction, where the indictment alleged acts that were made criminal by § 18-1506(1)(d), which was enacted in 2008, but the alleged acts occurred in 2001 and 2002. *State v. Olin*, — Idaho —, 292 P.3d 282 (Ct. App. 2012), review denied, — Idaho —, 2013 Ida. LEXIS 35 (Idaho Jan. 30, 2013).

Defendant failed to bring a due process challenge as to the sufficiency of the charging document prior to trial; therefore, that claim was waived. The charging document failed to cite § 18-8004(1)(a), but did cite the enhancement statute of § 18-8004C, which in turn cited to the applicable subsection; the charging document, although not ideal, was sufficient to confer jurisdiction on the court. *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008).

**Constitutionality.**

Defendant was not required to raise an issue concerning whether statutes were unconstitutionally vague prior to trial under I.C.R. 12(b)(2) because it did not constitute a challenge to the charging documents. *State v. Casano*, 140 Idaho 461, 95 P.3d 79 (Ct. App. 2004).

**Discretion of Court.**

Although the substitution of defense counsel immediately before trial did not require the trial court to hear and decide an otherwise untimely motion, the court did not abuse its

discretion by doing so. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

When deciding whether to grant or deny a motion for continuance, a magistrate is entitled to consider the effect that a continuance would have on the efficient operation of the court system. *State v. Irving*, 118 Idaho 673, 799 P.2d 471 (Ct. App. 1990).

The district court did not abuse its discretion to deny a motion to suppress an officer's testimony, particularly since defendant was later given the opportunity to argue for exclusion of the testimony during the trial. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992).

**Double Jeopardy.**

Where defendant had not been formerly convicted or acquitted of the offenses to which he pled guilty, he had not been in "former jeopardy" and had no right to a dismissal of either charge prior to trial; thus, he did not waive his right to raise his double jeopardy claim by failing to make a motion pursuant to this rule. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

**Due Process Challenges.**

Defendant's due process challenges to the information were waived because he did not raise them before the commencement of trial as required by Idaho Crim. R. 12(b)(2). *State v. Quintero*, 141 Idaho 619, 115 P.3d 710 (2005).

**Failure of Counsel to Move to Suppress Evidence.**

Where state placed paid informant in cell next to defendant ten days prior to trial and the informant elicited inculpatory statements from defendant, the Supreme Court could consider on appeal defendant's claim that he was deprived of his right to counsel since admission of this evidence was fundamental error in a criminal trial and such review was allowable even though defendant's counsel had failed to move to suppress the evidence prior to trial pursuant to subsection (b)(3) of this rule and failed to object to its admission at trial. *State v. LePage*, 102 Idaho 387, 630 P.2d 674, cert. denied, 454 U.S. 1057, 102 S. Ct. 606, 70 L. Ed. 2d 595 (1981).

Where, in a prosecution for aggravated driving under the influence of alcohol, the court entered a specific order directing the filing of all pretrial motions within the time set by the rules, and the defendant was put on adequate notice that he was required to file his objection to the use by the state of the test result obtained in possible violation of § 18-

8002; his failure to make such a motion, absent a showing of cause, constituted waiver of the objection. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988).

Where defendant did not prove resulting prejudice as a result of his attorney's failure to file a timely pretrial suppression motion, defendant did not establish that he was denied effective assistance of counsel. *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

Ordinarily, the failure to move to suppress evidence prior to trial pursuant to this rule and the failure to object to its admission would prevent the court from addressing the issue on appeal. However, where a fundamental error has been committed in a criminal trial, this court may consider it even though no objection was made before the trial court. *State v. Morris*, 116 Idaho 834, 780 P.2d 156 (Ct. App. 1989).

Defendant convicted of possession of a controlled substance was not entitled to relief on claim of ineffective assistance on grounds that counsel failed to file a pretrial motion to suppress the evidence obtained in search of the car he had parked at this friend's residence where nowhere in application or supporting affidavits did defendant present evidence to explain how the search was unreasonable or otherwise illegal, so as to justify suppression of the evidence derived therefrom. *State v. Ayala*, 129 Idaho 911, 935 P.2d 174 (Ct. App. 1996).

Subsection (d) of this rule clearly requires either good cause or excusable neglect to be shown by a party who has missed the prescribed deadlines. Therefore, where appellant has not shown either as an explanation for noncompliance with the deadlines, the trial court's suppression motion will not be disturbed. *State v. Gleason*, 130 Idaho 586, 944 P.2d 721 (Ct. App. 1997).

#### **Failure to Raise Issue.**

Where asserted error, not timely raised at trial, relates not to infringement upon a constitutional right, but to violation of a rule or statute, the "fundamental error" doctrine is not invoked and the appellate court will not review the error. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984).

In Idaho either the state or the defendant may move for severance under I.C.R., Rule 14, if it appears prejudice will occur at trial by a joinder of offenses or of defendants; pursuant to subdivision (b)(5), such a motion must be made prior to trial. The failure by a defendant to request a severance prior to trial or at such other time as the trial court may allow shall constitute a waiver thereof under sub-

section (e) of this rule. *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985).

Defenses and objections based on defects in the information, other than the failure to state a charge or the lack of jurisdiction of the court, must be raised prior to trial, and failure to raise the issue waives it. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

Any nonjurisdictional defects did not affect the voluntariness of the defendant's guilty plea and were waived by the failure to timely assert them. *State v. Jaramillo*, 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987), review denied, 116 Idaho 467, 776 P.2d 829 (1988).

Although subdivision (b)(2) of this section would appear to allow counsel to keep silent until after trial about a document's failure to charge an offense, an indictment not challenged before trial will be upheld unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant is convicted. *State v. Cahoon*, 116 Idaho 399, 775 P.2d 1241 (1989).

Where defendant did not move to dismiss on former jeopardy grounds until after a second trial was completed, his failure to make a timely motion to dismiss barred him from asserting the former jeopardy grounds theory on appeal. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992).

Where the pleading gave at least general, though imprecise, notice of charge of second offense DUI without alleging the time, place and validity of prior conviction, and where the defendant did nothing to seek clarification of the charge in the trial court, and where the defendant did not contend that he was actually misled or prejudiced by the generality of the pleading, a claim of a technical insufficiency of the complaint was not a claim of fundamental error which could be first introduced on appeal following a guilty plea. *State v. Tucker*, 124 Idaho 621, 862 P.2d 313 (Ct. App. 1993).

Once the information was filed, the district court had subject matter jurisdiction over the action and defendant's claim that the grand jury ignored the charge, in violation of Idaho Const. art. I, § 8, was waived by his failure to raise the issue before the district court pursuant to Idaho Crim. R. 12(f). *State v. Pierce*, 150 Idaho 1, 244 P.3d 145 (2010).

#### **Findings of Fact.**

The failure of the trial court to make findings of fact, when ruling on a suppression motion, does not automatically constitute reversible error; where there has been no request for findings by either party under subsection (d) of this rule (now subsection (e)) the Court of Appeals should examine the record to determine the implicit findings which under-



lie the judge's order. *State v. Middleton*, 114 Idaho 377, 757 P.2d 240 (Ct. App. 1988).

#### **Incorrect Case Numbers.**

Although the preferred manner of proceeding would have been to file a new case altogether rather than filing an amended complaint, merely having different or incorrect case numbers on the complaint or pleadings as a result of either a clerical or typographical error, or use of a number from a previously dismissed case on the amended complaint, is not sufficient cause to invalidate the complaint; this is particularly true where there is only one event giving rise to the charges contained in all pleadings. *State v. Bacon*, 117 Idaho 679, 791 P.2d 429 (1990).

#### **Motion to Suppress.**

Because there was no clear request for consent to search defendant's home, and it could not be inferred that defendant consented to the officers conducting a search to find items that were not in plain view, the search was unreasonable and defendant's motion to suppress should have been granted; the court thus vacated defendant's conviction of possession of methamphetamine in violation of § 37-2732(c)(1). *State v. Lafferty*, 139 Idaho 336, 79 P.3d 157 (Ct. App. 2003).

Order denying defendant's motion to suppress was affirmed because the valid detention of defendant became a consensual encounter at the point when defendant was told that he could leave. When defendant's driver's license and other documents were returned to him, he was told at least twice that he was free to leave, after defendant had returned to his car to depart the officer asked politely for permission to ask defendant a question, and it followed that the subsequent consent to a search occurred during a consensual encounter and was not the product of an unlawful detention, as the officer did not command defendant to stay, nor preface his request with any other comments that would suggest a continuing exercise of authority. *State v. Roark*, 140 Idaho 868, 103 P.3d 481 (Ct. App. 2004).

District court exceeded the bounds of its discretion when it refused to reschedule a hearing on defendant's motion to suppress since defendant failed to appear at an earlier hearing, because the district court's concern that other defendants would seek to delay their trial through similar tactics was unfounded, when the right to be present at a hearing on a motion to suppress could be waived by defendant's voluntary absence. *State v. Rupert*, 146 Idaho 742, 202 P.3d 1288 (2009).

Where a controlled drug transaction took

place at one location in a mobile home park, but a search of that location failed to find any marijuana, and the officer determined that the suspect lived in an adjoining space and obtained a search warrant for that space based solely on the residence of the suspect, the search of the adjoining space was invalid for lack of a nexus between the place to be searched and the item to be seized, and the evidence should have been suppressed. *State v. Belden*, 148 Idaho 277, 220 P.3d 1096 (2009).

#### **Multiplicity.**

Defendant waived the right to challenge the multiplicity of charges in a case relating to the unlawful killing of a deer because defendant was required to raise the issue prior to trial since it was a challenge to the charging documents. *State v. Casano*, 140 Idaho 461, 95 P.3d 79 (Ct. App. 2004).

#### **Notice.**

This rule only requires that notice which is already in writing and is to be filed with the court meet certain requirements, and thus an oral notice of the state's intent to seek an enhanced penalty for the use of a deadly weapon was sufficient to satisfy the notice requirements as set forth in § 19-2520. *Medina v. State*, 132 Idaho 722, 979 P.2d 124 (Ct. App. 1999).

#### **Records.**

A minute entry signed by the judge was not sufficient to dismiss a criminal case. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Requiring every discussion held between the parties and their counsel or interpreter to be transcribed by a necessarily bilingual court reporter would be impracticable and would unduly interfere with well-established court procedures. *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Tradition and common sense dictates that "proceedings," when used to define what a court should require as part of the transcript, means the conversations between the judge and the parties, their counsel or their interpreter, therefore neither § 1-1103 nor subsection (g) of this Rule require transcription of the conversations held at the defense table between the defendant and the interpreter or the defendant and his attorney because these discussions usually are spoken "sotto voce" and are not intended as communications for the court. *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

#### **Time of Filing.**

Where the defendant's motion for separate trials was filed on the morning of the trial without obtaining discretionary permission



from the trial court to file and argue the motion, and the defendant's counsel made no showing why the motion was not timely asserted in accordance with this rule, it was permissible for the district court to deny the severance motion solely on the basis of untimeliness, absent a showing of cause to enlarge the time. *State v. Gooding*, 110 Idaho 856, 719 P.2d 405 (Ct. App. 1986).

The trial court abused its discretion in considering the motion to suppress the evidence which was not timely filed when neither "good cause" or "excusable neglect" was shown. *State v. Alanis*, 109 Idaho 884, 712 P.2d 585 (1985).

It was not an abuse of discretion for the trial court to deny a motion for continuance made just before the scheduled trial where the purpose of said motion was to provide for the filing of an untimely motion to suppress. *State v. Irving*, 118 Idaho 673, 799 P.2d 471 (Ct. App. 1990).

Although failure of an indictment or information to charge a crime is a fundamental defect which can be raised at any time, indictments and informations which are tardily challenged are liberally construed in favor of validity. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

Allowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule. The district court should have entertained an explanation by counsel for the delay and then should have determined whether good cause or excusable neglect was shown based on the reasons given. If no good cause or excusable neglect was established to the satisfaction of the district court, the motion should not have been heard. *State v. Dice*, 126 Idaho 595, 887 P.2d 1102 (Ct. App. 1994).

In prosecution for delivery of a controlled substance where pre-trial deadline was June 5 and defendant made motion to dismiss grand jury indictment on June 5 but voluntarily withdrew it and on July 18 again made such motion, such motion was filed too late to be considered since defendant failed to establish good cause or excusable neglect as required by subsection (d) of this rule in order to be relieved of his failure to comply and district court did not abuse its discretion in denying motion to dismiss the indictment. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

District court did not err in denying defendant's motions to suppress due to untimeliness where defendant filed his motions to suppress 57 days following his pleas of not guilty and, thus, 29 days after the permissible date to file his motions; the mere assertion of

a heavy caseload was insufficient to support a finding of excusable neglect or good cause under subsection (d). *State v. Cutler*, 143 Idaho 297, 141 P.3d 1166 (Ct. App. 2006).

### **Voluntariness.**

Subsection (d) of this rule (now subsection (e)) does not require the trial court to render explicit findings of fact as to the voluntariness of the defendant's confession, where none are requested by either of the parties, and admission of the confession at trial operated, ipso facto, as a ruling that the confession was voluntarily made. *State v. Kirkwood*, 111 Idaho 623, 726 P.2d 735 (1986).

The defendant's failure to object at trial to the admission of his confession was an effective waiver to a complaint that such confession was not voluntarily made. *State v. Kirkwood*, 111 Idaho 623, 726 P.2d 735 (1986).

### **Waiver of Defenses.**

By pleading guilty to being a persistent violator, the defendant waived any legal defenses he may have had as a result of incorrect dates of the prior convictions alleged in the information. *State v. Angel*, 103 Idaho 624, 651 P.2d 558 (Ct. App. 1982).

Where following preliminary examination magistrate entered order that state had shown probable cause to bind defendant over, but prosecutor did not file information for more than 20 days, defendant by not moving for dismissal for lack of compliance with rule requiring filing of information within 10 days after entry of order waived the objection. *State v. McNeely*, 104 Idaho 849, 664 P.2d 277 (Ct. App. 1983).

**Cited in:** *Maxfield v. Thomas*, 557 F. Supp. 1123 (D. Idaho 1983); *State v. Fairchild*, 108 Idaho 225, 697 P.2d 1239 (Ct. App. 1985); *State v. Kay*, 108 Idaho 661, 701 P.2d 281 (Ct. App. 1985); *State v. Murinko*, 108 Idaho 872, 702 P.2d 910 (Ct. App. 1985); *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987); *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988); *State v. Wheeler*, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988); *State v. Thomas*, 116 Idaho 848, 780 P.2d 599 (Ct. App. 1989); *State v. Kysar*, 116 Idaho 992, 783 P.2d 859 (1989); *State v. Smith*, 117 Idaho 891, 792 P.2d 916 (1990); *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992); *State v. Carey*, 122 Idaho 382, 834 P.2d 899 (Ct. App. 1992); *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992); *State v. Leach*, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995); *State v. Avelar*, 129 Idaho 704, 931 P.2d 1222 (Ct. App. 1996); *Nelson v. Hayden*, 138 Idaho 619, 67 P.3d 98 (Ct. App. 2003); *State v. Murray*, 143 Idaho 532, 148 P.3d 1278 (Ct.

App. 2006); *State v. Turney*, 147 Idaho 690, 214 P.3d 1169 (2009); *State v. Lampien*, 148 Idaho 367 223 P.3d 750 (2009).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

**Appeal from Motions to Dismiss.**  
**Failure to Make Timely Objection.**

##### **Appeal from Motions to Dismiss.**

Although former Rule 12(a), I.R. Crim. P. abolished demurrers, the state could appeal under § 19-2804(1) (now repealed) from motions to dismiss which raised defenses and objections which were formerly grounds for demurrer. *State v. Murphy*, 99 Idaho 511, 584 P.2d 1236 (1978).

##### **Failure to Make Timely Objection.**

In a prosecution for delivery of a controlled substance where defendant failed to move to suppress the state's evidence prior to trial or to present any reason why such a motion could not have been made prior to trial, the trial court did not abuse its discretion in refusing to exclude such evidence on defendant's motion at trial. *State v. Collinworth*, 96 Idaho 910, 539 P.2d 263 (1975).

Where defendant, who pled guilty to four

counts of uttering and delivering a check with insufficient funds, failed to timely object that the information against him was filed more than ten days (now (14 days) after he was held to answer, his objection was deemed waived on appeal. *State v. Morris*, 97 Idaho 273, 543 P.2d 498 (1975).

Trial court in ruling that defendant's motion to suppress robbery victim's wallet was not timely did not abuse its discretion, where knowledge of the seizure of the wallet was available to defendants' trial counsel prior to trial from defendants themselves, counsel at the preliminary hearing, and an affidavit in support of the criminal complaint available in the case file. *State v. Gerhardt*, 97 Idaho 603, 549 P.2d 262 (1976).

Where the defendant complained about the specificity of the information under which he was tried only after his conviction, his complaint came too late since such objections had to be made before trial to avoid waiving them. *State v. Greene*, 100 Idaho 464, 600 P.2d 140 (1979).

#### RESEARCH REFERENCES

**A.L.R.** Modern status of the rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Drug addiction or related mental state as defense to criminal charge, 73 A.L.R.3d 16.

When intoxication deemed involuntary so as to constitute a defense to criminal charge, 73 A.L.R.3d 195.

#### **Rule 12.1. Notice of alibi.**

If the defendant intends to rely upon the defense of alibi, the defendant shall comply with section 19-519, Idaho Code. (Adopted December 27, 1979, effective July 1, 1980.)

#### JUDICIAL DECISIONS

##### ANALYSIS

**Alibi Defense Impractical.**  
**Time of Offense.**

##### **Alibi Defense Impractical.**

A defendant who has had a close association with a minor over a protracted period of time and who is charged with a continuous conduct of abuse will have no practical defense of alibi. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

##### **Time of Offense.**

Assertion of an alibi defense does not necessarily make time of the offense a material element which must be proven by the state. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

In child sexual abuse cases involving a continuous course of sexual abuse, and evidence of frequent, secretive offenses over a period of time, credibility, not alibi, is the only issue, and detailed specificity in the informa-

tion as to the times of the offenses is not required. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

**Cited in:** *State v. Mata*, 106 Idaho 184, 677 P.2d 497 (Ct. App. 1984).

### **Rule 13. Trial together of complaints, indictments and informations.**

The court may order two (2) or more complaints, indictments or informations to be tried together if the offenses, and the defendants if there is more than one (1), could have been joined in a single complaint, indictment or information. The procedure shall be the same as if the prosecution were under such single complaint, indictment or information. (Adopted December 27, 1979, effective July 1, 1980.)

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Joinder Improper.  
Joinder Permissible.  
Joinder Prejudicial.

#### **Joinder Improper.**

Joinder of defendant's sexual offenses was erroneous because the similarities that both girls were only temporarily in the household, that the acts occurred in defendant's home, and that the abuse began with "innocent" touching were insufficient to prove a common scheme or plan. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).

#### **Joinder Permissible.**

Court did not err by joining defendant's case with a co-defendant because there was no Bruton violation present. The co-defendant's denial that he knew the drugs were in the bag did not necessarily implicate defendant in knowing the drugs were present in the bag. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Court did not err by joining defendant's case with a co-defendant because the prosecutor charged the conspiracy crime in good faith by providing evidence that the parties agreed

to deliver the drugs to others, and, in any event, there did not exist any law in the jurisdiction making that element a requirement. Accordingly, the court did not err in joining the cases despite the fact that the conspiracy charge was later dismissed. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

#### **Joinder Prejudicial.**

Court improperly joined drug delivery and possession charges with a statutory rape charge because the proscribed conduct giving rise to each charge was distinct and occurred at various times and locations, and except for one minor overlap--the victim of the rape was one of five persons to whom defendant was accused of delivering methamphetamine--the parties involved, other than defendant, were different. There was also no allegation that any offense was the predicate to completing any other offense such that defendant's actions were part of an overall design or continuing course of conduct--rather, they were distinct and self-contained. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

**Cited in:** *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

#### **DECISIONS UNDER PRIOR RULE OR STATUTE**

#### **Joinder Permissible.**

Since the propriety of joinder is determined by what is alleged and not what the proof eventually shows, failure of a kidnapping count against defendant husband who was charged with kidnapping and issuing insufficient funds checks was not an indication of

misjoinder with defendant wife who was charged with kidnapping, and conviction on the charge of issuing insufficient funds checks would not be reversed for failure to sever in the absence of prejudice. *State v. Cochran*, 97 Idaho 71, 539 P.2d 999 (1975).



## RESEARCH REFERENCES

**A.L.R.** Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

**Rule 14. Relief from prejudicial joinder.**

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information or by such joinder for trial together, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial. (Adopted December 27, 1979, effective July 1, 1980.)

## JUDICIAL DECISIONS

## ANALYSIS

Burden of Proof.  
Denial of Severance Proper.  
Discretion of Court.  
Dual Jury Procedure.  
Failure to Raise Issue.  
Joinder Improper.  
Joinder Prejudicial.  
Notice of Appeal.  
Severance Denied.

**Burden of Proof.**

A defendant seeking a severance of parties properly joined has the burden of showing that a joint trial would be prejudicial. *State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985).

Where defendant claiming ineffective assistance by appellate counsel presented not a single legal authority to support his position that the consolidation of criminal cases was reversible error and that the transcript of an out-of-state proceeding should have been excluded, such argument would not be considered on appeal and dismissal of his claim was affirmed. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

**Denial of Severance Proper.**

Where the defendant, by presenting an alibi defense, directly placed his identity as the perpetrator of the two charged offenses of assault with intent to rape in issue, and where the incidents occurred 45 minutes and about five blocks apart, and the common assailant fits the same description and behaved in the same manner, the incidents were sufficiently similar to permit evidence of either to be introduced at a separate trial of the other,

and the trial court did not abuse its discretion by denying motions for separate trials. *State v. Abel*, 104 Idaho 865, 664 P.2d 772 (1983).

Where the facts relating to each incident of assault with intent to rape were so distinct and simple that there was little risk that, after having received proper instruction, the jury cumulated or confused the evidence, where the jury was properly instructed on the reasonable doubt standard and that each count charged a separate and distinct offense which must be decided separately on the evidence and law applicable to it uninfluenced by the jury's decision on any other count, and where jury returned different verdicts with respect to the two charged counts of assault with intent to rape, the trial court did not abuse its discretion in refusing the motions for severance on argued ground that jury might confuse and cumulate the evidence. *State v. Abel*, 104 Idaho 865, 664 P.2d 772 (1983).

**Discretion of Court.**

Whether the district court abused its discretion by failing to order, upon its own motion, a severance or other relief turns upon the extent of ensuing prejudice; the burden of showing prejudice is borne by the party asserting it. *State v. Martinez*, 109 Idaho 61, 704 P.2d 965 (Ct. App. 1985), rev'd on other grounds, 111 Idaho 281, 723 P.2d 825 (1986).

A motion for separate trials is directed to the court's discretion. *State v. Gooding*, 110 Idaho 856, 719 P.2d 405 (Ct. App. 1986).

The trial court did not abuse its discretion in denying the motion to sever where the trial court focused on the joint motions that the

defendants had made and the joint strategy and joint defense sessions defense counsel had conducted and there was not a sufficient showing of antagonistic defenses to require severance. *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

Pretrial motions for severance are directed to the trial court's discretion. *State v. Abel*, 104 Idaho 865, 664 P.2d 772 (1983).

#### **Dual Jury Procedure.**

While this rule does not explicitly provide for a dual jury procedure, neither does it expressly prohibit it; a trial court may provide whatever relief from prejudicial joinder that justice requires. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Where the trial judge was cautious and meticulous in his conduct of trial before dual juries, and there was no indication whatsoever that the dual jury procedure resulted in any unfairness, prejudice or violation of defendant's constitutional rights, there was no error in using a dual jury procedure in trying two co-defendants for murder. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

#### **Failure to Raise Issue.**

In Idaho either the state or the defendant may move for severance under this rule, if it appears prejudice will occur at trial by a joinder of offenses or of defendants; pursuant to I.C.R., Rule 12(b)(5), such a motion must be made prior to trial. The failure by a defendant to request a severance prior to trial or at such other time as the trial court may allow shall constitute a waiver thereof under I.C.R., Rule 12 (now 12(f)). *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985).

#### **Joinder Improper.**

Joinder of defendant's sexual offenses was erroneous because the similarities that both girls were only temporarily in the household, that the acts occurred in defendant's home, and that the abuse began with "innocent" touching were insufficient to prove a common scheme or plan. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).

#### **Joinder Prejudicial.**

Court improperly joined drug delivery and possession charges with a statutory rape charge because the proscribed conduct giving rise to each charge was distinct and occurred

at various times and locations, and except for one minor overlap--the victim of the rape was one of five persons to whom defendant was accused of delivering methamphetamine--the parties involved, other than defendant, were different. There was also no allegation that any offense was the predicate to completing any other offense such that defendant's actions were part of an overall design or continuing course of conduct--rather, they were distinct and self-contained. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

#### **Notice of Appeal.**

This rule required that, to perfect a timely appeal from the imposition of judgment and sentence, defendant's notice of appeal must have been filed within 42 days of the imposition of sentence, or defendant must have filed, within 14 days of imposition of sentence, a motion which, if granted, could have affected the judgment, order or sentence. *State v. Brydon*, 121 Idaho 890, 828 P.2d 919 (Ct. App. 1992), overruled on other grounds, *State v. Tranmer*, 135 Idaho 614, 21 P.3d 936 (2001).

#### **Severance Denied.**

In prosecution of the defendant on three counts of lewd conduct with minors, the court did not err in denying the defendant's severance motion, where there was little likelihood that the jury would confuse and cumulate the evidence, the defendant was not confounded in presenting his defenses, and the similarity of conduct involving the charged offenses weighed against the likelihood that the defendant was found guilty of any count simply on the basis of criminal disposition. *State v. Gooding*, 110 Idaho 856, 719 P.2d 405 (Ct. App. 1986).

A joint trial for one count of grand theft for removal of property taken from a storage unit, and two counts of possession of property stolen in two other burglaries was properly held not to have caused the jury to cumulate or confuse the evidence resulting in unfair prejudice where evidence was presented in a straightforward manner, where each of the victims testified as to the property taken, where each victim identified property, which had been recovered in the search of defendant's apartment, and where the jury was properly instructed on the elements required for each charged offense and that each count charged constituted a separate and distinct offense. *State v. Cirelli*, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989).

**Cited in:** *State v. Anderson*, 138 Idaho 359, 63 P.3d 485 (Ct. App. 2003).

**RESEARCH REFERENCES**

**A.L.R.** Antagonistic defenses as ground for separate trials of codefendants in state homicide offenses—Factual applications. 16 A.L.R.6th 329.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases — State Narcotics Offenses. 19 A.L.R.6th 115.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses — Applicable Standard and Extent of Antagonism Required. 24 A.L.R.6th 591.

Desire of Accused to Testify on Just One of Multiple Charges as Basis for Severance of Trials. 32 A.L.R.6th 385.

Antagonistic defenses as ground for separate trials of codefendants in criminal case — Federal homicide offenses. 7 A.L.R. Fed. 2d 415.

Antagonistic defenses as ground for separate trials of codefendants in criminal case — Federal cocaine offenses. 7 A.L.R. Fed. 2d 491.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Case — Federal Marijuana Offenses. 34 A.L.R. Fed. 2d 509.

**Rule 15. Depositions.**

(a) **When taken.** If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the testimony of the witness is material and that it is necessary to take the deposition of the witness in order to prevent a failure of justice, the court at any time after the filing of a complaint, indictment or information may upon motion of the prosecution or the defendant and after notice to all parties, order that the testimony of the witness be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness or any party and upon notice to the parties may direct that the deposition of the witness be taken. After the deposition has been subscribed the court may discharge the witness.

(b) **Notice of taking.** The party at whose instance the deposition is to be taken shall give to every other party a reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant to be removed from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify the defendant being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but defendant's failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.



(c) **Payment of expenses.** Whenever a deposition is taken, the court may, in its discretion, direct that the expense of travel and subsistence of the defendant and defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the county.

(d) **How taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without the defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The state shall make available to the defendant or defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the state and to which the defendant would be entitled at the trial. A deposition shall be taken as provided by the Idaho Rules of Civil Procedure. The court at the request of a defendant may direct that a deposition may be taken on written interrogatories in the manner provided in the Idaho Rules of Civil Procedure.

(e) **Use.** At the trial or upon any hearing, a part or all of a deposition so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as the term unavailability is defined in Rule 804(a) of the Idaho Rules of Evidence.

(f) **Objections to deposition testimony.** Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition, unless otherwise agreed by the parties.

(g) **Deposition by agreement not precluded.** Nothing in this rule shall preclude the taking of a deposition orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985.)

#### STATUTORY NOTES

**Cross References.** Examination of witnesses on commission, §§ 19-3201 — 19-3214.

#### JUDICIAL DECISIONS

##### ANALYSIS

Deposition of Prosecutrix.  
Preclusion of Equitable Claims.

##### Deposition of Prosecutrix.

Where there was no showing whatsoever that the prosecutrix would be unable to attend the trial, there were no grounds upon which to grant the motion to take the deposition of the prosecutrix and the court did not

err in refusing to allow it. *State v. Filson*, 101 Idaho 381, 613 P.2d 938 (1980).

##### Preclusion of Equitable Claims.

District court did not abuse its discretion when it would not allow amendment of pleadings to add an equitable claim where there were already contract claims asserted. *Iron Eagle Dev. v. Quality Design Sys., Inc.*, 138 Idaho 487, 65 P.3d 509 (2003).

**Rule 16. Discovery and inspection.**

(a) **Automatic disclosure of evidence and material by the prosecution.** As soon as practicable following the filing of charges against the accused, the prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control, or which thereafter comes into the prosecuting attorney's possession or control, which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment therefor. The prosecuting attorney's obligations under this paragraph extend to material and information in the possession or control of members of prosecuting attorney's staff and of any others who have participated in the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney.

In addition, the office of the prosecuting attorney shall disclose the general nature of evidence of other crimes, wrongs, or acts, it intends to introduce at trial in accordance with the provisions of Rule 404(b) of the Idaho Rules of Evidence.

(b) **Disclosure of evidence and materials by the prosecution upon written request.** Except as otherwise hereinafter provided in this rule, the prosecuting attorney shall at any time following the filing of charges, upon written request by the defendant, disclose the following information, evidence and material to the defendant, which shall not be filed with the court, unless otherwise ordered.

(1) **Statement of defendant.** Upon written request of a defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence; and also the substance of any relevant, oral statement made by the defendant whether before or after arrest to a peace officer, prosecuting attorney or the prosecuting attorney's agent; and the recorded testimony of the defendant before a grand jury which relates to the offense charged.

(2) **Statement of a co-defendant.** Upon written request of a defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph any written or recorded statements of a co-defendant; and the substance of any relevant oral statement made by a co-defendant whether before or after arrest in response to interrogation by any person known by the co-defendant to be a peace officer or agent of the prosecuting attorney.

(3) **Defendant's prior record.** Upon written request of the defendant, the prosecuting attorney shall furnish the defendant such copy of the defendant's prior criminal record, if any, as is then or may become available to the prosecuting attorney.

(4) **Documents and tangible objects.** Upon written request of the defendant, the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are in the possession, custody or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

(5) **Reports of examinations and tests.** Upon written request of the defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

(6) **State witnesses.** Upon written request of the defendant the prosecuting attorney shall furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any such person which is within the knowledge of the prosecuting attorney. The prosecuting attorney shall also furnish upon written request the statements made by the prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney or the prosecuting attorney's agents or to any official involved in the investigatory process of the case unless a protective order is issued as provided in Rule 16(k).

(7) **Expert witnesses.** Upon written request of the defendant the prosecutor shall provide a written summary or report of any testimony that the state intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications. Disclosure of expert opinions regarding mental health shall also comply with the requirements of I.C. § 18-207. The prosecution is not required to produce any materials not subject to disclosure under paragraph (f) of this Rule. This subsection does not require disclosure of expert witnesses, their opinions, the facts and data for those opinions, or the witness's qualifications, intended only to rebut evidence or theories that have not been disclosed under this Rule prior to trial.

(8) **Police reports.** Upon written request of the defendant the prosecuting attorney shall furnish to the defendant reports and memoranda in possession of the prosecuting attorney which were made by a police officer or investigator in connection with the investigation or prosecution of the case.

(9) **Disclosure by order of the court.** Upon motion of the defendant showing substantial need in the preparation of the defendant's case for



additional material or information not otherwise covered by this Rule 16(b), and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order the additional material or information to be made available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

**(c) Disclosure of evidence by the defendant upon written request.**

Except as otherwise hereinafter provided in this rule, the defendant shall at any time following the filing of charges against the defendant, upon written request by the prosecuting attorney, disclose the following information, evidence and material to the prosecuting attorney, which shall not be filed with the court, unless otherwise noted.

(1) **Documents and tangible objects.** Upon written request of the prosecuting attorney, the defendant shall permit the prosecutor to inspect and copy or photograph books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at the trial.

(2) **Reports of examinations and tests.** Upon written request of the prosecuting attorney, the defendant shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness.

(3) **Defense witness.** Upon written request of the prosecuting attorney, the defendant shall furnish the state a list of names and addresses of witnesses the defendant intends to call at trial.

(4) **Expert witnesses.** Upon written request of the prosecutor the defendant shall provide a written summary or report of any testimony that the defense intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions and the witness's qualifications. Disclosure of expert opinions regarding mental health shall also comply with the requirements of I.C. § 18-207. The defense is not required to produce any materials not subject to disclosure under paragraph (h) of this Rule, or any material otherwise protected from disclosure by his constitutional rights.

**(d) Redacting protected information from responses to discovery.**

The party providing discovery may redact protected information from the information or material provided.

(1) Protected information means:

A. Contact information. The home addresses, business addresses, telephone numbers (including cell phones), and email addresses of an

alleged victim, or of a witness, or of the spouse, children, or other close family members of the alleged victim or witness, and the places where any of such persons regularly go, such as schools and places of employment and worship.

B. Personal identifying information. The dates of birth and social security numbers of any persons other than the defendant.

C. Private information. Personal identification numbers (PINs), passwords, financial account numbers, information relating to financial transaction cards, and medical information protected by federal law that is not directly related to the crime charged.

(2) A prosecuting attorney who redacts protected information shall follow the following procedure:

A. If the defendant is represented by counsel, the prosecuting attorney shall serve defendant's counsel with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The defendant's attorney, including appellate counsel, shall not disclose the protected information to the defendant or to a member of the defendant's family without the consent of the prosecuting attorney or an order of the court upon a showing of need.

B. If the defendant is not represented by counsel, the prosecuting attorney shall serve the defendant with a redacted copy of the discovery and, within seven (7) days of doing so, even if the disclosure was not in response to a discovery request, shall file with the court and serve upon the defendant a motion for a protective order with respect to the redacted information.

(3) A defense attorney or defendant who redacts protected information shall serve the prosecuting attorney with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The state's attorney, including appellate counsel, shall not disclose the protected information to the alleged victim or to a member of the alleged victim's family without the consent of the defendant or an order of the court upon a showing of need.

**(e) Failure to make written request, waiver.**

(1) Any request by a party for information, evidence or material under subsections (b) and (c) of this rule must be in writing with the original document filed with the court and a copy served upon the prosecuting attorney or the defense attorney. Failure to so file and serve such request in writing, shall constitute a waiver of the right to discovery under subsections (b) and (c) of this rule. If no written request for discovery is so filed and served by the defendant, the defendant shall not be permitted to raise as error in any subsequent proceeding the failure of the prosecution to disclose the information described in subsection (b) of this rule.

(2) **Form of request.** A request for the information, evidence and material under subsection (b) of this rule shall be in substantially the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

STATE OF IDAHO,  
Plaintiff,  
v.  
\_\_\_\_\_,  
Defendant.

)  
)  
)  
)  
)

Case No. \_\_\_\_\_  
  
REQUEST FOR  
DISCOVERY

TO: THE (PROSECUTING ATTORNEY OF \_\_\_\_\_ COUNTY)  
(DEFENDANT):

PLEASE TAKE NOTICE that the undersigned pursuant to Rule 16 of the  
Idaho Criminal Rules request discovery and inspection of the following  
information, evidence and materials:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_

The undersigned further requests permission to inspect and copy said  
information, evidence and materials on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at  
\_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Attorney for (Plaintiff) (Defendant)  
(CERTIFICATE OF SERVICE)

- (f) **Response to request, failure to file a response.**
- (1) **Response to request.** The party upon whom a request has been  
served shall file and serve a written response within fourteen (14) days of  
service of the request by filing the original copy with the court and serving  
a copy upon the opposing party which shall state one or more of the  
following:
- A. That the response has already been complied with and that the  
inquiring party has been furnished the information, evidence and  
material listed in the request.



B. That there is no objection to the discovery of the information, evidence and materials sought by the request and that the opposing party shall be permitted discovery at a time and place certain.

C. That the responding party objects to part or all of the information, evidence and materials sought to be discovered in the response, which objection shall be specific and shall state the grounds for the objection.

(2) **Failure to comply.** Unless otherwise ordered by the court upon the showing of good cause or excusable neglect, the failure to file and serve a response within the time prescribed by this rule shall constitute a waiver of any objections to the request and shall be grounds for the imposition of sanctions by the court.

(3) A response to a request shall be in substantially the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

STATE OF IDAHO,	)
Plaintiff,	) Case No. _____
v.	) RESPONSE TO
_____,	) REQUEST FOR DISCOVERY
Defendant.	)

COMES NOW the (Plaintiff) (Defendant) and submits the following Response to the Request for Discovery:

(Plaintiff) (Defendant) has complied with such request by \_\_\_\_\_

\_\_\_\_\_

(or)

(Plaintiff) (Defendant) will comply with such request by \_\_\_\_\_

\_\_\_\_\_

(and/or)

(Plaintiff) (Defendant) objects to (all of the request) (that part of the request for the discovery of \_\_\_\_\_.)

The grounds for this objection are as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Attorney for (Plaintiff) (Defendant)

(CERTIFICATE OF SERVICE)

ACKNOWLEDGMENT OF DISCOVERY

(Optional)

The undersigned hereby acknowledges that discovery has been permitted of the following information, evidence and materials pursuant to the Request for Discovery.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Attorney for (Plaintiff) (Defendant)

(g) **Prosecution information not subject to disclosure.**

(1) **Work product.** Disclosure shall not be required of legal research or of records, correspondence, reports of memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney’s legal staff.

(2) **Informants.** Disclosure shall not be required of an informant’s identity unless such informant is to be produced as a witness at a hearing or trial, subject to any protective order under Rule 16(k) or a disclosure order under Rule 16(b)(8).

(h) **Defense information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or defendant’s attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant or state or defense witnesses, or prospective state or defense witnesses to the defendant, defendant’s agents or attorneys.

(i) **Failure to call witnesses.** The fact that a witness’s name is on a list furnished under this rule and that witness is not called shall not be commented upon at the trial.

(j) **Continuing duty to disclose.** If, subsequent to compliance with a request issued pursuant to this rule, and prior to or during trial, a party discovers additional evidence or the evidence of an additional witness or witnesses, or decides to use additional evidence, witness or witnesses, such evidence is automatically subject to discovery and inspection under such prior request and such party shall promptly notify the other party or that party’s attorney and the court of the existence of such additional evidence or the names of such additional witness or witnesses in order to allow the other party to make an appropriate request for additional discovery or inspection.

(k) **Orders for discovery.** If a party has failed to comply with a request for discovery under this rule, the court upon motion of a party, may, order a party to permit the discovery or inspection, prohibit the discovery of part or all of the information, evidence or material sought to be discovered, or enter such other order as it deems just in the circumstances. An order of the court granting discovery under this rule shall specify the time, place and manner of making the discovery and inspection permitted and prescribe such terms and conditions as are just.

(l) **Protective orders.** Upon a sufficient showing, after notice and hearing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate, including an order denying a request for disclosure of names and addresses of witnesses or others who may be subjected to economic, physical or other harm or coercion. The court may permit a party to make such showing in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief after such showing, the entire text of the party's statement shall be sealed and preserved in the record of the court to be made available to the appellate court in the event of an appeal. (Adopted December 27, 1979, effective July 1, 1980; am. February 20, 1980, effective July 1, 1980; amended March 27, 1989, effective July 1, 1989; amended March 9, 1999, effective July 1, 1999; amended March 28, 2007, effective July 1, 2007; amended February 9, 2012, effective July 1, 2012; amended November 20, 2012, effective January 1, 2013.)

### STATUTORY NOTES

**Cross References.** Examination of witnesses on commission, §§ 19-3201 — 19-3214.

Proceedings on information, discovery and inspection, § 19-1309.

### JUDICIAL DECISIONS

#### ANALYSIS

Audio Tapes.  
Construction.  
Copies of Requested Material.  
Defendant's Statement to Witness.  
Disclosure.  
—Convictions.  
—Exculpatory Evidence.  
—Informant's Identity.  
—Witness.  
Duty of Prosecutor.  
—Failure to Show Error.  
Examination and Reports.  
Examination and Tests.  
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—Not Error.  
Fair Trial.  
Inculpatory Testimony of Rebuttal Witness.  
Inspection of Real Property.  
Late Disclosure of Evidence.

Late Disclosure of Expert Witness.  
Lost Evidence.  
Non-Lawyer.  
Nonproduction of Original Evidence.  
Purpose.  
Request for Further Information.  
Sanctions.  
Standard of Review for Late Disclosure.  
State Witnesses.  
Substantial Compliance.  
—Transcript.  
Unknown Police Report.

#### Audio Tapes.

In prosecution for delivery of a controlled substance, in response to discovery of an audio tape of informant's action in buying drugs from defendant, statement that such tape was available for inspection at the prosecutor's office when in fact such tape did not exist, was misleading; however, since defen-



dant's counsel knew that the tape did not exist prior to the time of the trial defendant failed to show how he was prejudiced and such error was harmless; further, defendant's argument that the lack of an audio tape was exculpatory per se was without merit. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

#### **Construction.**

This rule does not refer to § 19-1309, but is obviously designed to amplify on the statute in an effort to assist prosecutors and defense counsel in utilizing discovery processes. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1989).

#### **Copies of Requested Material.**

The state need only make requested items available for the defendant to inspect and copy; the state is not required to initiate copying of the requested documents or to provide, without further request or court order, a copy of all materials sought. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

#### **Defendant's Statement to Witness.**

Defendant's statement to a witness did not fall within the ambit of former rule requiring disclosure of oral statements made by defendant to a peace officer, prosecuting attorney or his agent, and the prosecution was not required to disclose it before trial; the state was required to, and did, furnish defendant's counsel with the name of the witness as a potential state's witness. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

#### **Disclosure.**

Where at the grand jury proceedings informant testified that he had only been charged with a misdemeanor but in prosecution for delivery of controlled substance, where defendant moved to compel discovery, requesting a disclosure of agreement between state and informant who had bought drugs from defendant, the state replied that the entire agreement had been fully disclosed on the record, but informant testified he was charged with felony forgery and later on cross-examination admitted that he was also charged with petit theft, even if there was a discovery violation, defendant failed to show how he was prejudiced because all the charges against the informant were bought out on cross-examination in front of the jury and thus district court's error, if any, was harmless. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

In prosecution for delivery of a controlled substance, district court did not err in finding that state did not fail to make a proper

response in regard to the lack of marked money, in light of the fact that there was no marked money to be discovered and fact that state never represented in response to discovery that marked money was found on defendant. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

Where a district court found that the facts in a drug case showed that a confidential informant (CI) could have possibly given testimony relevant to the issues at trial, it erred by failing to conduct an in-camera review upon defendant's motion to disclose the identity of the CI. A remand was necessary to determine if a new trial was warranted. *State v. Farlow*, 144 Idaho 444, 163 P.3d 233 (Ct. App. 2007).

District court erred in ruling that a discovery violation occurred when defendant had no indication prior to trial that the store's loss prevention investigator would change his testimony regarding the location of camera coverage within the store and therefore was not aware that the store manager's testimony would be necessary; the district court's reliance upon a failure to disclose the store manager in pretrial discovery was not a valid basis to exclude his testimony. *State v. Karpach*, 146 Idaho 736, 202 P.3d 1282 (2009).

#### **—Convictions.**

Defendant's attorney's performance was not deficient where defense counsel requested only information concerning any felony convictions of state's witnesses and, therefore, did not find out about misdemeanor charges against the witnesses; this rule requires only that prosecutor disclose upon written request the felony convictions of state's witnesses. *Ramirez v. State*, 119 Idaho 1037, 812 P.2d 751 (Ct. App. 1991).

#### **—Exculpatory Evidence.**

The prosecutor's constitutional duty of disclosure and the requirements to disclose under subsection (a) of this rule both relate to exculpatory evidence. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

A prosecutor's failure to disclose exculpatory evidence is a denial of due process; however, to constitute a denial of due process, the exculpatory information must be shown to be material. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

Prosecutors have a constitutional duty to disclose to the defendant any exculpatory information in their control; exculpatory evidence is evidence which, if known, would have created a reasonable doubt of guilt that did not otherwise exist. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

The prosecutor's duty to disclose any excul-

patory information under the due process clause and under this rule appears to be coextensive. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985).

The state has a duty to provide all exculpatory or possibly exculpatory material, whether requested or not; however, the failure of the state to reveal exculpatory evidence will not result in a reversal unless the evidence is "material." *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

The state's failure to disclose the jailer's information did not so prejudice the defendant as to undermine confidence in the outcome of the proceedings, where the defendant's attorneys chose to utilize this evidence in mitigation at the sentencing hearing instead of seeking a continuance and moving to withdraw the plea before sentence was pronounced. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

Failure to disclose exculpatory and material evidence is a denial of due process irrespective of the good or bad faith of the prosecutor and requires reversal of the conviction. *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct. App. 1991).

The cumulative effect of the following errors warranted allowing defendant to withdraw his guilty plea: (1) He was not provided with police reports which he had requested and even without the requests, the state had a continuing duty to provide the reports because they were exculpatory and material; (2) he was wrongly advised of the maximum possible penalty for the charged crime, an error which the court stated it would redress by allowing defendant to withdraw his plea; (3) the court erred in determining defendant's motivation in withdrawing his plea; and (4) there would have been no prejudice to the state had the court allowed defendant to withdraw his guilty plea and the matter gone to trial. *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct. App. 1991).

The state has a duty to provide all exculpatory or possibly exculpatory material, whether requested or not. *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct. App. 1991).

Where the defense had information that there was a confession to the murder their client was charged with committing, and knew the identity of the confessor, the details of the confession, and the name of the officer who heard the confession, with that information they could have contacted the police officers involved to determine whether the confession was worth pursuing; therefore the fact that two additional police reports on the confession were not given to defense did not amount to a withholding of exculpatory evi-

dence by the prosecution. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (Ct. App. 1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

#### —Informant's Identity.

Where, in prosecution for manufacturing a controlled substance, the trial court refused to order the informant to identify the acquaintance who was the source of his belief that the defendant posed a threat to him, the relevancy of that information turned upon the defendant's ability to provide a foundation sufficient to call the informant's credibility into question through his allegation that the informant was biased and had asserted a false motivation. If the defendant raised only a bare allegation without foundation, a protective order might be warranted, but, if the defendant was able to offer sufficient foundation for his theory of the informant's motivation, the defendant might, in the discretion of the court, be entitled to an order to compel disclosure of the acquaintance's identity. *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).

The magistrate at the preliminary hearing determined, contrary to defendant's argument that the informant was not a participant in the commission of the crime of possession with intent to deliver; rather, the informant's activities confirmed the presence of controlled substances in the defendant's trailer, upon which the magistrate based his assessment that there was probable cause to have defendant answer for the crime; therefore, the magistrate and the district judge did not abuse their discretion in denying defendant's requests for disclosure of the informant's identity in pre-trial proceedings. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

In prosecution for delivery and trafficking in methamphetamine in violation of §§ 37-2732 and 38-2732B where defendant failed to articulate any basis for her assertion that the in camera hearing was insufficient to protect her rights and also failed to demonstrate how the informant's identity would have presented her with necessary information that the in camera hearing did not, trial court did not err in refusing to disclose the informant's identity. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

The government's privilege to withhold from disclosure the identity of confidential informers, the rule of nondisclosure, gives way if the informant is produced as a witness at trial or if otherwise ordered by the court, and the decision whether to require disclosure of the identity of the confidential informant is left to the discretion of the trial court. *State v.*

Davila, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995).

#### —Witness.

The prosecutor's duty to disclose witnesses, under subdivision (b)(6) of this rule, does not extend to persons called for rebuttal, or to witnesses whose testimony only concerns the chain of possession of certain evidence. *State v. Lopez*, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Where State did not show any prejudice, but simply stated an objection to the witness on the basis of late disclosure, and the district court did not require the State to make any showing that it would have been prejudiced if the witness was allowed to testify, the district court exceeded the proper bounds of its discretion by failing to analyze whether the State would suffer prejudice due to the late disclosure. *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997).

#### Duty of Prosecutor.

The prosecutor's responsibility under the due process clause and under this rule appear to be coextensive. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

In prosecution for delivery of a controlled substance in violation of misrepresentation on part of state that the sheriff's office had no written policy regarding confidential information and informants when there was in fact such a written policy which was disclosed during officer's cross-examination, while such policy should have been promptly disclosed, defendant was not prejudiced by such discovery violation and district court did not abuse its discretion in holding that there was no bad motive on part of the prosecutor and defendant was not prejudiced. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

#### —Failure to Show Error.

Where defendants filed a written request for discovery of a list of all baggers who were working in grocery store on the day in question, and where wanted until after trial to allege that the prosecutor failed to provide them with a complete list of baggers, the defendants failed to show that the prosecutor's alleged error so profoundly distorted the trial that it produced manifest injustice and deprived them of their fundamental right to due process. *State v. Webster*, 123 Idaho 233, 846 P.2d 235 (Ct. App. 1993).

#### Examination and Reports.

This Rule clearly allows access to reports which the defendant intends to introduce at trial or which were prepared by a witness whom the defendant intends to call at trial, but, in ordering a defense expert to prepare a

report for opposing counsel, or to submit to an interview by opposing counsel, the court overstepped the boundaries of the rule. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

#### Examination and Tests.

Where defendant hired an expert to examine state's evidence and the expert did not prepare or provide any written reports, in ordering the defense expert to prepare a report for opposing counsel, or to submit to an interview by opposing counsel, the court overstepped the boundaries of subsection (c)(2) of this Rule. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (Ct. App. 1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the State, some five months before trial, had provided defendant with expert's report, Exhibit C, containing his test results and conclusions performed on the methamphetamine, but the State did not provide the working papers and graphs on which the conclusions in the report were based until requested at trial, the trial court properly found that the State's providing the test results, Exhibit C, was adequate. *State v. Caswell*, 121 Idaho 801, 828 P.2d 830 (1992).

#### Failure to Disclose.

Even assuming that the evidence at issue fell within disclosure requirements, there was no reversible error in the trial court's refusal to impose sanctions for the prosecution's failure to disclose, where there was no showing that the failure to disclose was prejudicial. *State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (1987), aff'd, 116 Idaho 580, 777 P.2d 1253 (1989).

State violated or failed to comply with this rule by failing to provide defendant and his attorney with copies of any test results obtained by the State's agents, employees, or witnesses as requested under defendant's request for discovery and inspection pursuant to subsection (a) of this rule and the State has further violated or failed to comply with this rule by failing to provide documents and evidence, such as maintenance logs, requested by defendant in his supplemental request for discovery and inspection. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1989).

Finding against the State and in favor of defendant was improper where the magistrate erred in imposing a discovery sanction for a defense request not allowed by the Idaho Criminal Rules; there was no motion pursuant to subsection (b)(8) and therefore, the magistrate's order to disclose the facts and data underlying the expert's opinion was not



within the scope of the applicable criminal discovery rules; thus, the ordered sanction of preventing the expert from testifying was in error. *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004).

#### —Not Error.

State's late disclosure and non-disclosure of evidence did not violate defendant's constitutional right to a fair trial, where: (1) communications between defendant and another witness were not written or recorded and therefore not subject to this rule; (2) defendant did not show how late disclosure of another witness' statement affected trial preparations, and defendant did not request a continuance for further investigation; (3) defendant failed to indicate any prejudice by late disclosure of taped interview with officer, where officer was available for cross-examination; and (4) report on fingerprints had already been disclosed to defendant. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

Where evidence which was withheld concerned the technical sufficiency of a search warrant, not the defendant's guilt or innocence of murder, and where the prosecution and the magistrate failed to recognize the potential significance of the technical oversight, the actions of the prosecution and magistrate were not so egregious as to require a withdrawal of the defendant's guilty plea. *State v. Mathews*, 133 Idaho 300, 986 P.2d 323 (1999), cert. denied, 528 U.S. 1168, 120 S. Ct. 1190, 145 L. Ed. 2d 1095 (2000).

There was substantial and competent evidence that supported the trial court's conclusion that the state's untimely disclosure, although error, did not prejudice defendant, and defendant failed to meet his burden of showing that the late disclosure in any way prejudiced his case. *State v. Pacheco*, 134 Idaho 367, 2 P.3d 752 (Ct. App. 2000).

#### Fair Trial.

The disclosure of documents towards the end of the suppression hearing did not deny the defendants a fair trial and, therefore, the prosecution's conduct did not constitute reversible error, where the court granted the defendants' motion for continuance so that they could investigate matters relating to the newly discovered documents and to prepare briefs on their motion to suppress, and the record was void of any additional motions that the defendants made after further investigation if they felt that they were prejudiced. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

Even though the state's duty to disclose evidence is not dependent upon whether the state intends to use the evidence, where the

defendant's preparation or presentation of his defense was not prejudiced by a delay in the disclosure of evidence in that the defendant was aware of everything on the tape in question, the tape was never admitted to impeach the defendant nor as substantive evidence against him and did not contain any new information that might have helped in the preparation of the defense, the fact that the defendant may have been better prepared and testified different had he known of the existence of the tape did not make his trial unfair. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

#### Inculpatory Testimony of Rebuttal Witness.

There is no constitutional duty, nor any requirement under subsection (a) of this rule, for the State to disclose potentially inculpatory testimony of a rebuttal witness. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

#### Inspection of Real Property.

Subdivision (b)(8) of this rule does not authorize the trial court to order the prosecuting attorney to allow an inspection of real property in the possession or control of someone other than the prosecution when that person has not been brought before the court. *State v. Babb*, 125 Idaho 934, 877 P.2d 905 (1994).

#### Late Disclosure of Evidence.

On appeal from a conviction of rape, where the defendant had requested a disclosure of the state's evidence, under this rule, and in response the state disclosed evidence of a torn piece of panties found at the alleged scene of the rape and also listed a criminalist as a potential expert witness, the defendant was not prejudiced by the state's late disclosure of such criminalist's forensic laboratory report identifying the torn piece of panties as belonging to the victim, where the state delivered such report to the defendant's counsel on the day it was received by the state, although only three days before trial, and where there was no evidence that the expert misidentified the particular article. *State v. Hansen*, 108 Idaho 902, 702 P.2d 1362 (Ct. App. 1985).

In a prosecution for aggravated assault, where a tape recording had been made of a conversation between the victim and a police officer, late disclosure of the tape recording did not prohibit the defendant from receiving a fair trial, where the defendant was notified of the tape's existence within a reasonable time after its whereabouts were discovered, there were no dilatory tactics on the part of the prosecutor who decided to use the tape

only after it appeared that the victim might testify on behalf of the defendant and the defendant was adequately prepared to test the authenticity and content of the tape recording at trial. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

The error, if any, in belated disclosure of a co-defendant's prior statements contained within his presentence report was not fundamental where, although a defendant's presentence report was not identified in pretrial discovery, he was listed as a potential state's witness and defendant did not follow up with any specific request for access to a presentence report; moreover, co-defendant's prior statements contained within said report were inculpatory, not exculpatory, and therefore were not subject to automatic disclosure under subsection (a) of this rule or any constitutional standard. In addition, when the prosecutor announced his intention to ask the co-defendant about the prior statements, defendant did not seek a continuance to review the presentence report more fully or to contact the presentence investigator. *State v. Cates*, 117 Idaho 90, 785 P.2d 654 (Ct. App. 1989), review denied, 117 Idaho 372, 788 P.2d 187 (1990).

Defendant charged with violating probation was not deprived of opportunity to file pre-hearing motions due to the state's failure to comply with discovery where the motion and order for bench warrant for probation violation advised of date, times, and method of the alleged probation violation even where the only piece of information relied upon by the State in alleging the probation violation, was at the hearing produced, defendant had an opportunity to review the evidence with his attorney and cross-examine the witness and where defendant did not indicate anything he would have done differently had the state made a timely disclosure of the evidence he made no showing that he was prejudiced by the state's failure to earlier disclose the letter, nor had he shown that the magistrate abused his discretion in denying the motion to dismiss. *State v. Barton*, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991).

Delayed disclosure by the prosecution is not necessarily reversible error; the test for reversible error is whether lateness of disclosure so prejudiced defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

#### **Late Disclosure of Expert Witness.**

The district court did not abuse its discre-

tion in refusing to allow a defense witness to testify where there was late disclosure of the fact that the witness would be testifying as an expert, and where the judge considered the defendant's right to a fair trial and weighed the prejudice to the state. *State v. Miller*, 133 Idaho 454, 988 P.2d 680 (1999).

#### **Lost Evidence.**

In prosecution for driving under the influence, magistrate did not abuse her discretion in refusing to impose sanctions for loss of tape that contained recording of conversation between sheriff's dispatcher and unidentified caller who was relaying report of truck driver concerning suspected drunk driver, where there was nothing in the record that suggested that the tape would have been useful in defendant's defense. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

#### **Non-Lawyer.**

In a prosecution of defendant for following too closely, because defendant's non-lawyer father was not entitled to represent his defendant daughter, he could not properly sign and serve discovery requests on her behalf. *State v. Bettwieser*, 143 Idaho 582, 149 P.3d 857 (Ct. App. 2006).

#### **Nonproduction of Original Evidence.**

Where the defendant made a discovery request for an incriminating statement made to the police after he was arrested, and a transcribed copy of the incriminating statement was provided but not the tape-recorded statement itself, and a subsequent request was made for the tape recording, but the state was unable to produce the tape due to its apparently inadvertent erasure by the police, the state did not violate this rule by failing to produce something no longer in existence. *State v. Murinko*, 108 Idaho 872, 702 P.2d 910 (Ct. App. 1985).

#### **Purpose.**

This rule does not refer to § 19-1309, but is obviously designed to amplify on the statute in an effort to assist prosecutors and defense counsel in utilizing discovery processes. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1989).

#### **Request for Further Information.**

Defendant had five months from the time the State provided expert's test results and conclusions until trial to request further information from the State; defendant could not wait to raise the issue of the inadequacy of the State's response by merely objecting at trial when the State's witness was called to testify; therefore, the trial court did not err by allowing expert to testify and by admitting the test

results as evidence. *State v. Caswell*, 121 Idaho 801, 828 P.2d 830 (1992).

### **Sanctions.**

Where it was clear from the record that the prosecution orally responded to the defense's discovery request, it was not error for the trial court not to grant sanctions against the prosecution for failing to respond in writing. *State v. Albright*, 110 Idaho 748, 718 P.2d 1186 (1986).

The court did not abuse its discretion by awarding costs and attorney fees against the state and unto defendant and his attorney, where the prosecution failed to meet its obligations of disclosure prior to trial, and where such failure caused prejudice to the defendant. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1989).

Where the state violated or failed to comply with this rule and failed to meet its obligation of disclosure prior to a matter having come on for trial, and because such violation caused prejudice to defendant, this was deemed a proper case for imposition of sanctions against the state, and it would be just to order sanctions in the form of an award of certain costs and attorney fees against the state and unto the defendant and his attorney. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1989).

A probationer must be given a reasonable opportunity to examine and rebut adverse evidence and to cross-examine hostile witnesses, but subdivision (e)(2) of this section does not require the trial court to impose the sanction of dismissal for failure to comply with a discovery request. *State v. Barton*, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991).

Where in prosecution for driving under the influence, original request for discovery was filed in October, 1987, a partial response was provided on October 29, 1987, with the additional items procured in November, 1987 and on December 9, where the magistrate ordered further production and there was nothing in the record to suggest that discovery was not completed shortly thereafter, and where the trial was not held until June, 1988, magistrate did not abuse her discretion in ordering a further response to defendant's request for discovery but not imposing sanctions. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

The choice of an appropriate sanction for failure to comply with a discovery request is within the discretion of the trial court, and the trial court's exercise of that discretion is beyond the purview of a reviewing court unless it has been clearly abused. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

Defense counsel, who failed to disclose re-

ports relied on by his expert witness, was properly held in violation of a discovery order under subsection (j) of this rule and sanctioned \$1,781; such sanction amount was supported by the record, there was no denial of due process, and such sanction furthered the goal of discovery. *State v. Stradley*, 127 Idaho 203, 899 P.2d 416 (1995).

Magistrate's exclusion of defense witnesses as a discovery sanction for missing the discovery deadline, which severely penalized defendant convicted of DUI, was an abuse of discretion and conviction was vacated and case remanded for a new trial. *State v. Winson*, 129 Idaho 298, 923 P.2d 1005 (Ct. App. 1996).

Court did not err by excluding the testimony of defendant's witness in his rape trial as a sanction for failing to disclose the witness prior to trial where the State was prejudiced, and defendant intentionally withheld the information. *State v. Martinez*, 137 Idaho 804, 53 P.3d 1223 (Ct. App. 2002).

Defendant's grand theft conviction was proper pursuant to Idaho R. Evid. 702 and Idaho Crim. R. 16(b)(6) where the trial court did not err by allowing expert testimony from an attorney. While defense counsel complained generally about the lack of knowledge of the specific content of the witness's testimony, no discovery sanction was ever requested. *State v. Vondenkamp*, 141 Idaho 878, 119 P.3d 653 (Ct. App. 2005).

District court erred in reversing defendant's conviction for driving under the influence of alcohol on the ground that the magistrate abused its discretion in declining to exclude a nondisclosed State's witness as a discovery sanction. Defendant's claimed prejudice from the discovery violation (rejecting an attractive plea offer) was not the type of prejudice that called for exclusion of a witness as a discovery sanction. *State v. Allen*, 145 Idaho 183, 177 P.3d 397 (Ct. App. 2008).

### **Standard of Review for Late Disclosure.**

Where the question is one of late disclosure rather than failure to disclose, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial; the granting of a motion for a continuance is in the sound discretion of the trial court, and will not be disturbed unless there has been a clear abuse of discretion. *State v. Hansen*, 108 Idaho 902, 702 P.2d 1362 (Ct. App. 1985).

### **State Witnesses.**

Where a police officer testified that he visually compared the ignition key of a car with the key in the defendant's possession and



found them to be identical, such testimony was not based on a scientific test or experiment and thus was not subject to pretrial discovery under subdivision (b)(5) of this rule. *State v. Matthews*, 108 Idaho 482, 700 P.2d 104 (Ct. App. 1985).

The trial court did not abuse its discretion when it overruled defendant's objection to testimony by a detective about statements made to him by the defendant, despite the defendant's contention that he was neither formally nor timely notified that the state intended to use the statement at trial, where the defendant did not cross-examine the detective about the statement, request a continuance in order further to investigate the basis of the testimony, nor make any showing of how he was prejudiced. *State v. Wolf*, 102 Idaho 789, 640 P.2d 1190 (Ct. App. 1982).

A delayed disclosure by the prosecution is not per se reversible error. Where the question is one of late disclosure rather than failure to disclose, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982).

Where the state did not disclose a witness until the evening after the first day of trial, introducing him as a rebuttal witness on the second day of trial, and limited his testimony to rebuttal because he had not been disclosed, furthermore making an offer to proof outside the presence of the jury so that defendant was informed of the substance of the witness' testimony before he testified, and defendant did not object to the admission of the testimony on the basis that he would be prejudiced thereby, nor seek a continuance so he could prepare to meet the testimony, and made no showing of prejudice by the late disclosure, the trial court committed no reversible error in admitting the witness' testimony. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982).

### **Substantial Compliance.**

Although the better practice would have been for the prosecutor to give defendant a complete list of all known witnesses conforming literally to the requirements of subsection (b)(6) of this section, where the aggregate disclosure was not done in this manner, yet where it did include identity of the witness in

question, and because defendant did not demonstrate any prejudice, substantial compliance with the rule was sufficient. *State v. Phillips*, 117 Idaho 23, 784 P.2d 353 (Ct. App. 1989).

Although the state failed to formally disclose a potential witness until six days prior to trial, state was not considered late in its disclosure because witness' statement had been previously provided in the state's first discovery response and defendant had adequate notice prior to trial that the individual in question would be a potential witness. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

### **—Transcript.**

The prosecution in a rape, incest and lewd conduct with a minor case substantially complied with this rule with respect to a video tape of victim's testimony by furnishing a transcript of the tape. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

The reference to "two video tapes" on a police report did not substantially comply with this section with regard to a video tape of victim's testimony, where neither a copy of the tape nor a transcript was provided to defendant. However, the court found that the video tape was not material to the outcome of the case. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

### **Unknown Police Report.**

Where prosecuting attorney's office and its investigator were never aware that a police officer had made a handwritten note prior to trial, the trial court concluded that no violation of the defendant's right to discovery had occurred, and accordingly denied the motion for new trial. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

**Cited in:** *State v. Garza*, 109 Idaho 40, 704 P.2d 944 (Ct. App. 1985); *State v. Edwards*, 109 Idaho 501, 708 P.2d 906 (Ct. App. 1985); *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986); *Paradis v. Arave*, 667 F. Supp. 1361 (D. Idaho 1987); *State v. Roles*, 122 Idaho 138, 832 P.2d 311 (Ct. App. 1992); *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993); *State v. Vierra*, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994); *State v. Davila*, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995); *Hansen v. State (In re Hansen)*, 138 Idaho 865, 71 P.3d 464 (Ct. App. 2003).

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

Discretion of Trial Court.  
 Duty of Continuing Discovery.  
 Effect of Nondisclosure on Defense.  
 Standard of Review for Late Disclosure.  
 State Witnesses.

**Discretion of Trial Court.**

Former rule governing discovery gave the trial court discretion to allow the trial to continue without imposing any sanction on the party that fails to comply with a discovery order. *State v. Buss*, 98 Idaho 173, 560 P.2d 495 (1977).

Where there was no showing that the defendant's truck was material to the case or that he would be prejudiced by going to court without it, the trial court abused its discretion by dismissing a kidnapping felony information as a sanction against the state for failure to preserve the truck, which it had impounded but was unable to produce in response to a motion for disclosure. *State v. White*, 98 Idaho 781, 572 P.2d 884 (1977).

**Duty of Continuing Discovery.**

Former rule governing discovery imposed a duty of continuing discovery prior to and during trial and where a prosecutor learned, the night before trial, that the victim had lied and suborned the perjury of another witness, the prosecutor had a duty to disclose such information to the defense. *Schwartzmiller v. Winters*, 99 Idaho 18, 576 P.2d 1052 (1978).

**Effect of Nondisclosure on Defense.**

In a prosecution for embezzlement the nondisclosure until trial of an audit report deprived defendant of an opportunity to prepare and develop an adequate defense thus violating his constitutional right to a fair trial where defendant contended that had he been aware of this document or more importantly the fact that money was missing from the clerk's office which he had not collected from the sheriff's office, he could have developed a defense which would have placed a reasonable doubt in the minds of the jury concerning his responsibility for the missing money and ultimately his guilt. *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980).

The late disclosure of a document revealing that money was missing from the clerk's office which had been handled by defendant was prejudicial, where the premise of the state's case against defendant was that he had received money from the sheriff's office and subsequently failed to deliver the money to the clerk's office, where the evidence intro-

duced by the state showed that he had purportedly signed for the money and that the clerk's office had no record of receiving the money from defendant, and where the state asked the jury to infer from these facts that since the money was missing from the clerk's office, defendant was the responsible party. *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980).

**Standard of Review for Late Disclosure.**

In dealing with late disclosure, rather than withheld information discovered only after conviction, the standard of review is whether the lateness of the disclosure so prejudiced defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980).

**State Witnesses.**

In prosecution for burglary in the first degree, it was error for the trial court to prohibit accomplices' mother from testifying merely because her name was not endorsed upon the information, where the state did not learn of the witness' information which would corroborate accomplices' testimony until the day of the trial, and where defendant, in objecting to admission of the testimony, did not allege that he would be prejudiced by its admission. *State v. Nelson*, 97 Idaho 718, 552 P.2d 226 (1976).

The failure of the prosecution to supply defendant prior to trial with the names of two witnesses, both of whom testified for the prosecution at trial, did not deny defendant due process of law, where defendant did not object while the witnesses were testifying on the ground that he was not notified by the prosecution that they might be called as witnesses, nor did he seek a continuance so he could prepare to meet such testimony, and where the record indicates that the first objection to the admission of one of the witness' testimony was at the close of the state's case in chief when moved for a mistrial on numerous grounds including the failure of the prosecution to list the witness. *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1978).

The failure of the prosecution to give timely notice of a witness' status as a possible state witness did not constitute prejudicial error, where defendant at no time made an appropriate objection to the admission of such testimony, did not ask for a continuance to meet such testimony, was aware of the substance of the witness' testimony since she testified substantially the same at the preliminary hear-

ing and made no showing of how he was prejudiced by the failure of the prosecution to give notice. *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1978).

Pretrial disclosure of any statements made by two of state's witnesses was not required by former rule providing for discovery and inspection where defendant had received a continuance some six weeks before the trial

was held based on knowledge of a change in testimony by one witness and where the substance of second witness' testimony was presented at preliminary hearing through the testimony of a deputy sheriff. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds as stated in, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

## RESEARCH REFERENCES

**A.L.R.** Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Defendant's right to disclosure of presentence reports, 40 A.L.R.3d 681.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

Failure of State Prosecutor to Disclose Ex-

culpatory Physical Evidence as Violating Due Process — Weapons. 53 A.L.R.6th 81.

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process — Personal Items Other Than Weapons. 55 A.L.R.6th 391.

Absolute immunity for failing to disclose exculpatory evidence under 42 U.S.C.S. § 1983 following *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). 63 A.L.R.6th 255.

Discovery and inspection of prosecution evidence under Federal Rule 16 of criminal procedure, 39 A.L.R. Fed. 432; 108 A.L.R. Fed. 380; 109 A.L.R. Fed. 363; 110 A.L.R. Fed. 313; 111 A.L.R. Fed. 197; 115 A.L.R. Fed. 573.

## Rule 17. Subpoena.

(a) **For attendance of witnesses, form, issuance.** A subpoena shall be issued by the clerk of the court or the judge thereof or as otherwise allowed by statute, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk may issue a subpoena, signed and sealed, but otherwise in blank to a party requesting it who shall fill in the blanks before it is served.

(b) **For production of documentary evidence and of objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(c) **Service.** A subpoena may be served by a peace officer, by the officer's deputy, or by any other person who is not a party and who is not less than eighteen (18) years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named.



**(d) Place of service.**

(1) **In the State of Idaho.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place in the state of Idaho.

(2) **Outside the state of Idaho.** A subpoena directed to a witness outside the state of Idaho shall be issued under the circumstances and in the manner and be served as provided by law.

(3) **Prisoners or persons in confinement.** A subpoena directed to a witness who is a prisoner or a person held in confinement shall be issued and served as provided by law.

(e) **For taking deposition, place of examination.** When an order has been entered by the district court authorizing the taking of a deposition the clerk of said court shall issue a subpoena requiring the attendance of the deponent witness; provided that such deposition shall be taken only in the county within which the deponent resides, is employed or conducts business in person, or at such other place as fixed by the district court in such order.

(f) **Contempt.** Failure by any person to obey a subpoena served upon the person may be deemed in contempt of the court from which the subpoena issued. (Adopted December 27, 1979, effective July 1, 1980; amended March 17, 2006, effective July 1, 2006.)

**JUDICIAL DECISIONS****ANALYSIS**

Harmless Use.  
Utility Records.

**Harmless Use.**

Where peace officer used "other legally authorized means" to obtain orally the same information he later obtained in written form from utility company with use of a subpoena, the I.C.R. 17(b) subpoena used was harmless in that it did not reveal any information which law enforcement had not already obtained orally. *State v. Kluss*, 125 Idaho 14, 867 P.2d 247 (Ct. App. 1993).

**Utility Records.**

The scope of protection afforded by Const., art 1, § 17 does not extend to the individual power consumption records maintained by a utility. Any expectation of privacy in those records is not objectively reasonable. If, as a matter of policy, a utility chooses to voluntarily disclose such information to a law enforcement officer without a subpoena issued under either § 37-2741A or this rule, that disclosure is lawful, and there is neither any statutory nor constitutional basis for suppression of evidence so obtained. *State v. Kluss*, 125 Idaho 14, 867 P.2d 247 (Ct. App. 1993).

**Rule 18. Pretrial conference.**

At any time prior to trial, the court, upon motion of any party or upon its own motion, may order one or more conferences to consider such matters as would promote a fair and expeditious trial. At the conclusion of the conference the court shall file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in a felony case where a defendant is not represented by counsel, except upon defendant's request. (Adopted December 27, 1979, effective July 1, 1980.)

**JUDICIAL DECISIONS**

**Cited in:** State v. Smith, 117 Idaho 891,  
792 P.2d 916 (1990).

**Rule 18.1. Mediation in criminal cases.**

In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of the parties. Not all defendants in a multi-defendant case need join in the request or in the settlement conference/mediation. Decision making authority remains with the parties and not the mediator.

(1) **Definition of “Mediation”.** Mediation under this rule is the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing options, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case. Unless otherwise ordered, mediation shall not stay any other proceeding.

(2) **Matters Subject to Mediation.** All misdemeanor and felony cases shall be subject to mediation if the court deems that it may be beneficial in resolving the case entirely. Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 agreements, the handling of restitution and continuing relationship with any victim, are all matters which may be referred to mediation.

(3) **Selection of Mediator.** The court shall select a mediator from those maintained on a roster provided by the Administrative Office of the Courts, after considering the recommendations of the parties. That roster will include senior or sitting judges or justices who have indicated a willingness to conduct criminal mediations and who have completed a minimum of twelve (12) hours of criminal mediation training within the previous two years before being placed on the roster. If the selected mediator is a senior judge or justice, the mediator will be compensated as with any senior judge service, and approval from the trial court administrator must be obtained by the court prior to the mediation.

(4) **Role of the Mediator.** The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any future aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case.

(5) **Persons to be Present at Mediation.** Participants shall be determined by the attorneys and the mediator. The government attorney

participating in the settlement discussions shall have authority to agree to a disposition of the case.

(6) **Confidentiality.** Except as provided in I.C. § 16-1605, mediation proceedings shall in all respects be confidential and not reported or recorded.

(7) **Mediator Privilege.** Mediator privilege is governed by Idaho Rule of Evidence 507.

(8) **Communications Between Mediator and the Court.** The mediator and the court shall have no contact or communication except that the mediator may, without comment or observation, report to the court:

(a) that the parties are at an impasse;

(b) that the parties have reached an agreement. In such case, however, the agreement so reached may be reduced to writing, signed by the prosecuting attorney, the Defendant and defense counsel, and submitted to the court for approval;

(c) that meaningful mediation is ongoing;

(d) that the mediator withdraws from the mediation.

(9) **Communications Between Mediator and Attorneys.** The mediator may communicate in advance of the mediation with the attorneys to become better acquainted with the current state of negotiations and the issues to be resolved in the mediation. This communication may be conducted separately with each of the attorneys and without the presence of the defendant.

(10) **Termination of Mediation.** The court, the mediator, or any party may terminate the mediation at any time if further progress toward a reasonable agreement is unlikely or concerns or issues arise that make mediation no longer appropriate. (Adopted March 18, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012; amended February 27, 2013, effective July 1, 2013.)

## **Rule 19. Place of prosecution and trial.**

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the county in which the alleged offense was committed. (Adopted December 27, 1979, effective July 1, 1980.)

## **JUDICIAL DECISIONS**

### **Prosecution in Proper Place.**

Where the crime to which defendant pled guilty occurred in Cassia County, where the criminal complaint was filed in Cassia County, where a preliminary hearing was conducted by a Cassia County magistrate, where defendant was arraigned in the District Court for Cassia County by a district judge of the Fifth Judicial District, where he entered a plea of guilty in Cassia County, where, as the state conceded, the sentencing hearing and oral pronouncement of sentence

occurred in Minidoka County, also in the Fifth Judicial District, and the same district judge presided, and where the judgment was entered in Cassia County, as was the subsequent order placing defendant on probation, I.C.R. 20 is inapposite, and there was substantial compliance with the requirement of this section that the prosecution shall be had in the county in which the alleged offense was committed. *Housley v. State*, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991).



**RESEARCH REFERENCES**

**A.L.R.** Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 A.L.R.3d 988.

**Rule 20. Transfer from the county for plea and sentence.**

(a) **Complaint or indictment or information pending.** A defendant arrested, held, or present in a county other than that in which the complaint, information, or indictment is pending against the defendant may state in writing that the defendant wishes to plead guilty to the complaint, information, or indictment which is pending and to consent to disposition of the case in the county in which the defendant was arrested, or is held, or is present, subject to the approval of the transfer by the prosecuting attorney from each county involved and the trial court where the case is pending.

(b) **Clerk's duties.** Upon receipt of the defendant's request and consent and of the written approval of the prosecuting attorneys and the trial court where the case is pending, the clerk of the court in which the complaint is pending shall transfer the papers and the proceeding or certified copies thereof to the clerk of the court for the county in which the defendant was arrested, or is held or is present; and the prosecution shall continue in that county.

(c) **Effect of not guilty plea or failure to abide by conditions of transfer.** If after the proceeding has been transferred pursuant to subsection (a) of this rule the defendant pleads not guilty or fails to abide by the conditions of the transfer, if any, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of the court. The defendant's statement that the defendant wished to plead guilty shall not be used against the defendant.

(d) **Summons.** For the purpose of initiating a transfer under this rule a person who appeared in response to the summons issued under Rule 4 shall be treated as if that person had been arrested or held on a warrant in the county of such appearance. (Adopted December 27, 1979, effective July 1, 1980; amended effective July 1, 2004.)

**STATUTORY NOTES**

**Cross References.** Removal of action, §§ 19-1801 — 19-1815.

**JUDICIAL DECISIONS****Prosecution in Proper Place.**

Where the crime to which defendant pled guilty occurred in Cassia County, where the criminal complaint was filed in Cassia County, where a preliminary hearing was conducted by a Cassia County magistrate, where defendant was arraigned in the District Court for Cassia County by a district

judge of the Fifth Judicial District, where he entered a plea of guilty in Cassia County, where, as the state conceded, the sentencing hearing and oral pronouncement of sentence occurred in Minidoka County, also in the Fifth Judicial District, and the same district judge presided, and where the judgment was entered in Cassia County, as was the subse-

quent order placing defendant on probation, this section is inapposite, and there was substantial compliance with the requirement of I.C.R. 19 that the prosecution shall be had in

the county in which the alleged offense was committed. *Housley v. State*, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991).

### **Rule 21. Change of venue.**

(a) **For prejudice.** The court upon motion of either party shall transfer the proceeding to another county if the court is satisfied that a fair and impartial trial cannot be had in the county where the case is pending.

(b) **Other cases.** For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to the defendant to another county.

(c) **Proceedings on transfer.** In the event a trial judge grants a change of venue pursuant to this rule to a court of proper venue within the same judicial district, the trial judge granting the change of venue shall order the case transferred to a specific court of proper venue within the judicial district and shall continue the assignment over the case, unless the administrative district judge shall reassign the case to another judge of the judicial district. In the event a trial judge desires to transfer a case to a court of proper venue outside of the judicial district in which the action is filed and desires to continue the assignment over the case, the trial judge may enter an order granting the change of venue and indicate therein a suggested court of proper venue in another judicial district and the judge's desire to preside over the case, and then refer the case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue in another judicial district and assignment of a specific judge to preside in the proceeding. In the event a trial judge desires to transfer a case to a court of proper venue outside of the judicial district in which the action is filed and the trial judge does not desire to continue the assignment over the case, the trial judge shall enter an order granting the change of venue without specifying the new place of venue, and then refer the case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue in another judicial district and assignment of a specific judge to preside in the criminal proceeding.

(d) **Disqualification of Judge.** In the event a judge is disqualified from further handling of a proceeding in which a change of venue has been granted to a court of proper venue within the same judicial district, the administrative district judge shall reassign the case to another judge of the judicial district. In the event that a judge is disqualified from further handling of a proceeding in which a change of venue has been granted from an originating court outside of the judicial district, the administrative district judge of the judicial district to which venue has been removed shall refer case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue and assignment of a specific judge to preside in the criminal proceeding.

(e) **[Rescinded.]** (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 30, 1984, effective July 1, 1984.)

## STATUTORY NOTES

**Compiler's Notes.** Subsection (e) of this rule was rescinded by order of the Supreme Court of March 30, 1984, effective July 1, 1984.

**Cross References.** Removal of action, §§ 19-1801 — 19-1815.

## JUDICIAL DECISIONS

## ANALYSIS

Discretion of Court.

Failure to Request.

—Not Ineffective Assistance.

Failure to Show Prejudice.

Pretrial Publicity.

Scope of Review.

**Discretion of Court.**

The judge acted within his sound discretion by denying the motion for a change of venue, where the defendant presented no affidavits demonstrating community prejudice arising from media coverage, the record contained no expression by the defense of dissatisfaction with the final 12 jurors selected, and the bulk of media coverage occurred within two months of the shootings, while the trial did not commence until nearly a year had elapsed. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Where there was extensive pretrial publicity, over a two-year period, which implicated defendant in murder, but the reports contained only dispassionate and objective factual accounts of events then occurring, and where neither the State nor the defense exercised all of its peremptory challenges and no unusual difficulty was experienced in selecting the jury, the defendant was not denied a fair trial and the trial court did not abuse its discretion in denying a motion for change of venue. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

A criminal defendant may seek a change of venue under § 19-1801 or this rule if he believes a fair and impartial trial cannot be had in the county where the indictment is pending. The trial court can transfer the case to another county if satisfied that a fair and impartial trial cannot be had; this decision rests with the sound discretion of the trial court. *State v. Sanger*, 108 Idaho 910, 702 P.2d 1370 (Ct. App. 1985).

**Failure to Request.****—Not Ineffective Assistance.**

Where there was nothing in the record to establish the basis for a change of venue even if such a request had been made, failure of defendant's counsel to move for change of

venue did not constitute ineffective assistance of counsel. *State v. Fee*, 124 Idaho 170, 857 P.2d 649 (Ct. App. 1993).

**Failure to Show Prejudice.**

The defendant did not challenge for cause any juror seated which, we have held, indicates "satisfaction with the jury as finally constituted" and the record clearly demonstrates that none of the jurors seated had formed an opinion of the defendant's guilt or innocence based on pretrial publicity; accordingly, defendant has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which she complains permits an inference of actual prejudice. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

Because it did not appear from the record that there was any difficulty in selecting a jury and the record did not contain copies of the articles from the news releases or the composite, so the court could evaluate their prejudicial impact, the district court did not err in denying defendant's motion for change of venue. *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995).

District court's decision to deny a change of venue in a first-degree murder trial was upheld on appeal because a trial court was able to find enough fair and impartial jurors; defendant was unable to show that the setting of the trial was inherently prejudicial or that actual prejudice could have been inferred from the jury selection process, and there was overwhelming evidence of defendant's guilt. *State v. Yager*, 139 Idaho 680, 85 P.3d 656 (2004).

**Pretrial Publicity.**

The question posed by a motion to change venue is whether a "reasonable likelihood" exists that pretrial publicity has affected the impartiality of prospective jurors. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Impartiality of the jury may be affected adversely by the quality or the quantity of pretrial media coverage. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

When a trial judge finds a reasonable likelihood that qualitative or quantitative ele-



ments of pretrial publicity have affected the impartiality of prospective jurors, the constitutional balance swings in favor of assuring a fair trial; the judge should continue the case until the impact of publicity abates or should transfer the case to another county where publicity has been less pervasive. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

District court did not abuse its discretion in denying defendant's motion for change of venue in his trial for murder of a bail bondsman, because the record supported the district court's determination that a fair and impartial jury could be, and was, impaneled for the trial despite pretrial publicity. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

Trial court did not err under this rule in denying defendant's motion for a change of venue during a trial for grand theft of approximately 20 calves, because the presumption of prejudice did not apply; pretrial publicity surrounding unrelated charges for attempted murder and solicitation of murder was relatively factual and non-inflammatory. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Trial court did not err in denying defendant's motions for a change of venue, as it was apparent that defendant could receive a fair trial; the jurors exposed to pretrial publicity testified that they could be unbiased and the nature of the pretrial publicity was relatively factual and noninflammatory. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Publicity by itself does not require a change of venue, and error cannot be predicated on the mere existence of pretrial publicity concerning a criminal case. However, a defendant's inability to make a detailed and conclusive showing of prejudice is not a proper ground for refusing to change venue, as prejudice seldom can be established or disproved with certainty. Rather, it is sufficient for the accused to show there was a reasonable likelihood that prejudicial news coverage prevented a fair trial in violation of the Sixth Amendment to the United States Constitution. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

#### Scope of Review.

When reviewing a judge's denial of a motion to change venue, the appellate court independently examines the record to determine whether there was a "reasonable likelihood" that pretrial publicity adversely affected juror impartiality; among the factors considered are the existence of affidavits indicating prejudice, or lack of prejudice, in the community where the defendant was tried; testimony at voir dire as to whether any jurors had formed an opinion of the defendant's guilt or innocence based on pretrial publicity; whether the defendant challenged for cause any of the jurors finally selected; the nature and content of the pretrial publicity; the length of time elapsed between the pretrial publicity and the trial; and any assurances given by the jurors themselves concerning their impartiality. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### Discretion of Court.

Where considering the record as a whole, including the transcript of the voir dire examination, it appears that there was no difficulty in selecting the jury and that the defendant received a fair trial, and where defendant failed to show that the setting of

the trial was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice, the trial court did not abuse its discretion in denying defendant's motions for change of venue. *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979).

#### RESEARCH REFERENCES

**A.L.R.** Change of venue by state in criminal case, 46 A.L.R.3d 295.

Necessity of proving venue or territorial jurisdiction of criminal offenses beyond reasonable doubt, 67 A.L.R.3d 988.

Venue in homicide cases where crime is

committed partly in one county and partly in another, 73 A.L.R.3d 907.

Where embezzlement is committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

**Rule 22. Time of motion for change of venue.**

A motion for change of venue under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe. (Adopted December 27, 1979, effective July 1, 1980.)

**STATUTORY NOTES**

**Cross References.** Removal of action, §§ 19-1801 — 19-1815.

**Rule 23. Trial by jury or by the court — Waiver of jury — Number of jurors.**

(a) **Felony cases.** In felony cases issues of fact must be tried by a jury, unless a trial by jury is waived by a written waiver executed by the defendant in open court with the consent of the prosecutor expressed in open court and entered in the minutes.

(b) **Misdemeanor cases.** In criminal cases not amounting to a felony, issues of fact must be tried by a jury, unless a trial by jury is waived by the consent of both parties expressed in open court and entered in the minutes.

(c) **Number of jurors.** In a felony case the jury shall consist of twelve (12) jurors or any lesser number upon which the party may agree upon the record or in open court. In a misdemeanor case the jury shall consist of six (6) jurors or any lesser number upon which the parties may agree upon the record or in open court. (Adopted March 28, 1986, effective July 1, 1986.)

**STATUTORY NOTES**

**Compiler's Notes.** A former Rule 23 (Adopted December 27, 1979, effective July 1, 1980) was rescinded by order of the Supreme Court of March 28, 1986, effective July 1, 1986.

**Cross References.** Mode of trial, formation of jury, §§ 19-1901 — 19-1909.

**JUDICIAL DECISIONS**

**ANALYSIS**

Grounds for New Trial.  
Misdemeanor Cases.  
Waiver of Jury.  
—Evidence Before Trial Court.

**Grounds for New Trial.**

Although defendant filed a motion for a new trial, noncompliance with this rule was not a ground for that motion, and he did not otherwise bring the issue to the district court; therefore court would not consider the issue on appeal. *State v. Campbell*, 131 Idaho 568, 961 P.2d 659 (Ct. App. 1998).

**Misdemeanor Cases.**

Conviction of a nonpetty misdemeanor of

fense by a unanimous six-member jury does not violate the Sixth Amendment. *State v. Ritchie*, 114 Idaho 528, 757 P.2d 1247 (Ct. App. 1988).

**Waiver of Jury.**

**—Evidence Before Trial Court.**

Where defendant in a lewd conduct with a minor case waived his right to a jury trial a liberal practice in the admission of evidence was followed, supported with a presumption on appeal that the trial judge, knowing the applicable rules of evidence, did not consider matters which were inadmissible when making his findings. *State v. Powell*, 120 Idaho 707, 819 P.2d 561 (1991).

**Cited in:** State v. Wheeler, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988).

### RESEARCH REFERENCES

**A.L.R.** Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense. 16 A.L.R.3d 1373. Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 A.L.R.4th 304.

#### **Rule 23.1. Juror questionnaires — Confidentiality.**

In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order. For the limited purpose of trial preparation, copies of the juror questionnaires and answers may be made available by the clerk to an attorney for a party or to a party appearing pro se. Such disclosure shall be subject to the rule of juror confidentiality stated above and any further limiting order of the administrative or trial judge. Such a limiting order may include deletion of the name, address, phone number or any other information about a prospective juror that should remain confidential. (Adopted, effective July 1, 2001.)

#### **Rule 24. Trial jurors.**

(a) **Opening statements to the entire jury panel.** The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion, the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.

(b) **Examination.** Voir dire examination of the prospective jurors drawn from the jury panel shall first be conducted by the court. The attorney for the plaintiff, and then the attorney for the defendant, and then the attorney for each other party to the action shall then be permitted to propound questions to prospective jurors concerning their qualifications to sit as jurors in the action. The voir dire examination shall be under the supervision of the court and subject to such limitations as the court may prescribe in the furtherance of justice and the expeditious disposition of the case. Any question propounded by an attorney to a prospective juror which is not directly relevant to the qualifications of the juror, or is not reasonably calculated to discover the possible existence of a ground for challenge, or has been previously answered, shall be disallowed by the court upon objection or upon the court's own initiative. Challenges for cause may be made by an attorney at any time while questioning a prospective juror, or not later than the conclusion of all questions propounded to an individual prospective juror, or the prospective jury if questioned as a whole, except that a challenge for cause may be permitted by the court at a later time upon a showing of good cause. Challenges for cause, as provided by law, must be tried by the court. The challenged juror, and any other person, may be examined as a witness on the



trial of the challenge. Whenever a juror is excused by the court in sustaining a challenge for cause, the clerk shall immediately draw another name from the jury panel to fill the vacancy. There shall be no limit upon the number of challenges which may be made for cause by any party, and it shall not be necessary for any co-parties to join in making such challenges. Unless otherwise stipulated in the record by all parties to the action, the entire voir dire examination of all prospective jurors and the court's rulings on all challenges shall be reported verbatim.

(c) **Peremptory challenges.** If the offense charged is punishable by death, or life imprisonment, each side, state or defense, regardless of the number of defendants, is entitled to ten (10) peremptory challenges. In all other felony cases each side, state or defense, regardless of the number of defendants, is entitled to six (6) peremptory challenges and in all misdemeanor cases each side, state or defense, regardless of the number of defendants, is entitled to four (4) peremptory challenges. In the event, (1) there are co-defendants and the court determines that there is a conflict of interest between or among the co-defendants, or (2) if there be alternate jurors, the court may allow any or all of the parties additional peremptory challenges and permit them to be exercised separately or jointly. Any party who waives a peremptory challenge shall be deemed to have waived only that particular peremptory challenge and may subsequently exercise any of that party's remaining challenges as to any juror, provided, if all parties consecutively waive their peremptory challenge, the trial jury shall be deemed accepted by the parties and any remaining peremptory challenges are waived.

(d) **Additional jurors.**

(1) **Selection.** The court may direct that one (1) or more jurors in addition to the regular panel be called and impaneled to sit as jurors. All jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges prior to deliberations. If more than one additional juror is called, each party is entitled to two (2) peremptory challenges in addition to those otherwise allowed by law; provided, however, that if only one additional juror is called, each party shall be entitled to one (1) peremptory challenge in addition to those otherwise provided by law. At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot. Those removed by lot may be discharged after the jury retires to consider its verdict, unless the court otherwise directs as provided below.

(2) **Jurors removed by lot.** If the court determines that those jurors removed by lot must be available to replace any jurors who may be excused during deliberations due to death, illness or otherwise as determined by the court, then the bailiff, sheriff or other person appointed by the court shall take custody of the removed jurors until discharged by the court; however, if the jury has not been sequestered then the jurors

removed by lot may be released by the court with appropriate instructions. In the event a deliberating juror is removed, the court shall order the juror discharged and draw the name of an alternate juror who shall then take the discharged juror's place in the deliberations. The court shall instruct the panel to set aside and disregard all past deliberations and begin anew with the new juror as a member of the panel.

(3) **Disability of juror.** If at any time a juror dies or becomes ill, or upon other good cause shown to the court that the juror is found to be unable to perform jury duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate juror who shall then take the discharged juror's place in the jury box and be subject to the same rules and regulations as though the juror had been selected as one (1) of the jurors.

(e) **Use of a struck jury.** The court may, in its discretion, cause a panel of jurors to be questioned and passed for cause in a number equal to the number of jurors and alternates required for the final jury and an additional number equal to the number of peremptory challenges of the parties. Such prospective jurors when chosen shall be seated in such manner as to be designated numerically with the lower numbered jurors constituting the initial panel and alternate jurors, and the subsequent numbered jurors becoming the replacement jurors in the event any of the jurors of the original panel are removed by a peremptory challenge. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended June 26, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended February 10, 1993, effective July 1, 1993; amended effective July 1, 2001; amended April 19, 2002, effective July 1, 2002; amended effective July 1, 2004.)

#### STATUTORY NOTES

**Compiler's Notes.** A former subsection (a) of this section was rescinded by order of the Supreme Court of March 28, 1986, effective July 1, 1986.

**Cross References.** Challenging the jury, §§ 19-2001 — 19-2030.

Conduct of jury, §§ 19-2201 — 19-2210.  
Mode of trial, formation of jury, §§ 19-1901 — 19-1909.  
Trial, §§ 19-2101 — 19-2135.

#### JUDICIAL DECISIONS

##### ANALYSIS

Clarification of Procedure.  
Jury Selection.  
Limitations on Voir Dire.

##### Clarification of Procedure.

Where during the voir dire examination of jurors after defendant twice attempted to question a juror, the judge clarified the appropriate procedure for defendant in front of the jury, there was no abuse of discretion nor any

indication of bias on the part of the judge, for while in some instances it might be more appropriate for the court to excuse the jury briefly in order to ascertain if there is any problem or misunderstanding between a defendant and his counsel as to the proper procedure or as to the extent of the defendant's active participation in the conduct of the trial and discretion must be used to avoid embarrassing counsel or allowing a defendant's own inappropriate conduct to prejudice

the defense, a simple clarification, such as the court gave was appropriate unless there were indications of a serious problem, and the record did not indicate that the court should have excused the jury before attempting to correct the course of the voir dire and the language used by the court did not seem severe, nor unduly abrupt. *State v. Elisondo*, 112 Idaho 815, 736 P.2d 867 (Ct. App. 1987), reversed on other grounds, 114 Idaho 412, 757 P.2d 675 (1988).

### **Jury Selection.**

Where the method employed by the court with respect to jury selection involved the State exercising its peremptory challenge first on rounds one, two, five, seven and nine and the defendant exercising the first peremptory in rounds three, four, six, eight and ten, although the method utilized by the trial court in this case was unconventional and not a recommended procedure, it did not significantly vary from the regular manner of exercising peremptory challenges sufficient to constitute reversible error; further, no objection was made by either party to the procedure utilized. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Where the potential for juror bias was carefully explored, and based upon the totality of the information given by the juror, no bias was demonstrated the court did not abuse its discretion in denying the defendant's request to disqualify the juror. *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996).

### **Limitations on Voir Dire.**

Placing limits beyond which the voir dire

examination may not properly go is a matter which rests in the sound discretion of the trial court; the exercise of such discretion will not be disturbed except for a manifest abuse of discretion. *State v. Camarillo*, 106 Idaho 310, 678 P.2d 102 (Ct. App. 1984).

The clear language of this rule allows, but does not require, a trial to constrain voir dire examination. *State v. Lewis*, 126 Idaho 77, 878 P.2d 776 (1994).

A decision as to what limits ought reasonably to be placed upon jury voir dire, and whether previously imposed limits should be relaxed in light of circumstances that have developed during the course of the proceedings, calls for the trial court to weigh all of the factors affecting the legitimate, sometimes conflicting, needs of the parties for time or latitude and the need of the court for efficiency and economy. *State v. Larsen*, 129 Idaho 294, 923 P.2d 1001 (Ct. App. 1996).

Because the question of obscenity of expressive materials involves additional complexities affecting jury voir dire and because the record indicated that the trial court did not go through the proper reasoning process when determining whether to grant defense request for additional time to complete jury voir dire, but instead allowed the decision to be made by the prosecutor, an abuse of discretion occurred when the additional time was denied and conviction for sale of obscene matter was vacated and case remanded for new trial. *State v. Larsen*, 129 Idaho 294, 923 P.2d 1001 (Ct. App. 1996).

**Cited in:** *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982); *State v. Clay*, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987).

## **DECISIONS UNDER PRIOR RULE OR STATUTE**

### **Racial Discrimination.**

Defendant, a quarter-breed Indian, could not complain that no Negroes, Greeks or

Italians were placed on the jury list since he was not a member of any of those races. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

## **RESEARCH REFERENCES**

**A.L.R.** Juror's presence at or participation in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant, 6 A.L.R.3d 519.

Prejudicial effect, in criminal case, of communications between witnesses and jurors, 9 A.L.R.3d 1275.

Number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together, 21 A.L.R.3d 725.

Prior service on grand jury which considered indictment against accused as disquali-

fication for service on petit jury, 24 A.L.R.3d 1236.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case, 38 A.L.R.3d 1012.

Beliefs regarding capital punishment as disqualifying juror in capital case — post-Witherspoon cases, 39 A.L.R.3d 550.

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions, 43 A.L.R.3d 1081.

Constitutionality and construction of stat-



ute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 15 A.L.R.4th 1127; 88 A.L.R.4th 711; 115 A.L.R. Fed. 381; 119 A.L.R. Fed. 589.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 35 A.L.R.4th 890; 38 A.L.R.3d 1012, 35 A.L.R.4th 890, 43 A.L.R.4th 410.

Alternate jurors in Federal Trials under Rule 24(c) of Federal Rules of Criminal Procedure or Rule 47(b) of Federal Rules of Civil Procedure, 10 A.L.R. Fed. 185; 115 A.L.R. Fed. 381; 119 A.L.R. Fed. 589.

Number of, and manner of exercising, peremptory challenges in federal criminal trials subsequent to promulgation of Rule 24(b) of Federal Rules of Criminal Procedure, 11 A.L.R. Fed. 715; 110 A.L.R. Fed. 626.

Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

### **Rule 24.1. Notes by jurors — Juror notebooks.**

(a) **Jury notes.** A juror may take or make written notes during a trial and take them with the juror when the jury retires for deliberation. The court shall give the jury appropriate instruction in how to exercise the right to take notes. At the conclusion of the proceedings, the Court shall take custody of the notes and provide for their destruction.

(b) **Juror notebooks.** In the discretion of the court, jurors may be provided notebooks containing documents for use by the jurors during trial to aid them in performing their duties. Notebooks may contain, but are not required to have or be limited to: (1) a copy of all jury instructions; (2) juror notes; (3) the names of witnesses, including photographs and biographies; (4) copies of exhibits, including an index thereto, but excepting depositions, and (5) a glossary of technical terms. (Adopted, effective July 1, 2001.)

**Collateral References.** Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

### **Rule 25. Disqualification of judge.**

(a) **Disqualification of judge without cause.** In all criminal actions, except actions before drug courts or mental health courts, the parties shall each have the right to one disqualification without cause of the judge or magistrate, except as herein provided, under the following conditions and procedures:

(1) **Motion to disqualify.** In any criminal action in the district court or the magistrate's division thereof, excluding actions before drug courts or mental health courts, any party may disqualify one (1) judge or magistrate by filing a motion for disqualification without cause, which shall not require the stating of any grounds therefor, and the granting of such motion for disqualification without cause, if timely, shall be granted. Each party in a felony prosecution shall have one (1) disqualification without cause under this Rule as to the magistrate appointed to hear the preliminary hearing and another disqualification without cause as to the district judge appointed to hear the trial of the action.

(2) **Time for filing.** A motion for disqualification without cause must be filed not later than seven (7) days after service of a written notice setting the action for status conference, pre-trial conference, trial or for

hearing on the first contested motion, or not later than fourteen (14) days after the service of a written notice specifying who the presiding judge or magistrate to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pre-trial conference, a contested proceeding or trial in the action.

(3) **Multiple defendants.** If there are multiple defendants the trial court shall determine whether such co-defendants have a sufficient interest in common in the action so as to be required to join in any disqualification without cause, or whether such parties have an adverse interest in the action such that each adverse co-defendant will have the right to file one (1) disqualification without cause.

(4) **New judge.** If at any time during the course of the proceedings, except under circumstances involving alternate judges or magistrates as set forth below in subparagraph (6), a new judge or magistrate is assigned to preside over the case, each party shall have the right to file a motion for one (1) disqualification without cause as to the new judge or magistrate within the time limits set forth in subparagraph (2) of this Rule. Provided, if a party has previously exercised a disqualification without cause under this Rule 25(a) such party shall have no right of disqualification without cause of a new judge or magistrate under this subparagraph.

(5) **Disqualification on new trial.** After a trial has been held, if a new trial has been ordered by the trial court or by an appellate court, any party may file a motion for disqualification without cause of the presiding judge or magistrate within the time limits set forth in subparagraph (2) of this Rule; provided, a remand of a case for sentencing or resentencing does not reinstate the right to one disqualification without cause under this subparagraph.

(6) **Alternate judges.** If the presiding judge intends to have a panel of judges as alternates to preside at trial or at any other hearing or proceeding in the case, a notice or amended notice of trial setting shall include a list of judges who may alternatively be assigned to so preside if the presiding judge is unavailable. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for the disqualification without cause as to any alternate judge or magistrate not later than fourteen (14) days after service of written notice listing the alternate judges or magistrates. Provided, if a party has previously exercised the right to disqualification without cause under this Rule 25(a), that party shall have no right to disqualify an alternate judge or magistrate under this subparagraph.

(7) **Service on judge.** A party moving to disqualify a judge or magistrate under this Rule 25(a) shall mail a copy of the motion for disqualification to the presiding judge or magistrate at the judge's or magistrate's resident chambers.

(8) **Hearings by new judge.** If the presiding judge or magistrate is disqualified under this Rule and the newly appointed judge or magistrate resides in a county other than the county where the action is filed, then all

hearings on motions and evidentiary hearings, except the primary trial of the action, can be heard by the newly appointed judge or magistrate in another county within the judicial district, at the discretion of the new presiding judge or magistrate.

(9) **Exceptions.** Notwithstanding the above provisions, the right to one (1) disqualification without cause shall not apply to:

(i) A judge when acting in an appellate capacity, unless the appeal is a trial de novo;

(ii) A judge or magistrate in a post-conviction proceeding, when that proceeding has been assigned to the judge or magistrate who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding;

(iii) A judge or magistrate who has been appointed by the Supreme Court to preside over a specific criminal action.

(10) **Speedy trial.** If a defendant disqualifies a judge or magistrate under this Rule, the time within which that defendant must be given a speedy trial or trial pursuant to I.C. § 19-3501 shall commence to run anew on the date of such disqualification.

(11) **Matters that may be heard by a disqualified judge.** A judge who has been disqualified without cause in a case may preside over an initial appearance or arraignment in that case, and may also, when the parties and the disqualified judge have so agreed in writing or on the record, preside over any other hearing and decide any other issue in the case.

(12) **Misuse of disqualification without cause.** A motion for disqualification without cause shall not be made under this Rule to hinder, delay or obstruct the administration of justice. If it appears that an attorney, law firm, prosecuting attorney's office or public defender's office is using disqualifications without cause for such purposes, or with such frequency as to impede the administration of justice, the Trial Court Administrator shall notify the Administrative Director of the Courts requesting a review of the possible misuse of disqualifications without cause. The Administrative Director shall review the possible misuse of this Rule and may take remedial measures. The Administrative Director, before or after taking such remedial measures, may refer the matter to the Chief Justice, who, upon determining that there has been misuse of disqualifications without cause, may take appropriate action to address the misuse, which may include an order providing that the attorney, firm, prosecuting attorney's office or public defender's office that has engaged in such misuse is prohibited from using disqualifications without cause for such period of time as is set forth in the order or until further order of the Chief Justice.

(b) **Disqualification for cause.** Any party to an action may disqualify a judge or magistrate from presiding in any action upon any of the following grounds:

(1) That the judge or magistrate is a party, or is interested, in the action or proceeding.



(2) That judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

(3) That judge or magistrate has been attorney or counsel for any party in the action or proceeding.

(4) That judge or magistrate is biased or prejudiced for or against any party or that party's case in the action.

(c) **Motion for disqualification.** Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or that party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

(d) **Voluntary disqualification.** This rule shall not prevent any presiding judge in an action from voluntarily disqualifying himself or herself without stating any reason therefore.

(e) **Disqualification and assignment of new judge.** Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification or to act as provided in subparagraph (a)(11) of this Rule. Upon disqualification of a judge for any reason, the administrative judge of the judicial district, or designee, shall appoint any other qualified judge in the judicial district to act or preside in the action. In lieu of such direct appointment procedure, the administrative district judge, or designee, may make application to the Supreme Court for appointment of a new judge from outside of the judicial district to act or preside in the action. (Adopted March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended August 16, 2000, effective September 1, 2000; amended effective July 1, 2004; amended November 20, 2006, effective January 1, 2007; amended effective August 28, 2008; amended effective July 23, 2010; amended December 27, 2010, effective January 1, 2011; amended June 3, 2011, effective July 1, 2011; amended February 9, 2012, effective July 1, 2012.)

#### STATUTORY NOTES

**Compiler's Notes.** A former Rule 25 was rescinded by Supreme Court Order of March 24, 1982, effective July 1, 1982.

A former subsection (a) was rescinded by Supreme Court Order of June 15, 1987, effective November 1, 1987.

Subsection (a) of this rule was rescinded by

the Supreme Court, effective July 23, 2010, and was reinstated December 27, 2010, effective January 1, 2011.

**Cross References.** For cases construing former law governing disqualification, see IRCP Rules 40(d)(1) — 40(d)(5).

## JUDICIAL DECISIONS

## ANALYSIS

Basis for Disqualification.  
 Contempt Proceedings.  
 Discretion of Judge.  
 Disqualification Without Cause.  
 Effect of Appeal.  
 Persistent Violator Prosecution.  
 Post-Conviction Proceedings.  
 Prejudice Not Shown.  
 Procedure Upon Disqualification Motion.  
 Timeliness of Motion.

**Basis for Disqualification.**

Conclusions about the character of a defendant or the merits of his defense which arose during the trial and are based upon the evidence or the defendant's behavior are not a basis for disqualification. *State v. Elliott*, 126 Idaho 323, 882 P.2d 978 (Ct. App. 1994).

By its clear language subsection (a)(3) of this rule was not intended to allow a party to disqualify a judge who has, in some other action or proceeding, been attorney or counsel for any party in the pending action or proceeding. *State v. Zamora*, 129 Idaho 817, 933 P.2d 106 (1997).

**Contempt Proceedings.**

Where contempt proceedings arose from a misdemeanor prosecution in order to obtain the defendant's compliance with an obligation to pay the fine earlier imposed, the contempt proceeding was a continuation of the underlying case, precluding a second automatic disqualification under subsection (a) of this rule. *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Contempt proceedings are unique, criminal rules are used for guidance only and they are not mandatory, therefore, in a proceeding for direct contempt, there is no right to disqualify the involved judge where the conduct of the attorney was not a personal affront to the magistrate. *State v. Delezenne* (In re Williams), 120 Idaho 473, 817 P.2d 139 (1991).

**Discretion of Judge.**

The trial judge did not abuse his discretion by not disqualifying himself upon learning of a death threat by defendant against him, where the judge stated the death list's personal threat against the judge would not affect the sentencing, and that the judge was not biased or prejudiced against defendant. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

A judge does not have an affirmative duty to withdraw from cases which merely relate tangentially to the judge's participation in an

organization or committee, such as the Governor's Task Force for Children at Risk. *State v. Knowlton*, 123 Idaho 916, 854 P.2d 259 (1993).

**Disqualification Without Cause.**

There is no discretionary act involved in ruling upon a motion under subdivision (a)(1) or this rule because any motion brought in conformity with the rule must be granted as a matter of right. *Bower v. Morden*, 126 Idaho 215, 880 P.2d 245 (1994).

The right to judicial disqualification without cause under subsection (a) of this rule may not be limited due to the number of cases in which a party exercises the right against an individual judge. *Bower v. Morden*, 126 Idaho 215, 880 P.2d 245 (1994).

**Effect of Appeal.**

An appeal does not make any difference regarding the right of automatic disqualification of the district court. If the defendant had not appealed and simply had entered his plea, he would not have been entitled to disqualify the district court prior to the waiver hearing and the sentencing proceeding. The waiver hearing and the sentencing proceeding were simply an ongoing part of the original proceedings, and no right of automatic disqualification was reinstated when the case was remanded. *State v. Larios*, 129 Idaho 631, 931 P.2d 625 (1997).

**Persistent Violator Prosecution.**

The fact that district judge was the prosecuting attorney in one of the cases alleged as the basis for the persistent violator charge did not allow defendant to disqualify the district judge pursuant to subdivision (a)(3) of this rule, for a persistent violator charge is not a continuation of the prior felony cases upon which it is based, but is merely the procedure for imposing additional punishment on a person who is convicted for at least the third time of the commission of a felony. *State v. Zamora*, 129 Idaho 817, 933 P.2d 106 (1997).

**Post-Conviction Proceedings.**

Where judge's stated reason for not honoring motion for disqualification, that he had been in the case from its inception, could only be understood as founded upon his view that the post-conviction proceeding was a continuation of the criminal action at which he had presided, he erred in continuing to preside in the post-conviction relief action. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), superseded by statute on other grounds as stated in, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Where, in a post-conviction proceeding, the defendant offered no evidence or reasoning indicating that the judge was biased against him other than a failure to impose the same term of sentence as another judge in a similar robbery prosecution against the defendant, the judge did not err by refusing to disqualify himself. *Stedtfeld v. State*, 114 Idaho 273, 755 P.2d 1311 (Ct. App. 1988).

The trial judge was not required to disqualify himself from presiding over defendant's post-conviction proceeding and the Rule 35 motion for reduction in sentence, where the trial judge refused to sentence his co-defendant on remand after the Supreme Court found co-defendant's death sentence excessive and disproportionate because the trial judge felt the aggravating factor outweighed the mitigating factors in co-defendant's case. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989).

The trial court did not err in refusing to disqualify himself from participating in the post conviction and Rule 35 sentence reduction proceedings merely because he had disqualified himself from further participation in the resentencing of co-defendant, even though, in the process, he had expressed strong disagreement with this Court's action which vacated co-defendant's death penalty sentence. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

A trial judge is not required to erase from his mind all that has gone before, when faced with a Rule 25(b)(4) motion to disqualify for bias and prejudice in a post conviction or Rule 35 proceeding, the trial judge need only conclude that he can properly perform the legal analysis which the law requires of him, recognizing that he has already prejudged the case and has formed strong and lasting opinions regarding the worth of the defendant and the sentence that ought to be imposed to punish the defendant and protect society. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

### **Prejudice Not Shown.**

Where the court afforded minimal weight to codefendant's allegedly prejudicial statements about defendant, and where court's consideration of previous unproven charges was not improper, defendant failed to show that the district court was sufficiently prejudiced to warrant a recusal. *State v. Gawron*, 124 Idaho 625, 862 P.2d 317 (Ct. App. 1993).

Denying defendant a continuance to develop evidence that would merely contradict his own admission did not prejudice a sub-

stantial right; thus, defendant failed to show bias or prejudice in judge's denial to disqualify himself. *State v. Saunders*, 124 Idaho 334, 859 P.2d 370 (Ct. App. 1993).

### **Procedure Upon Disqualification Motion.**

Under subsection (e) of this Rule the district court may not take any action, other than ruling on the motion to disqualify, after the motion has been filed. The district court in the present case simply was reexamining the issue of whether it should grant or deny the motion to disqualify and was not taking any other action in the case. Thus, the district court was well within its rights to reconsider its ruling, and the district court was correct to set aside the earlier order. *State v. Larios*, 129 Idaho 631, 931 P.2d 625 (1997).

Where the magistrate judge convicted defendant of misdemeanor domestic battery, the district court ruled that the magistrate erred by applying the beyond a reasonable doubt standard to defendant's self-defense claim. The district court acted properly in remanding the case to the same magistrate to reconsider the testimony applying the correct burdens of proof. Access to the disqualification procedure outlined in Idaho Crim. R. 25 adequately addressed defendant's concerns about a magistrate who was unable to be fair given the circumstances of the remand. *State v. Jones*, 146 Idaho 297, 193 P.3d 457 (Ct. App. 2008).

### **Timeliness of Motion.**

The defendants' motion for automatic disqualification of the judge pursuant to subsection (a) of this rule was timely where it was filed on the eighth day following the mailing of notice of the trial setting, since according to I.R.C.P. 6(e)(1), the defendants had three extra days because the notice was served by mail. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

The defendant's motion to disqualify the judge for cause was untimely where it was made after the judge decided the contested question. *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Once a defendant, during the early stages of his case, allowed a magistrate to sit without disqualifying him within the statutory period, he did not have the option under subsection (a) of this rule to automatically disqualify him without cause if the magistrate were called back into the case to preside at the trial. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

The supreme court of Idaho would not consider defendant's contention that the trial judge was biased or prejudiced against him in



the absence of a timely motion to disqualify for cause. *State v. Knowlton*, 123 Idaho 916, 854 P.2d 259 (1993).

**Cited in:** *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983); *State v. Mauro*,

121 Idaho 178, 824 P.2d 109 (1991); *State v. Sivak*, 127 Idaho 387, 901 P.2d 494 (1995); *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### **Timeliness of Motion.**

Defendant was not prejudiced by the granting of the state's motion to disqualify the first trial judge assigned to hear the case, while the defendant's motion to disqualify the magistrate was denied as untimely filed. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

While the defendant's motion to disqualify the magistrate, filed at the preliminary hear-

ing itself was clearly untimely, the state's motion, at the District Court level, was timely because a Saturday and a Sunday intervened in the time between the setting of trial and the filing of the motion; therefore, the defendant was not prejudiced by grant of the state's motion. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

#### RESEARCH REFERENCES

**A.L.R.** Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant — state cases. 85 A.L.R.5th 547.

Disqualification or Recusal of Judge Due to

Comments at Continuing Legal Education (CLE) Seminar or Other Educational Meetings. 49 A.L.R.6th 93.

Disqualification of judge under 28 U.S.C.A. § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 163 A.L.R. Fed. 575.

### **Rule 25.1. Death or disability of judge.**

(a) **During trial.** If by reason of death, sickness or other disability, the judge or magistrate before whom a jury trial has commenced is unable to proceed with the trial, any other qualified judge or magistrate, upon agreement of the parties and upon certifying that the judge or magistrate has familiarized himself or herself with the record of the trial, may proceed with and finish the trial. If the parties do not agree to a substitute judge or magistrate, the administrative district judge shall order a new trial.

(b) **After verdict or finding of guilt.** If by reason of absence, death, sickness or other disability, the judge or magistrate before whom a defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other qualified judge or magistrate may perform those duties; but if such other judge or magistrate is satisfied that he or she cannot perform those duties because he or she did not preside at the trial or for any other reason, the judge or magistrate may in his or her discretion grant a new trial. (Adopted March 30, 1984, effective July 1, 1984.)

### **Rule 26. Evidence.**

In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by statute or by these rules, the Idaho Rules of Evidence, or other rules adopted by the Supreme Court of Idaho. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986.)

## STATUTORY NOTES

**Cross References.** Examination of witnesses, §§ 19-3101 — 19-3112.  
Trial, §§ 19-2101 — 19-2135.

For other cases construing prior law governing evidence, see Idaho Rules of Civil Procedure, Rules 43(a)—44(d).

## JUDICIAL DECISIONS

**Standard of Review.**

The rule that the sentencing court is charged with evaluating the expert testimony and will not have its findings reversed absent a clear abuse of discretion, applies in criminal as well as in civil cases. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, *Creech v. Idaho*, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

**Cited in:** *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981); *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982); *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983); *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

**Foundation for Impeachment.**  
**Leading Questions.**

defendant offered no testimony to explain any inconsistency in the written statement with his testimony at trial. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

**Foundation for Impeachment.**

In a prosecution for kidnapping and assault with intent to commit infamous crime against nature, the admission into evidence of a handwritten document for the purpose of impeaching defendant's testimony at trial consisting of an alibi placing him out of the area at the time the offenses occurred was not error, where before he was subjected to any questions defendant inspected the document which had been prepared in the presence of two cellmates while defendant was in the county jail awaiting trial and where defendant

**Leading Questions.**

In prosecution for lewd conduct with a minor child under sixteen and for kidnapping in the second degree, where prosecution's witness, who was also defendant's mother, suffered an almost complete lapse of memory, the trial court did not abuse its discretion in permitting prosecution to ask leading questions. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), superseded by statute as stated in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

## RESEARCH REFERENCES

**A.L.R.** Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

**Rule 27. Stipulations not binding on court — Continuance of trial or hearing.**

The parties to any action may present to the court a stipulation as to any procedural matter involved in any proceeding, including a stipulation to vacate or continue a hearing or trial, but such stipulation shall be considered as a joint motion by the parties to the court for its consideration, and shall not be binding upon the court. The court may approve or disapprove the stipulation in the same manner as the court rules upon a motion. The court may by oral or written notice to the parties limit the time within which a motion or stipulation to vacate or continue a hearing or trial must be made

in order to be considered by the court. (Adopted March 30, 1984, effective July 1, 1984.)

### **Rule 28. Interpreters.**

In any criminal action in which any witness or a party does not understand or speak the English language, or who has a physical handicap which prevents the witness or party from fully hearing or speaking the English language, then the court shall appoint a qualified interpreter to interpret the proceedings and the testimony of such witness or party. Upon appointment of such interpreter, the court shall cause to have the interpreter served with a subpoena as other witnesses, and such interpreter shall be sworn to accurately and fully interpret the testimony given at the hearing or trial to the best of the interpreter's ability before assuming duties as an interpreter. The court shall determine a reasonable fee for all such interpreter services which shall be paid for by the county. (Adopted December 27, 1979, effective July 1, 1980.)

## **JUDICIAL DECISIONS**

### **ANALYSIS**

Continuing Oath.

Failure to Swear.

Illiterate Defendant.

Interpreter Considered Witness.

Presumption of Accuracy.

Shared Interpreter.

#### **Continuing Oath.**

In the instant case, the interpreter at appropriate times testified that she was under a "continuing oath" and her translations were received without objection or any other signs that the defendant could not understand her; therefore, any objection as to the sufficiency of her oath was waived. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

#### **Failure to Swear.**

Failure to swear an interpreter is not reversible error per se, and the testimony provided by an unsworn interpreter is not nullified by a lack of oath; failure to require an oath of an interpreter does not require reversal in the absence of a suitable objection at trial. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

#### **Illiterate Defendant.**

Although defendant was illiterate in both English and Spanish, he understood the proceedings, and therefore, there was no error or

abuse of discretion when the court refused to appoint an interpreter. *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991).

#### **Interpreter Considered Witness.**

An interpreter is considered a witness in the sense that the accuracy of her translation is a question of fact for the jury which may be disputed by counsel. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

#### **Presumption of Accuracy.**

Where defendant has failed to indicate that interpreter was not qualified or that her translations were somehow deficient, she is presumed to have translated accurately. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

#### **Shared Interpreter.**

When charged with conspiracy to traffic in heroin, defendants' rights were not violated when they were required to share a single interpreter during the final day of their trial, as at least one interpreter provided service for both defendants at all times throughout the trial, complying with § 9-205, this rule, Idaho Admin. R. 52, and the United States Constitution. *State v. Herrera*, 149 Idaho 216, 233 P.3d 147 (2009).

**Cited in:** *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003); *Murillo v. State*, 144 Idaho 449, 163 P.3d 238 (Ct. App. 2007).

## **Rule 29. Motion for judgment of acquittal.**

(a) **Motion before submission to jury.** The court on motion of the defendant or on its own motion shall order the entry of judgment of acquittal



of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence. In the event the court dismisses the charged offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense.

(b) **Reservation of decision on motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion after discharge of jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen (14) days after the jury is discharged or within such further time as the court may fix during the fourteen (14) day period. If a verdict of guilty is returned the court may, on such motion, set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter a judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. (Adopted December 27, 1979, effective July 1, 1980; Amended March 19, 2009, effective July 1, 2009.)

JUDICIAL DECISIONS

ANALYSIS

- Acquittal Improper.
- Appellate Review.
- Characterization of Motion.
- Denial of Motion.
- In General.
- Investigative Services.
- Sufficiency of Evidence.

**Acquittal Improper.**

Because trial court incorrectly interpreted statutes to conclude that growing marijuana was exempt from the manufacturing of controlled substances statutes, it was error to grant the motion for judgment of acquittal pursuant to subsection (c) of this rule. *State v. Griffith*, 127 Idaho 8, 896 P.2d 334 (1995).

Magistrate erred in granting defendant's motion for acquittal under Idaho Crim. R. 29 because the magistrate improperly found that the state official who requested defendant to leave the premises failed to express an adequate reason for doing so, and such was not an element in the trespass statute, § 18-7008(8); because the magistrate's dismissal was based on an erroneous legal conclusion, double jeopardy principles under Idaho

Const. art. I, § 13 did not bar a retrial of defendant on the trespass charge. *State v. Korsen*, 138 Idaho 706, 69 P.3d 126 (2003).

**Appellate Review.**

When a motion for judgment of acquittal has been denied, and the defendant stands convicted, all reasonable inferences on appeal are taken in favor of the prosecution. *State v. O'Campo*, 103 Idaho 62, 644 P.2d 985 (Ct. App. 1982); *State v. Mata*, 107 Idaho 863, 693 P.2d 1065 (Ct. App. 1984).

The rule is well settled in this state that the action of the trial court in giving, or refusing to give, an advisory instruction to acquit is purely a discretionary matter which is not reviewable on appeal if there is some substantial evidence upon which to base a verdict of guilty. *State v. Elisondo*, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982).

Review of a denial of a motion for judgment of acquittal requires the appellate court to independently consider the evidence in the record and determine whether a reasonable mind would conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. In making this determination, all reasonable

inferences are taken in favor of the State. *State v. Printz*, 115 Idaho 566, 768 P.2d 829 (Ct. App. 1989).

Review of a denial of a motion for judgment of acquittal requires the appellate court to independently consider the evidence in the record and determine whether a reasonable mind would conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. In making this determination, all reasonable inferences are taken in favor of the state. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

In reviewing a denial of a motion for a judgment of acquittal, the appellate court must independently consider the evidence in the record and determine whether a reasonable mind could conclude that a defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. *State v. Willard*, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

#### **Characterization of Motion.**

In prosecution for driving without privileges, defendant's motion for a directed verdict, which was more accurately characterized as a motion for acquittal under this rule than as a motion for directed verdict, was not independently reviewable where defendant presented evidence in his defense after his motion was denied. *State v. Clifford*, 130 Idaho 259, 939 P.2d 578 (Ct. App. 1997).

#### **Denial of Motion.**

Where victim's out-of-court statements were offered and admitted into evidence without objection and without limitation, the statements could be considered by the jury as substantive evidence to prove the charged crimes; accordingly, there was no error in denying defendant's motion for a judgment of acquittal. *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993).

In prosecution for trafficking in methamphetamine which according to subsection (a)(3) of § 37-2732 requires possession of at least 28 grams, where package received by defendant contained 27.02 grams and STP can located in defendant's car contained 6.85 grams, since the can was in defendant's car and she had just recovered a package containing a substantial amount of methamphetamine, the same substance as that contained in the can, and although defendant took the package to her car before delivering a sample to an undercover police officer and the package was found unopened in the car indicating that she had extracted the sample from another source within her car, jury could find that defendant had sufficient dominion and

control over the can and its contents; thus trial court did not err in refusing to grant defendant's motion for judgment of acquittal on the trafficking charge. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

Where defendant argued he was entrapped in accepting methamphetamine as payment for his legal services, the evidence in the record, and reasonable inferences therefrom, sufficed to establish defendant's knowledge that the substance was methamphetamine; the trial court did not err in its instruction on the entrapment defense, and in denying defendant's motion for judgment of acquittal. *State v. Henry*, 138 Idaho 364, 63 P.3d 490 (Ct. App. 2003).

Defendant's motion for judgment of acquittal was properly denied where the State did not have to prove defendant's knowledge of the quantity of cocaine to sustain a trafficking conviction under § 37-2732B(a)(2); the State was only required to prove the amount of the controlled substance, but not the knowledge of the amount. *State v. Barraza-Martinez*, 139 Idaho 624, 84 P.3d 560 (Ct. App. 2003).

Time was not a material element to the crime of lewd and lascivious conduct with a minor, and where the only allegation that defendant in his motion for a judgment of acquittal under subsection 29(a) was that the State failed to prove beyond a reasonable doubt was the time at which the offense occurred, the district court's denial of the motion was affirmed. *State v. Jones*, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003).

Denial of defendant's motion for judgment of acquittal was proper pursuant to subsection 29(c) where the district court did not abuse its discretion in declaring a mistrial because the jury did not return a unanimous verdict, and also, the proper terminology describing the standard of review for a motion for judgment of acquittal under subsection 29(c) is whether there was substantial and competent evidence upon which a trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hoyle*, 140 Idaho 679, 99 P.3d 1069 (2004).

Motion to acquit on a conviction for failure to provide notice was properly denied where the State proved that the offender changed address and failed to notify the authorities as required. The State was not required to prove the exact location to which the defendant moved. *State v. Lee*, — Idaho —, — P.3d —, 2011 Ida. App. LEXIS 47 (June 29, 2011).

#### **In General.**

The use of the *Holder* standard is inapplicable to a district court's decision of whether to grant a motion under this rule. *State v.*

Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

### **Investigative Services.**

The district court properly denied the defendant's motion for post-trial investigative services where the investigation was to be into jury prejudice, since that was not an appropriate basis for such a motion. *State v. Murphy*, 133 Idaho 489, 988 P.2d 715 (Ct. App. 1999).

### **Sufficiency of Evidence.**

Where evidence placed defendant in a store on the day before a robbery and connected him with the car observed at the time of the robbery, such evidence was sufficient to withstand a motion for acquittal. *State v. Holder*, 100 Idaho 129, 594 P.2d 639 (1979), overruled on other grounds, *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000).

In ruling on motion for directed judgment of acquittal, the test that should be used by a trial court is whether the evidence is sufficient to sustain a conviction of the offense or offenses charged. *State v. Holder*, 100 Idaho 129, 594 P.2d 639 (1979), overruled on other grounds, *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000).

Even though there is no requirement of corroboration in rape cases under § 18-6101, the state must still show under I.C.R. 5 that a crime has been committed and that there is probable cause that defendant committed it, and the court should grant a judgment of acquittal under this rule where the evidence is found insufficient to support a guilty verdict. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

A motion for acquittal will not be granted when the evidence is sufficient to sustain a conviction, the test of which is whether there is substantial and competent evidence to support a conviction — the same standard applied in appellate review of convictions. *State v. Elisondo*, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982); *State v. Mata*, 107 Idaho 863, 693 P.2d 1065 (Ct. App. 1984).

The common issue as to either a motion for advisory instruction to acquit or a motion for judgment of acquittal, is whether there is "substantial" evidence to support a conviction, and if there is such evidence in the record, a defendant was not denied effective assistance of counsel by failure of his attorney to move for acquittal or to request an advisory instruction to acquit. *State v. Elisondo*, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982).

Where a defendant's motion challenging the sufficiency of the state's evidence is mistakenly designated as a "motion to dismiss" or as a "motion for a directed verdict," the court

should treat it as a motion for judgment of acquittal under this rule. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), *aff'd in part*, 105 Idaho 43, 665 P.2d 1053 (1983); *State v. Garner*, 103 Idaho 468, 649 P.2d 1224 (Ct. App. 1982).

The test for deciding a motion for judgment of acquittal under this rule is as follows: The trial judge must review the evidence in the light most favorable to the state, recognizing that full consideration must be given to the right of the jury to determine the credibility of witnesses, the weight to be afforded evidence, as well as the right to draw all justifiable inferences from the evidence. Viewed in this manner, where the inculpatory evidence presented as to any essential element of the crime is so insubstantial that jurors could not help but have a reasonable doubt as to the proof of that element, a judgment of acquittal should be entered. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), *aff'd in part*, 105 Idaho 43, 665 P.2d 1053 (1983).

Where evidence in murder prosecution indicated that defendant armed himself while still in bar and was preparing for subsequent violent confrontation outside bar, the evidence of the crucial element of intent was not so insubstantial that the jurors could not help but have a reasonable doubt as to proof of that element; to the contrary, the evidence, and the inferences reasonably drawn from it, strongly supported the conclusion that defendant acted with malice and, accordingly, the court did not err in denying motion for a judgment of acquittal. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

The test of sufficiency of the evidence to sustain a conviction is whether there is substantial evidence upon which rational triers of fact could find guilty beyond a reasonable doubt. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

Where the taxpayer posted a sign in his store stating that customers could not be required to pay sales tax and that the taxpayer could not be required to collect them, and when a customer testified that when he asked the taxpayer about the sales tax, the taxpayer responded that he "didn't believe in it," substantial evidence supported the jury's implicit finding that the taxpayer's failure to comply with the sales tax laws was willful. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

With regard to a motion pursuant to this section, the test of whether evidence is insufficient to sustain a conviction is whether there is substantial and competent evidence to support a conviction—the same standard applied in an appellate review of convictions. *State v.*



Hoffman, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989).

The trial court properly denied a motion for acquittal where there was testimony of an accomplice and corroborating evidence. *State v. Swenor*, 96 Idaho 327, 528 P.2d 671 (1974), overruled on other grounds, *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

Evidence is sufficient to sustain a conviction if there is substantial evidence upon which a rational trier of fact could conclude that the defendant's guilt as to each material element was proved beyond a reasonable doubt. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

A criminal defendant need not move for a directed verdict or judgment notwithstanding the verdict in order to preserve for appeal the issue of whether there was sufficient evidence before the jury to support a verdict to convict. *State v. Faight*, 127 Idaho 873, 908 P.2d 566 (1995).

Where defendant insisted 13-year-old girl go upstairs and show him where some towels were, followed her, blocked the hall, pushed her into the bedroom and, pointing to the bed, stated "Right here should be fine," the jury could have reasonably concluded that, by successfully getting away, the girl had escaped being a victim of rape or lewd conduct; thus, defendant was unable to demonstrate on appeal that there was insufficient evidence to support the jury's conviction for battery with the intent to commit a serious felony. *State v. Monroe*, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

In prosecution for kidnapping on the identity issue, the state's evidence that victim[s] fingerprints and palm prints were found in bathroom of defendant's residence, that victim picked defendant's photo from a photo lineup conducted a few days after the abduction, that her description of defendant's pickup was consistent of general appearance of defendant's pickup and her description of his residence matched photos was clearly sufficient to defeat the defendant's motion for a judgment of acquittal. *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996).

Where district court found that defendant admitted signing employer's name on a certain check that represented loan proceeds from certain properties, that defendant's employer testified that he had never given her permission to endorse his name on the such check nor did the powers of attorney executed by employer include such authority and although there was evidence in the record that defendant was given authority to conduct

business on employer's behalf and that employer testified that he and defendant were equally involved in the properties but that he was unaware of the check and denied that he had ever authorized defendant to sign his name on any documents but defendant testified that they had discussed the check and she informed him that it would be in both their names but since he would be out of town she would sign both their names, the verdict reflects that the jury rejected defendant's testimony and the record was sufficient to sustain the jury's verdict and court's denial of new trial or acquittal was not error. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

District court did not err in denying defendant's motion for a judgment of acquittal where the jury could reasonably find that defendant had not abandoned his effort to commit the crime but had simply been prevented from proceeding further because the girl he was expecting to meet was not there; defendant's acts were sufficient to show that it went beyond mere preparatory activity and unequivocally confirmed a criminal design. *State v. Glass*, 139 Idaho 815, 87 P.3d 302 (Ct. App. 2003).

In defendant's criminal prosecution for forgery, the accomplice's testimony that she and defendant drove to the bank, cashed the decedent's social security check, and shared the proceeds, was sufficient to support defendant's conviction where the accomplice's testimony was corroborated by a bank employee and evidence of the check itself that bore defendant's endorsement; therefore, the court properly denied defendant's motion for a judgment of acquittal. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

Trial court did not err by denying defendant's motion for a judgment of acquittal because the evidence was sufficient to support his arson convictions. The evidence showed that: (1) it was uncontroverted that the fire was intentionally set; (2) defendant was the only person who had access to the business at the time of the fire; (3) the business was not paying bills as they came due; and (4) the business had recently been fully insured, giving defendant a motive to set the fire. *State v. Christiansen*, 144 Idaho 463, 163 P.3d 1175 (2007).

**Cited in:** *State v. Gardiner*, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995); *State v. Griffith*, 130 Idaho 64, 936 P.2d 707 (Ct. App. 1997); *State v. Cheatham*, 134 Idaho 565, 6 P.3d 815 (2000); *State v. Mercer*, 143 Idaho 123, 138 P.3d 323 (Ct. App. 2005); *State v. Pina*, 149 Idaho 140, 233 P.3d 71 (2010)

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

Acquittal Improper.  
Double Jeopardy.  
Sufficiency of Evidence.

**Acquittal Improper.**

Trial court erred in dismissing charges of kidnapping and rape where the evidence was sufficient to sustain a conviction, since the credibility of the witnesses and the weight to be given their testimony were matters for the jury. *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975).

**Double Jeopardy.**

Dismissal of charges of rape and kidnapping on defendant's motion for acquittal on

the ground that the state's evidence was insufficient to sustain a conviction, though erroneously granted, constituted a factual determination of innocence favorable to the defendants who were thereby protected from retrial by double jeopardy considerations. *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975).

**Sufficiency of Evidence.**

A motion for judgment of acquittal must be granted only when there is no evidence upon which to base a verdict of guilt; therefore, such directed verdicts are limited to cases involving total lack of inculpatory evidence. *State v. Vargas*, 100 Idaho 658, 603 P.2d 992 (1979).

**Rule 29.1. Motion for mistrial.**

At any time during a trial, the court may declare a mistrial and order a new trial of the indictment, information or complaint under the following circumstances:

(a) **Upon motion of defendant.** A mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial. When such an error, defect or conduct occurs during the joint trial of two (2) or more defendants, and a mistrial motion is made by one or more, but not by all, the court must declare a mistrial only as to the defendant or defendants making or joining in the motion, and the trial of the other defendant or defendants must proceed.

(b) **Upon motion of state.** A mistrial may be declared upon motion of the state, when there occurs during the trial, either inside or outside the courtroom, misconduct by the defendant, the defendant's attorney or attorneys, or some other person acting on defendant's behalf, resulting in substantial prejudice to the state's case. When such misconduct occurs during a joint trial of two (2) or more defendants, and when the court is satisfied that it did not result in substantial prejudice to the state's case as against a particular defendant, and that such defendant was in no way responsible for the misconduct, it may proceed with the trial with respect to that defendant.

(c) **When verdict not possible.** A mistrial may be declared upon motion of either party or upon the court's own motion when it is impossible to proceed with the trial in conformity with law, or when, after jury advice, the court is convinced that the jury cannot reach a verdict. (Adopted December 27, 1979, effective July 1, 1980.)

## JUDICIAL DECISIONS

## ANALYSIS

Admission of Evidence.  
Appellate Standard.  
Discretion of Court.  
Invited Error.  
Mistrial Denied.  
Reversible Errors.

**Admission of Evidence.**

Admission of improper evidence does not automatically require the declaration of a mistrial. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

**Appellate Standard.**

The question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error, when viewed in the context of the full record. The appellate focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. *State v. Grantham*, 146 Idaho 490, 198 P.3d 128 (2008).

On a motion for mistrial, after admission of questionable testimony, an error is harmless, rather than reversible, when the reviewing court can find, beyond a reasonable doubt, that the jury would have reached the same result without the admission of the challenged evidence. *State v. Grantham*, 146 Idaho 490, 198 P.3d 128 (2008).

**Discretion of Court.**

The decision whether to grant a mistrial rests within the sound discretion of the district court and will not be disturbed on appeal absent an abuse of discretion. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

The district court's decision to have the jury continue deliberating after the numerical division was revealed under I.C.R. 31(d) did not in any way coerce any juror to change their verdict to require a mistrial. *State v. Lee*, 131 Idaho 600, 961 P.2d 1203 (Ct. App. 1998).

**Invited Error.**

The doctrine of invited error (invited errors are not reversible) applies to estop a party from asserting an error when his own conduct induces the commission of the error. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

A misstep on dangerous ground, where

counsel has voluntarily ventured but is unsure of possible responses, may result in invited error, and if so, cannot then be grounds for a mistrial. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

**Mistrial Denied.**

Witness' remarks tending to show that defendant was a troublemaker, though erroneously admitted, did not require a mistrial where its prejudicial effect, taken in the context of the entire trial, was only slight, and the admission of the statement did not deprive defendant of a fair trial. *State v. Rodriquez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Where evidence of one defendant's guilt of the crime of rape, and of other defendant's guilt of the lesser included offense of attempted rape, of unconscious victim whom they subsequently abandoned by the roadside, was satisfactorily established and the result would not have been different had the pathologist characterized hypothermia merely as a "complicating factor" in the victim's death, pathologist's testimony that hypothermia was a cause of death did not require a mistrial. *State v. Silva*, 106 Idaho 14, 674 P.2d 443 (Ct. App. 1983).

Defendant failed to show that the court abused its discretion in denying motion for mistrial where the record did not support the contention that any remark was made by one juror to another that would prejudice the defendant. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (Ct. App. 1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the entire testimony surrounding the defendant's arrest was stricken, so as not to draw attention to the fact that the probation officer was present at the arrest, and where a proper limiting instruction was given to the jury, the district court did not err in denying defendant's motion for a mistrial. *State v. Fluery*, 123 Idaho 9, 843 P.2d 159 (Ct. App. 1992).

Trial court did not abuse its discretion in denying defendant's motions for a mistrial, where (1) state's witness alleged defendant had sniffed glue the day of the murder, but court instructed jury to disregard statement; (2) cross-examination of defendant with regard to intoxication and threats was proper where defendant "opened the door" to this area; and (3) court did not allow reference to "inmate code" of behavior, but rather re-



stricted witnesses to testify regarding an inmate's perception of life in prison. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

Because defendant convicted of delivery of a controlled substance failed to demonstrate any prejudice from the late disclosure of a "CI Agreement" containing guidelines for the informant used in the drug buy and because continuance granted by the district court was the reasonable and less radical choice under the circumstances, district court did not abuse its discretion in denying motion for mistrial based on the belated delivery of the agreement. *State v. Canelo*, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996).

The relevance of the testimony regarding the activity at the victim's residence did not become apparent until the defendant's defense strategy was revealed. There was no prejudice to the defendant merely because defense counsel was unable to discuss this evidence with the jury during voir dire or opening statement. Therefore, the court's denial of the defendant's motions for a mistrial and for a new trial insofar as they were based upon the claim that there was prejudicial error in the timing of the court's decision on the motion in limine, was proper. *State v. Dopp*, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996).

Fact that defendant screamed in courthouse library due to a stun belt accident, and potential jurors were at the same time being assembled in courtroom for voir dire, did not require a mistrial where defendant presented no evidence that any potential juror had heard him scream, and subsequent questioning of the empaneled jury indicated that no juror had heard him scream or was prejudicially influenced by his scream. *State v. Wachholtz*, 131 Idaho 74, 952 P.2d 396 (Ct. App. 1998).

Although a number of errors occurred during the trial, these errors were, individually and cumulatively, harmless beyond a reasonable doubt and did not result in the denial of a fair trial. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

In a criminal trial, a comment by the prosecutor, referring to defendant's presence in jail during questioning by a detective, was not grounds for a mistrial since given that defendant was on trial for a criminal offense, even in the absence of the prosecutor's comment, any reasonably knowledgeable juror likely would have surmised that defendant had at some point been in jail. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

Prosecutor's comments during rebuttal closing that remarks made by defense counsel regarding victim were offensive were within

the permissible scope of closing argument. The prosecutor's remark was not made to inflame the passions of the jury or disparage opposing counsel; rather it was made in response to defense counsel's suggestion that the state's case was offensive. *State v. Gutierrez*, 143 Idaho 289, 141 P.3d 1158 (Ct. App. 2006).

In drug crimes prosecution, court did not err in refusing to grant defendant a mistrial after dismissing conspiracy charges because, even if the conspiracy evidence was not relevant to an issue other than propensity in regard to the remaining charges, the admission was harmless error given the extensive and convincing evidence of defendant's guilt on the remaining charges. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Trial court's denial of a mistrial was not reversible error, because a disclosure of a previous trial and appeal was harmless considering the overwhelming evidence of guilt presented at trial and the curative instruction given by the trial court. *State v. Watkins*, 152 Idaho 764, 274 P.3d 1279 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 123 (May 9, 2012).

Although a State's witness purportedly referenced defendant's alleged gang affiliation, a mistrial was not warranted. The passing reference to "my homie" and the "hood," and a gesture to a neck tattoo were not necessarily indicative of gang affiliation. Moreover, the allegedly prejudicial testimony did not contribute to the verdict in any meaningful way. *State v. Thumm*, — Idaho —, 285 P.3d 348 (Ct. App. 2012).

### Reversible Errors.

The question is whether the event or events which brought about the motion for mistrial constitute reversible error when viewed in the context of the entire record. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

The question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made, rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. *State v. Harrison*, 136 Idaho 504, 37 P.3d 1 (Ct. App. 2001).

Denial of defendant's motion for mistrial was in error, as both of the State's witnesses testified as to defendant's English proficiency, and during defendant's offer of proof, his counsel informed the court that defendant had intended to testify that his alleged admission to the police was a product of language

difficulties; a comment by the magistrate was in effect a preemptive rejection of defendant's planned testimony, it effectively prevented defendant from testifying about his alleged language barrier, and it discouraged him from testifying at all. *State v. Johnson*, 138 Idaho 103, 57 P.3d 814 (Ct. App. 2002).

Trial court's refusal to grant a mistrial was not reversible error where bringing to light by the trial judge an omission by the prosecutor's testimony that was crucial to its case and obtainable through a simple question furthered justice by clarifying the evidence and completing the record; the evidence was already before the jury but in a form that was determined to be improper, such that it gave the jury nothing it did not already have, but assured that the evidence could be properly considered. *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003).

In prosecution for aggravated battery, trial court erred in not declaring a mistrial due to prosecuting attorney's improper comments in closing that no one had rebutted state's evidence, which were a clear violation of defendant's right against self-incrimination. *State v. McMurtry*, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006).

In prosecution for aggravated battery, trial court erred in not declaring a mistrial due to prosecuting attorney's improper comments in closing that no one had rebutted state's evidence, which were a clear violation of defendant's right against self-incrimination. *State v. McMurtry*, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006).

**Cited in:** *State v. Waggoner*, 121 Idaho 758, 828 P.2d 321 (Ct. App. 1993); *State v. Norton*, 151 Idaho 176, 254 P.3d 77 (Ct. App. 2011).

## RESEARCH REFERENCES

**A.L.R.** Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11.

Unauthorized view of premises by juror or

jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Prejudicial Effect of Juror Misconduct Arising from Internet Usage. 48 A.L.R.6th 135.

## Rule 30. Instructions and communications with jury.

(a) **Jury instructions conference.** Prior to the presentation of evidence, the court may instruct the jury on the role of the court, counsel and jury, the elements of all claims in dispute and any known defenses, and any other matter it believes necessary and appropriate to aid in resolution of the issues at hand. The Court shall hold an instruction conference prior to trial to consider these initial instructions to the jury.

(b) **Final instructions.** No later than five (5) days before the commencement of any trial by jury, any party may file written requests that the court instruct the jury on the law as set forth in the request. The Court may grant an exception for unanticipated issues or matters constituting fundamental errors. At the same time, copies of such requested instructions shall be furnished to all parties. The court shall inform counsel of its proposed actions upon the requested instructions and shall allow counsel a reasonable time within which to examine and make objections outside the presence of the jury to such instructions or the failure to give requested instructions. No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection. The court shall read the instructions to the jury prior to final argument; but if all parties consent, it may read part or all of the instructions after final argument. The written instructions, or a copy thereof, shall be given to each juror to take when the jury retires for deliberation.

(c) **Communications with the jury.** Any request by the jury to be further informed of any point concerning the action shall be communicated to the court in writing, at which time the attorneys for the parties shall be given the opportunity to be present, if the attorney is available and can be present within a reasonable period of time, and the court in its discretion may further instruct the jury in writing or explain the instructions in open court which shall be made part of the record. (Adopted December 27, 1979, effective July 1, 1980; amended March 28, 1986, effective July 1, 1986; amended March 1, 2000, effective July 1, 2000; amendment, effective July 1, 2000; amended effective July 1, 2004.)

### STATUTORY NOTES

**Cross References.** Trial, §§ 19-2101 — 19-2135.

### JUDICIAL DECISIONS

#### ANALYSIS

Doubt or Confusion of Jury.  
 Failure to Object.  
 Jury Instructions.  
 —Accurate Statement of Law.  
 —Lesser Included Offenses.  
 No Instruction Requested.  
 Objections.  
 Response to Jury Question.  
 Verdict Forms.  
 Waiver.

#### **Doubt or Confusion of Jury.**

If a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury but it is under no duty to do so. However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

In a trial where an ex-felon was accused of injuring another by discharge of a firearm, the judge erred in not directly answering a juror's question as to whether defendant's unlawful possession of a firearm would negate his self-defense claim; therefore, the defendant was entitled to a new trial. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

If a jury expresses doubt or confusion on a point of law correctly and adequately covered

in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but is under no duty to do so. *Carsner v. State*, 132 Idaho 235, 970 P.2d 28 (Ct. App. 1998).

#### **Failure to Object.**

Where the defendant did not object to an instruction on self-defense at trial he was deemed to have waived any objection to it. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981).

Although defendant failed to make a timely objection to a district court's erroneous jury instruction about juror conduct, defendant was permitted to raise the issue on appeal; the proper standard on review was whether prejudice could have reasonably occurred, not whether it actually did occur. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Ordinarily, a party may not claim a jury instruction was erroneous unless the party objected to the instruction prior to the start of jury deliberations. However, even absent a timely objection to the trial court, a narrow exception exists for those issues rising to the level of fundamental error. The Idaho supreme court has clarified the fundamental error doctrine applicable where an alleged error was not followed by a contemporaneous objection. Such review includes a three-pronged inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical



decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

### **Jury Instructions.**

The amended Rule does not require an objection at trial to preserve issues regarding errors in the substance of jury instructions. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

District court properly rejected defendant's requested instructions defining residence and domicile because they are terms of common understanding and because the proposed instructions did not define the actual terms used in the statute; jury was instructed in the language of the statute and that was sufficient. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

### **—Accurate Statement of Law.**

When the state introduced into evidence two test results showing an alcohol concentration of .10 percent, those results satisfied the requirement for prosecution under the per se standard described in § 18-8004; therefore, the jury instruction was an accurate statement of the law when applied to the facts of the case. *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992).

### **—Lesser Included Offenses.**

Bar and bench should be aware that the 1988 amendment to I.C. § 19-2132(b) appears to put the burden on counsel to affirmatively request jury instructions on lesser included offenses; however, this rule does not appear to require counsel to offer jury instructions on lesser included offenses. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

### **No Instruction Requested.**

Defendant could not claim an error on appeal for a defense theory that did not constitute a necessary matter of law and for which no instruction was requested pursuant to I.C. § 19-2132(a); a trial court did not err in failing sua sponte to instruct the jury on the inherent dangers of eyewitness identification. *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

### **Objections.**

Although the Idaho Supreme Court recently may have shed some doubt on the necessity of an objection, when it held in a civil case that an erroneous instruction could be challenged for the first time on appeal,

until the Supreme Court decides otherwise, the Idaho Court of Appeals, in criminal cases, will require timely objections to preserve claims of error, but continue to review any claim of "fundamental" error. *State v. Randles*, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989), *Aff'd in part*, 117 Idaho 344, 787 P.2d 1152 (1990).

It is apparent that the amendment to this rule that was made in 1980 was designed to parallel the amendment to I.R.C.P. 51(a)(1) made in 1976 and 1977; by these amendments to the rules of civil and criminal procedure, it is not necessary to object to instructions in either civil or criminal cases in order to preserve an issue of the propriety of the instructions. *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990).

Defendant's conviction for felony domestic violence was appropriate because, while the prosecutor did commit misconduct by misstating the law in closing arguments, defendant failed to object, and the misconduct on the part of the prosecutor did not rise to the level of fundamental error. *State v. Coffin*, 146 Idaho 166, 191 P.3d 244 (2008).

### **Response to Jury Question.**

The district court did not commit reversible error by instructing the jury in a robbery prosecution that it could not consider the defendant's race in reaching its verdict after the trial court received a letter signed by eight of the jurors stating that one of the jurors had a racial bias against the defendant. *State v. Miera*, 132 Idaho 70, 966 P.2d 1115 (Ct. App. 1998).

In a case regarding the murder of a bail bondsman, the district court did not abuse its discretion in not answering the questions of jurors, because the plain language of a jury instruction regarding the scope of authority for bail bondsmen did not contain a defect, ambiguity, or gap, and was a sufficient answer to the questions; the requests for further definitions of common terms were properly rejected within the discretion of the district court. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

### **Verdict Forms.**

Even though the trial court erred by not reading an instruction regarding a verdict form in open court or providing counsel with copies prior to the instruction conference, prejudice was not found and the error was harmless. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

### **Waiver.**

Where defendant did not object to an order of conviction based on the special verdict form

at trial of defendant's case involving aggravated driving under the influence, the failure to object to an instruction at trial in a criminal case did not constitute a waiver of any objection to the instruction on appeal; but, where defendant's counsel explicitly accepted the use of a special verdict form, to which objection was later made, any error in the special verdict form was invited by defendant. *State v. Johnson*, 126 Idaho 892, 894 P.2d 125 (1995).

Where defendant did not object to an erroneous jury instruction on the definition of general criminal intent, the error was harm-

less where the overwhelming evidence showed that defendant's act of firing a pistol created a well-founded fear in the young victims that violence was imminent, and where other evidence supported the State's case. *State v. Hansen*, 148 Idaho 442, 224 P.3d 509 (2009).

**Cited in:** *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982); *State v. Eisele*, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985); *State v. Wilkerson*, 121 Idaho 345, 824 P.2d 920 (Ct. App. 1992); *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### Failure to Object.

In a prosecution for delivery of a controlled substance, defendant's failure to object to the instructions at trial foreclosed an assignment of errors upon the basis of the instructions given. *State v. Collinworth*, 96 Idaho 910, 539 P.2d 263 (1975).

The lack of opportunity to object is not established simply because the court did not ask for objections, for where a trial court inadvertently or even purposefully imposes on either party or both a variation in procedure, there yet remains an obligation to make a timely objection. *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978).

Where defendant was afforded a suitable opportunity to make specific objections to the failure to give requested instructions, but did

not object to the failure to instruct on lesser included offenses, defendant was foreclosed from assigning the failure to give such instructions as error on appeal. *State v. Adair*, 99 Idaho 703, 587 P.2d 1238 (1978).

Instructions which were not objected to by defense counsel at trial should not be entertained on appeal. *State v. McCurdy*, 100 Idaho 683, 603 P.2d 1017 (1979).

Where defendant did not object to instruction which impermissibly permitted the jury to presume intent, she must, under former rule regarding instructions, be deemed to have waived any objection to the instruction. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

#### RESEARCH REFERENCES

**A.L.R.** Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Propriety under *Griffin v. California* and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 A.L.R.3d 1335.

Propriety of reference, in instruction in criminal case, to jurors duty to God, 39 A.L.R.3d 1445.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.

Instructions urging dissenting jurors in criminal case to give due consideration to opinion of majority (Allen charge) — modern cases, 97 A.L.R.3d 96; 44 A.L.R. Fed. 468.

Necessity and sufficiency of cautionary instructions, in prosecution for rape, as to evi-

dence of other similar offense, 2 A.L.R.4th 330.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Instructions in criminal case in which defendant pleads insanity as to hospital confinement in the event of acquittal, 81 A.L.R.4th 659.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial, 28 A.L.R. Fed. 767.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial, 17 A.L.R. Fed. 249.

Instructing on burden of proof as to defense, of entrapment in federal criminal case, 28 A.L.R. Fed. 767.

**Rule 30.1. Juror questioning of witnesses.**

In the discretion of the court, jurors may be instructed that they are individually permitted to submit to the court a written question directed to any witness. If questions are submitted, the parties or counsel shall be given the opportunity to object to such questions outside the presence of the jury. If the questions are not objectionable, the court shall read the question to the witness. The parties or counsel may then be given the opportunity to ask follow-up questions as necessary. (Amended, effective July 1, 2000.)

**Rule 31. Verdict.**

(a) **Return.** The verdict shall be unanimous and shall be returned by the jury to the judge in open court.

(b) **Several defendants.** If there are two (2) or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) **Conviction of lesser offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) **Poll of jury.** When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged. (Adopted December 27, 1979, effective July 1, 1980.)

**STATUTORY NOTES**

**Cross References.** Verdict, §§ 19-2301 — 19-2319.

**JUDICIAL DECISIONS****ANALYSIS**

Conviction of Lesser Offense.  
Poll of Jury.  
Unanimity.

**Conviction of Lesser Offense.**

Where defendant was charged with voluntary manslaughter in information which recited specific acts, which included the essential elements of involuntary manslaughter, the information identified the acts with sufficient particularity so as to bar a second prosecution for the same conduct and informed defendant of the nature of the greater charge against him, yet stated every element necessary to constitute the lesser included offense of involuntary manslaughter and afforded

him the means by which to prepare a proper defense. *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980).

Fairness requires that a criminal defendant be tried only upon charges of which he has notice and, accordingly, the general rule has evolved that an accused person is denied due process by variance between the crime charged in a prosecutor's information and the crime upon which a judgment of conviction is entered. However, there is a well-recognized exception to this general rule in that a defendant is deemed to have presumptive notice of a lesser included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

If an offense is "included" in the crime charged, a defendant may be fairly said to have constructive notice of the alleged con-



duct comprising it and such notice is not defeated by the fact that the included offense may carry a heavy penalty; accordingly, information charging statutory rape of a 12-year-old girl furnished constructive notice to defendant that he might be convicted of lewd conduct as an included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

This rule and §§ 19-2132(b) and 19-2312 impute no meaning to the word “lesser” different from the word “included” and, accordingly, the doctrine of the lesser included offense is not limited to an offense less serious than the crime charged. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

**Poll of Jury.**

Where court polled the jury, revealing a 7-5 split in favor of conviction, after the verdict was recorded, motion for mistrial should have been granted. *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997).

The district court’s decision to have the jury continue deliberating after the numerical di-

vision was revealed under subsection (d) of this rule did not in any way coerce any juror to change their verdict to require a mistrial under I.C.R. 29.1. *State v. Lee*, 131 Idaho 600, 961 P.2d 1203 (Ct. App. 1998).

**Unanimity.**

A trial court is required to instruct the jury that it must unanimously agree on the defendant’s guilt in order to convict the defendant of a crime. An instruction that the jury must unanimously agree on the facts giving rise to the offense, however, is generally not required. *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).

An instruction informing the jury that it must unanimously agree on the specific occurrence giving rise to the offense is necessary, when the defendant commits several acts, each of which would independently support a conviction for the crime charged. *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).

**Cited in:** *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

**RESEARCH REFERENCES**

**A.L.R.** Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Juror’s reluctant, equivocal, or conditional assent to verdict, on polling, as ground for

mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

Interrogation or Poll of Jurors, During Criminal Trial, as to Whether They Were Exposed to Media Publicity Pertaining to Alleged Crime or Trial. 55 A.L.R.6th 157.

What constitutes lesser offenses “necessarily included” in offense charged, under Rule 31(c) of Federal Rules of Criminal Procedure, 11 A.L.R. Fed. 173.

**Rule 32. Standards and procedures governing presentence investigations and reports.**

The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:

(a) **When presentence investigations are to be ordered.** The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

(b) **Contents of presentence report.** A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and the defendant's explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.

(2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interests and activities.

(4) The defendant's educational background.

(5) The defendant's employment background, including any military record, and defendant's present employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of defendant.

(8) Health of the defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The results of any substance abuse evaluation, mental health evaluation, domestic assault and battery evaluation, or psychosexual evaluation, including any report prepared pursuant to I.C. § 19-2522 or I.C. § 19-2524, but excluding content of any evaluation or report prepared pursuant to I.C. § 18-211 or I.C. § 18-212.

(11) The presentence investigator's analysis of the defendant's condition. The analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.

(c) **Recommendations concerning sentence.** The presentence report may recommend incarceration but it should not contain specific recommendations concerning the length of incarceration, the imposition of a fine or the amount of a fine, or the length of probation or other matters which are within the province of the court. Provided, however, the presentence report may recommend programs or treatment for the defendant and comment as to the length of time that may be required for the defendant to complete any recommended programs or treatment. The presentence report may also comment generally on the probability of the defendant's successfully completing the term of probation or the defendant's financial ability to pay a fine imposed by the court.

(d) **Psychological evaluations.** The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge.

(e) **Information which may be included in the presentence report.**

(1) **Content.** The presentence report may include information of a hearsay nature where the presentence investigator believes that the

information is reliable, and the court may consider such information. In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at a trial. However, while not all information in a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report. Any pictures or depictions of child pornography that are included as attachments to the report must be placed in a separate envelope and marked as such, with access restricted to only those allowed by the trial court.

(2) **Previous charges against defendant.** It is permissible for the sentencing judge to consider information in a presentence report regarding a previous charge against the defendant which had been dismissed after a successful probation period.

(3) **Idaho Sentencing Information Database.** The presentence report may include a report generated from use of the Sentencing Tool of the Idaho Sentencing Information Database (<http://sentencing.isc.idaho.gov/>), and may contain a narrative description of the database results.

(f) **Additional report may be ordered.** The sentencing judge may order an additional investigation of the case if the judge deems it necessary and use such results in considering the disposition.

(g) **Access to presentence report.**

(1) **Disclosure of report, exceptions.** Full disclosure of the contents of the presentence report shall be made to the defendant, defendant's counsel, and the prosecuting attorney prior to any hearing on the sentence except as hereinafter provided. The defendant and defendant's attorney shall be given a full opportunity to examine the presentence investigation report so that, if the defendant desires, the defendant may explain and defend adverse matters therein. The defendant shall be afforded a full opportunity to present favorable evidence in defendant's behalf during the proceeding involving the determination of sentence. Provided, however, the trial court may withhold from disclosure parts of the presentence report which contain diagnostic opinion which might seriously disrupt a program of rehabilitation, or information which in the court's discretion may prove harmful to an individual not a party in the proceeding, or pictures or depictions of child pornography that are separately identified pursuant to subsection (e)(1).

(2) **Explanation of non-disclosure.** Where the trial court chooses to withhold from disclosure to the defendant information in the presentence report, the court must state for the record the reasons for its action, inform the defendant and defendant's attorney that information has not been disclosed, and explain the general nature of the information being withheld. Further, if requested, the defendant's attorney, if the defendant is represented by counsel, shall be allowed to review any



information in the presentence report which is so withheld from disclosure so as to allow the attorney a full opportunity to explain and rebut the information contained therein.

(3) **Time of disclosure.** Disclosure of the information contained in the presentence report under the conditions mentioned above shall be made at a sufficient time prior to the imposition of sentence so as to afford a reasonable opportunity for the defendant or defendant's attorney to verify or rebut any information contained in the report. Reasonable requests for a continuance of the sentence proceeding, when based on lack of sufficient time to examine or offer rebuttal to information contained in the presentence report, may be granted by the sentencing judge.

(h) **Disclosure of presentence reports.**

(1) **Custody of presentence report.** Any presentence report shall be available for the purpose of assisting a sentencing court and once prepared may be released to any district judge for that purpose. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. Provided, the presentence report shall be available to the Idaho Department of Corrections so long as the defendant is committed to or supervised by the Department, and may be retained by the Department for three years after the defendant is discharged. In addition, when preparing a report on a defendant, a presentence investigator shall have access to previous presentence reports, including all attachments and addendums, prepared on that defendant, whether in the same case or in previous cases. The presentence investigator's own copy of the presentence report similarly is restricted from use by all but authorized court personnel. Neither the defendant, defendant's counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein, except as provided in Article 1, Section 22(9) of the Idaho Constitution. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

(2) **Availability of presentence information to evaluators.** The presentence investigator may release information relating to the defendant's criminal history and law enforcement reports related to the offense for which the defendant is to be sentenced to persons preparing reports to assist the court in sentencing pursuant to a court-ordered evaluation. Any person receiving such information shall not release that information to any other person or agency. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

(3) **Availability of presentence report to third parties.** With the permission of the sentencing judge, the presentence report may be available to persons or agencies having a legitimate professional

interest in the information likely to be contained therein, if it appears that such availability will further the plan or rehabilitation of the defendant or further the interests of public protection, and that appropriate safeguards for the confidentiality of information contained in the presentence report will be provided by the persons or agencies receiving such information. Such persons or agencies may include a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, a probation or parole department, or the supervisors of a public or private rehabilitation program.

**(4) Availability of presentence report to problem-solving court personnel.** With the permission of the sentencing judge, the presentence report may be made available to problem-solving court personnel for purposes of screening the defendant to determine the defendant’s suitability for admission into a problem-solving court program.

**(5) Availability of presentence report on appeal.** When relevant to an issue on which an appeal has been taken, the report shall be available for review in courts of appeal when requested by a party or ordered by the court pursuant to Idaho Appellate Rule 31(b). Pictures and depictions of child pornography contained in the report that are placed in a separate envelope pursuant to subsection (e)(1) of this rule shall not be transmitted to the parties or the court as part of the appeal unless specifically requested. (Adopted December 27, 1979, effective July 1, 1980; amended June 15, 1987, effective November 1, 1987; amended March 1, 2000, effective July 1, 2000; amended January 30, 2001, effective July 1, 2001; amended April 4, 2008, effective July 1, 2008; amended March 18, 2011, effective July 1, 2011; amended February 27, 2013, effective July 1, 2013.)

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Appellate Review.

The Court of Appeals will not review a contention, made for the first time on appeal, that compliance with the rule was simply inadequate — e.g., that the presentence report should have developed a particular point further, or that certain information was incomplete or inaccurate. Those are matters which should have been raised at the sentencing hearing. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

Where no objection has been made to a

presentence report at a sentencing hearing, and the report substantially addresses the points required by this rule, the Court of Appeals will not review a challenge to the report raised on appeal. *State v. Angel*, 103 Idaho 624, 651 P.2d 558 (Ct. App. 1982).

Where no objection is made to a presentence report at the sentencing hearing, and the report substantially meets the requirements established by court rule, the Court of Appeals will not review a challenge to the report raised on appeal. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

The appellate court will not review a challenge to a presentence report where the report substantially complies with the rule and where no objection to it, in regard to the question raised on appeal, was urged at the sentencing hearing. *State v. Terris*, 106 Idaho 927, 684 P.2d 329 (Ct. App. 1984).

An objection to part of the presentence report does not preserve for review on appeal another, unrelated issue concerning the adequacy of the report. *State v. Terris*, 106 Idaho 927, 684 P.2d 329 (Ct. App. 1984).

Where no objection is made to a presentence report at the sentencing hearing, and where the report substantially meets the requirements of this rule, an alleged inadequacy of the report will not be reviewed on appeal. *Volker v. State*, 107 Idaho 1059, 695 P.2d 809 (Ct. App. 1985).

As a general rule, the Court of Appeals will not entertain, for the first time on appeal, a challenge to the contents of a presentence report unless the presentence report demonstrates a "disregard" for this rule. *State v. Sensenig*, 110 Idaho 83, 714 P.2d 52 (Ct. App. 1985).

The court will not review a challenge to a presentence report when no objection is urged at the sentencing hearing. *Svenson v. State*, 110 Idaho 161, 715 P.2d 374 (Ct. App. 1986).

Defendant contended that the District Court erred in not striking from the presentence report a statement that victim would need professional help in the future but this alleged speculation in the presentence report was never objected to at the time of sentencing and review of an issue initially raised on appeal will be granted only in a case where the requirements of this Rule have been disregarded. *State v. King*, 120 Idaho 955, 821 P.2d 1010 (Ct. App. 1991).

The Court of Appeals task on review of a sentence is to decide whether a clear abuse of discretion has been affirmatively shown in that the sentence is unreasonable upon the facts of the case. *State v. Harris*, 127 Idaho 376, 900 P.2d 1387 (Ct. App. 1995).

#### **Applicability.**

Because Idaho Crim. R. 32 was not impli-

cated in probation violation proceedings and defendant failed to raise the issue below, the court would not consider whether the district court erred by failing to sua sponte order a § 19-2524 mental health examination for purposes of his probation violation disposition. *State v. Hanson*, 150 Idaho 729, 249 P.3d 1184 (Ct. App. 2011).

#### **Certification of Criminal Record.**

This rule contains no express requirement that the summary of a defendant's criminal record contained in his or her presentence investigation report be certified; ample protection against inaccuracies in the report is provided by the defendant's opportunity to test the reliability of the information at the time of sentencing. *Cunningham v. State*, 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990).

#### **Codefendant's Statements.**

There was no merit to murder defendant's assertion that use of codefendant's statements violated this rule where it was obvious from the contents of the presentence report that the investigator understood the requirements of this rule, and there was no indication from the report or anything presented by defendant that the investigator did not consider codefendant's transcribed statement to be reliable. *State v. Sivak*, 127 Idaho 387, 901 P.2d 494 (1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 819, 133 L. Ed. 2d 763 (1996).

#### **Consideration by Sentencing Court.**

Generally, a sentencing court is free to consider the results of a presentence investigation if the reliability of the information contained in the report is insured by the defendant's opportunity to present favorable evidence, to examine all the materials contained in the presentence report and to explain or rebut adverse evidence. *Cunningham v. State*, 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990).

It was of no consequence that the dismissal of previous charges against defendant resulted from successfully completed probationary periods, or that the dismissed cases occurred in another jurisdiction; under this rule, the report of those dispositions properly was disclosed as part of defendant's prior criminal history and could be considered by the district court in determining the sentence to be imposed in the present case. *State v. Barnes*, 121 Idaho 409, 825 P.2d 506 (Ct. App. 1992).

District court understood the import of defendant's drug and alcohol abuse but determined that, in light of these problems, incarceration, rather than an ordered alcohol treatment program, was most appropriate;



the district court did not abuse its discretion or manifestly disregard this rule in sentencing defendant. *State v. Corwin*, 147 Idaho 893, 216 P.3d 651 (2009).

#### **Consideration of Other Offenses.**

Sentencing court could properly consider defendant's 33 arrests in the state of Washington in the 31 months prior to arrest in Idaho for grand larceny, which arrests included arrest for a felony reduced to a misdemeanor and 30 other traffic offenses to which defendant pleaded guilty, as well as pending charges for battery, resisting arrest and possession of stolen property; thus imposition of an indeterminate term not to exceed seven years which was one-half of the maximum sentence allowable for grand larceny under I.C., § 18-4606 (repealed) was proper. *State v. Ott*, 102 Idaho 169, 627 P.2d 798 (1981).

Where, in prosecution for first degree burglary and sexual abuse of a child, the hearsay information in the presentence report came from victims of other sexual misconduct by the defendant, those individuals later appeared at the sentencing hearing and were subjected to cross-examination by defense counsel, the defendant also testified, attempting to rebut the witnesses' allegations, and the information was found to be reliable and was probative in establishing the defendant's character, there was no error in considering the uncharged crimes disclosed by the presentence report. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

A trial court, in determining the sentence to be imposed, may consider prior dismissed charges and charges which are currently pending against the defendant; this information may be considered so long as the defendant has the opportunity to object to or rebut the evidence of his prior criminal conduct. *State v. Stewart*, 122 Idaho 284, 833 P.2d 917 (Ct. App. 1992).

#### **Contents of Report.**

Where the failure of a presentence report to meet all of the requirements of subdivision (b) of this rule was the result of the defendant's refusal to cooperate in the preparation of the report, the defendant could not claim that the deficiencies in the report precluded the trial court from sentencing him. *State v. Bylama*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982).

Neither a recommendation for a psychological analysis by the presentence investigator, nor a plan of rehabilitation, is an essential requirement of a presentence report although they should be included where appropriate. *State v. Wilson*, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983), reversed on other grounds, 107 Idaho 506, 690 P.2d 1338 (1984).

Under subdivision (e) of this rule, information in the presentence report can be stricken only if no reasonable basis exists to deem the information reliable or the information is simply conjecture and speculation. *State v. Sensenig*, 110 Idaho 83, 714 P.2d 52 (Ct. App. 1985).

Hearsay information may be set forth in a presentence report, so long as the defendant is afforded an opportunity to present favorable evidence and to explain or rebut the adverse information; however, hearsay information must be disregarded if there is no reasonable basis to deem it reliable, as where the information is simply conjecture. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

The record in this case did not reflect that the alleged defect in the presentence report was brought to the district court's attention, nor did defendant request the court to disregard the challenged statement; because the alleged error in defendant's presentence report was not first presented to the district court for consideration, the Court of Appeals would not entertain it on appeal. *State v. Lamas*, 121 Idaho 1027, 829 P.2d 1376 (Ct. App. 1992).

The rules of evidence are not applicable to presentence investigation reports, and evidence that would otherwise be inadmissible at trial may be considered in the trial court's discretion at sentencing; the requirements and guidelines for the proper content of presentence investigation reports are found in subdivision (b) of this section. The purpose of the rule is clearly to provide as much information as possible to the sentencing judge, in order to paint a full picture of the offense, the offender, and the offender's history. *Fodge v. State*, 125 Idaho 882, 876 P.2d 164 (Ct. App. 1994).

In prosecution for lewd conduct with a minor under 16 years of age where contents of presentence report contained the items required by subsection (b) of this rule and even though investigator did not comment on defendant's successfully completing probation as suggested but not mandated by subsection (c) of this rule, probably based on defendant's denial of culpability and that sex offenders must first admit the offense in order to benefit from treatment, there was no substantial flaw in the report and failure of counsel to object to it did not amount to ineffective assistance of counsel. *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997).

Defendant failed to show an abuse of discretion in declining to strike portions of the presentence investigation report because defendant was unable to show any of the infor-

mation to which he objected or which he rebutted was found to be unreliable or inaccurate by the district court. *State v. Carey*, 152 Idaho 720, 274 P.3d 21 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 113 (Idaho Apr. 25, 2012).

#### —Reliable Information.

Where defendant was presented a full opportunity to confront and disprove the truthfulness of statements contained in the presentence investigation report, the sentencing court could properly find that the statements provided reliable information which was probative both of defendant's character and of the seriousness of the offenses. *State v. Campbell*, 123 Idaho 922, 854 P.2d 265 (Ct. App. 1993).

#### —Unreliable Information.

Utah report's inclusion in the presentence investigation report (PSI) was not warranted as there was sufficient basis to credit it as reliable or referable to defendant; the unreliable information should have been stricken from the PSI to prevent future prejudice to defendant. *State v. Molen*, 148 Idaho 950, 231 P.3d 1047 (Ct. App. 2010).

#### Denial of Motion to Redact Suppressed Statements.

District court did not err in denying defendant's motion to redact suppressed statements from presentence investigation report because: (1) it did not have the authority to correct the document after the final judgment was issued; (2) defendant did not invoke his Fifth Amendment privilege against self-incrimination in regard to the presentence investigation; and (3) inclusion of the statements did not violate his plea agreement with the State. *State v. Person*, 145 Idaho 293, 178 P.3d 658 (Ct. App. 2007).

#### Denial of Motion to Strike.

Defendant contended that including the impressions investigator had of defendant in the presentence investigation report (PSI) was improper. The district court ruled that these comments were essentially an "analysis of the defendant's condition" which is required to be included. The court also ruled that the statements complained of addressed the investigator's opinion as to broad mental and psychological factors. The denial of defendant's motion to exclude these statements from the PSI was proper. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

The court did not err in refusing to strike the part-narrative, part-verbatim statement of a victim from presentence investigation report. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

#### Hearsay Evidence.

Hearsay evidence presented in a presentence investigation report in the manner and in the form articulated in this rule, as well as in § 19-2516, I.C.R. 33.1, and *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), is appropriate at sentencing hearings. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Defendant contended that the statement contained in the presentence investigation report (PSI) from the victim's counselor was improper because the statement was beyond the investigator's expertise, and the PSI did not contain any substantiating report from the counselor. Upon objection, the district court ruled that the information was hearsay, but that under the rule, the court could consider the information where the investigator believed that it was reliable. The court stated that the fact that the investigator included the statement in the PSI implied a belief of reliability. This ruling was not erroneous. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

Defendant's assertion that presentence report improperly contained prejudicial hearsay would not be entertained on appeal, where at initial sentencing hearing defendant did not offer any factual corrections, nor did he object to the contents of the report at the initial or final sentencing hearings. *State v. Robles-Rivas*, 125 Idaho 160, 868 P.2d 488 (Ct. App. 1993).

#### Inaccuracies in Report.

Where a defendant has been accorded the opportunity to examine the presentence report and to explain and rebut adverse evidence, inaccuracies in the report do not result in reversible error. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

Where the presentence report substantially complied with this rule, the Court of Appeals would not entertain it on appeal because the alleged error in defendant's presentence report was not first presented to the district court for consideration. *State v. Pena*, 121 Idaho 1032, 829 P.2d 1381 (Ct. App. 1992).

#### Investigator's Comments.

In prosecution for lewd conduct with a minor under 16 years of age where presentence investigator allegedly made a allegation of racial bias concerning defendant, since the Presentence Investigation Report (PSI) is almost entirely factual and contains little information derived from other persons and sim-

ply presents information with little comment or recommendations, where defendant pointed out no information that was inaccurate and the district court made it clear that the alleged racial bias of the PSI, if true, would have no effect of the court's sentencing decision, there was error in district court's response to alleged racial bias on the part of the investigator. *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997).

Presentence investigation report did not violate subsection (c) of this rule; there was no evidence that the trial judge saw the investigator's comments as a recommendation of a fixed-life sentence after defendant was convicted of first-degree murder and, while the investigator's comments came close to crossing the line, no specific sentence was, in fact, recommended. *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011).

#### **Lack of Report.**

Although the defendant did not object at the hearing at which he pled guilty to kidnapping with intent to rape to the lack of a presentence report, the absence of objection did not excuse the trial judge's noncompliance with this rule. *State v. Goldman*, 107 Idaho 209, 687 P.2d 599 (Ct. App. 1984).

The failure to order a presentence report (PSR) when a defendant is being considered for probation is per se error; however, the converse is not true, and simply because probation is not an option in a particular case does not mean a sentencing judge may dispense with the presentence investigation, as a trial court may forego a PSR only where (a) the record affirmatively establishes a valid reason therefor, and (b) there is sufficient information from independent sources to enable the sentencing court to fashion an appropriate sentence. *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

#### **Motion to Strike Victim Impact Statement.**

The sentencing court did not err by denying defendant's motion to strike the victim impact statement when it imposed a fixed life prison term for first degree murder. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

#### **Prejudice from Report.**

Where the record indicated that the presentence report was made available to the defendant prior to sentencing, where the defendant exercised his opportunity to correct the report by pointing out alleged inaccuracies contained in the report in a letter to the trial court and, at the sentencing hearing, a state

parole officer testified and confirmed some of the defendant's statements regarding the inaccuracies, and where after making those corrections, the defendant made no further objection to the report, the defendant failed to show by a preponderance of the evidence that prejudice resulted from the report. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

#### **Psychological Evaluation.**

The determination of whether a psychological evaluation should be included in a presentence report is one for the sound discretion of the trial court. *State v. Bylama*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982).

Where the defendant had refused to cooperate in the preparation of a presentence report and there was no indication that, if a psychological evaluation had been ordered, the defendant would have cooperated, nor was there any showing that a meaningful examination could have been conducted without such cooperation, the failure to order a psychological evaluation was not error. *State v. Bylama*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982).

A psychological evaluation is not required in every case where the court orders a presentence report and the decision to order such an evaluation rests with the judge. *State v. Anderson*, 103 Idaho 622, 651 P.2d 556 (Ct. App. 1982).

Where the presentence report stated that the defendant underwent a psychological evaluation approximately five months before the report was prepared, where copies of the evaluations made by a psychiatrist and a psychologist were submitted with the report at the sentencing hearing, and where both the psychiatrist and the psychologist testified at the sentencing hearing, and an evaluation was made and presented to the court as part of the presentence investigation in compliance with subdivision (b)(10) of this rule. *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985).

The requesting of, and the sufficiency of, a psychological evaluation are matters which are within the trial judge's discretion, absent abuse. *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985).

Where, although the district judge did not order a psychological evaluation as part of a presentence investigation, the district judge did order the defendant transported to a mental health facility "for the purpose of a psychological evaluation," the order gave adequate notice to the defense that an evaluation would occur, and the judge did not err in considering the psychological evaluation when determining the defendant's sen-



tence. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

The judge erred in a case involving lewd conduct and sexual abuse of a minor by not ordering a psychological evaluation as part of the presentence investigation or through retained jurisdiction, because, although a psychological evaluation is not required in every case where the court orders a presentence investigation, in this case, defendant had a solid work history, was a family man, and had no prior criminal record. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Although defendant lacked a history of sexual criminal behavior, he did have a history of other criminal acts; further, though he denied at trial that he committed a lewd and lascivious act, he apparently made contrary statements while in counselling sessions after being convicted and showed no remorse for his act, and acted in a way that led correction employees to conclude that he did not think his actions were wrong. A psychological evaluation would have added little to these observations, or the court's ability to weigh the conclusions of correction employees against its own observations and other evidence in the record; therefore, the court did not err in refusing to continue the sentencing hearing a second time to allow for a psychological evaluation. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Where defendant did not request a psychological evaluation or object on the ground that one had not been performed, where the presentence investigator did not express concern over the lack of an evaluation and thoroughly discussed her sentencing and treatment recommendations, and both the presentence investigator and the court were negatively impressed with how long defendant had been abusing his stepdaughter, defendant failed to show that the court manifestly disregarded the provisions of this rule. *State v. Wolfe*, 124 Idaho 724, 864 P.2d 170 (Ct. App. 1993).

Failure to order a second psychological exam sua sponte under this rule did not constitute error, as defendant did not properly preserve the issue for appeal. *State v. Sengthavisouk*, 126 Idaho 881, 893 P.2d 828 (Ct. App. 1995).

Where a defendant fails to request a psychological evaluation or object to a presentence report on the ground that an evaluation has not been performed, he must demonstrate that by failing to order an evaluation the court manifestly disregarded the provisions of this rule. *State v. Jones*, 132 Idaho 439, 974 P.2d 85 (Ct. App. 1999).

Where the defendant did not make the presentence report part of the record on ap-

peal, the appellate court presumed that the presentence investigator did not express concern over the lack of a psychological evaluation, articulated appropriate sentencing and treatment recommendations and otherwise adequately addressed those factors set out in this rule, and that the district court therefore did not manifestly disregard the provisions of this rule by failing to order a psychological evaluation sua sponte. *State v. Jones*, 132 Idaho 439, 974 P.2d 85 (Ct. App. 1999).

Where the presentence investigation failed to meaningfully comply with the provisions of Idaho Crim. R. 32, the district court possessed inadequate information concerning defendant's mental condition at the time of sentencing. *State v. Craner*, 137 Idaho 188, 45 P.3d 844 (Ct. App. 2002).

Where the evidence indicated that defendant's criminal actions were part of a suicide plan, a district court erred by failing to sua sponte order a psychological examination. The district court abused its discretion by proceeding with sentencing since a presentence investigation report did not contain adequate information regarding defendant's treatment or diagnosis. *State v. Collins*, 144 Idaho 408, 162 P.3d 787 (Ct. App. 2007).

In robbery prosecution, district court's failure to order a psychological evaluation for the purpose of sentencing warranted remand, as there was sufficient information before that court to indicate that defendant's mental condition would be a significant factor in sentencing. *State v. Durham*, 146 Idaho 364, 195 P.3d 723 (Ct. App. 2008).

Denial of defendant's request for a psychological evaluation on the basis that he was precluded from doing so by his exercise of his Fifth Amendment right against self-incrimination with regard to the presentence investigation report was improper. *State v. Hanson*, — Idaho —, 271 P.3d 712 (2012).

Section 19-2522, not this rule, governs whether a psychological evaluation must be ordered. *State v. Carter*, — Idaho —, — P.3d —, 2012 Ida. App. LEXIS 12 (Feb. 8, 2012).

No manifest error occurred when the trial court failed to order, sua sponte, a psychological evaluation for use in sentencing a 67-year-old defendant for lewd conduct with a seven-year-old child. Even if defendant's dementia was a significant factor at sentencing, the district court already had a psychosexual evaluation and social/sexual assessment before it. *State v. Clinton*, — Idaho —, — P.3d —, 2012 Ida. App. LEXIS 49 (Aug. 20, 2012).

#### **Right to Copy of Report.**

Following sentencing, a defendant does not have an automatic right to a copy of his report; rather, a defendant must demonstrate

a genuine need for his report to obtain court authorization for its release. *State v. Adams*, 115 Idaho 724, 769 P.2d 601 (Ct. App. 1989).

In habeas corpus action, since by the terms of this rule the Parole Commission was prohibited from allowing petitioner to review any information contained in the department's copy of his presentence report without prior approval from the sentencing court, and where defendant did not allege in his amended petition, nor does the record show, that an attempt was made unsuccessfully to obtain an order of the court for release of his presentence report, there was no merit to petitioner's contention that he was wrongfully denied access thereto. *Freeman v. State, Comm'n of Pardons & Paroles*, 119 Idaho 692, 809 P.2d 1171 (Ct. App. 1991).

Idaho Criminal Rules provide for disclosure of the contents of the Presentence Investigation (PSI) report to the defendant prior to any hearing on the sentence, and rules further allow the defendant and his attorney a full opportunity to examine the PSI report so that the defendant may explain and defend adverse matters therein. *State v. Greenawald*, 127 Idaho 555, 903 P.2d 144 (Ct. App. 1995).

Where the defendant did not allege, nor did the record indicate, that he had made an attempt to obtain an order of the court for release of his presentence investigation report, there was no merit in his contention that he was wrongly denied access to that report. *Hays v. State*, 132 Idaho 516, 975 P.2d 1181 (Ct. App. 1999).

#### —Counsel's Failure to Provide.

Although attorney's failure to advise defendant of his right of allocution and to provide defendant with a copy of his presentence report did not constitute inadequate representation, defendant's verified application for post-conviction relief stating that attorney declined to file an appeal, despite defendant's request, did require an evidentiary hearing on counsel's ineffectiveness. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).

#### Sentencing Decision.

In the absence of an explicit request for a formal hearing, the court may reach its sentencing decision by receiving the unsworn formal statements presented by both sides, together with the presentence report and arguments of the respective counsel. *State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980).

The district court abused its discretion when it jumped from accepting the defendant's guilty plea to pronouncing the sentence, where neither the defendant nor his attorney was afforded a timely opportunity to speak on the sentencing issue. *State v. Gold-*

*man*, 107 Idaho 209, 687 P.2d 599 (Ct. App. 1984).

Where the defendant pled guilty to kidnapping a woman with intent to rape her, and the district judge pronounced sentence immediately upon acceptance of the plea, without ordering a presentence investigation and without asking the defendant or defense counsel whether they wished to speak or to present information in mitigation of punishment, the sentence was imposed by improper procedure and had to be vacated. *State v. Goldman*, 107 Idaho 209, 687 P.2d 599 (Ct. App. 1984).

#### Victim.

##### —Admissibility of Testimony.

This rule prescribes the contents of the presentence investigation report, but does not address the admissibility of testimony from the victim in sentencing proceedings. *State v. Chapman*, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991).

When four officers arrived at defendant's apartment seeking her husband, who was wanted for felony probation violations, three officers were injured in the attempt to take the husband into custody; defendant pled guilty to harboring and protecting a felon. At sentencing, the injured officers were properly allowed to give victim impact statements under Idaho Const. art. I, § 22, § 19-5306(1)(e), and this rule; the officers were victims of defendant's crime of harboring and protecting her husband. *State v. Lampien*, 148 Idaho 367 223 P.3d 750 (2009).

##### —Family Members of Minor.

Murder defendant's counsel was not ineffective for failing to object to statements by the victims father in the presentence report concerning impact of the crime. Such statements by a victim are allowed under § 19-5306 and immediate family members of a minor are included in the definition of a victim. *Fodge v. State*, 125 Idaho 882, 876 P.2d 164 (Ct. App. 1994).

##### —Impact of Crime.

Letter from victim's psychologist describing effect of crime on victim and her family and recommending incarceration of the defendant for life did not have to be stricken from the presentence report as the letter was merely one straw in a larger bundle of information that the court could properly consider; the defendant had a chance to object to the letter and did; and there was no indication that the judge would have prohibited the psychologist from presenting his evaluation of the effect of the crimes on the victim and her family, if he

had chosen to do so. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

The district court properly exercised its discretion in denying vehicular manslaughter defendant's motion to strike from the presentence report the statements of the two girls who were injured in the auto accident which killed victim, and the statements of the girls' parents. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

#### **Use of Prior PSI Report.**

Since the decision to order a presentence investigation (PSI) report, as well as a psychological examination, is within the discretion of the court and the court may forego a PSI report only where the record affirmatively establishes a valid reason therefor, and where there is sufficient information from independent sources to enable the sentencing court to fashion an appropriate sentence and since the purpose of the PSI report is to provide information on defendant's family history, educational background, social history, sense of values and outlook on life in general there was no error in the district court's use of the PSI report which was prepared and submitted in connection with defendant's earlier sentencing for his convictions of robbery in another county, absent a showing of some material change in defendant's circumstances in the 30 days between the date the PSI report was prepared in the first prosecution and the sentencing hearing

in the second prosecution. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

**Cited in:** *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980); *State v. Jensen*, 101 Idaho 594, 618 P.2d 772 (1980); *State v. Fowler*, 105 Idaho 642, 671 P.2d 1105 (Ct. App. 1983); *State v. White*, 107 Idaho 941, 694 P.2d 890 (1985); *State v. Matthews*, 108 Idaho 482, 700 P.2d 104 (Ct. App. 1985); *Brown v. State*, 108 Idaho 655, 701 P.2d 275 (Ct. App. 1985); *State v. Morgan*, 109 Idaho 1040, 712 P.2d 741 (Ct. App. 1985); *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986); *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986); *State v. Molina*, 113 Idaho 449, 745 P.2d 1070 (Ct. App. 1987); *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989); *State v. Cates*, 117 Idaho 90, 785 P.2d 654 (Ct. App. 1989); *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991); *State v. Mauro*, 121 Idaho 178, 824 P.2d 109 (1991); *State v. Matteson*, 123 Idaho 622, 851 P.2d 336 (1993); *State v. Travis*, 125 Idaho 1, 867 P.2d 234 (1994); *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994); *State v. Viehweg*, 127 Idaho 87, 896 P.2d 995 (Ct. App. 1995); *State v. Adams*, 137 Idaho 275, 47 P.3d 778 (Ct. App. 2002); *State v. Howell*, 137 Idaho 817, 54 P.3d 460 (Ct. App. 2002); *State v. Goodlett*, 139 Idaho 262, 77 P.3d 487 (Ct. App. 2003); *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006); *Hughes v. State*, 148 Idaho 448, 224 P.3d 515 (Ct. App. 2009).

### **DECISIONS UNDER PRIOR RULE OR STATUTE**

#### **ANALYSIS**

**Discretion of Trial Court.**

**Reuse of Report.**

**Showing Required in Absence of Investigation.**

**Where No Positive Plan of Rehabilitation.**

#### **Discretion of Trial Court.**

Where presentence report revealed that contrary to defendant's testimony he had lived in Florida and had used another name and that defendant had violated probation in Pennsylvania, the information was properly considered by the trial court as being relevant to court's refusal to grant probation and its imposition of sentence for rape conviction. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

#### **Reuse of Report.**

There was no error in the sentencing judge's use of the presentence investigation report prepared in connection with defendants' earlier sentencing in his conviction for

the sale of marijuana, which occurred nine days before the sentencing for delivery of controlled substance, absent a showing of some material change in defendant's circumstances in the nine-day interim. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

#### **Showing Required in Absence of Investigation.**

While the former rule stated that a trial judge need not require a presentence investigation report in every case and that it is within the court's discretion to do so, the rule also stated that when the trial court does not require a presentence investigation in a felony case, the court must show affirmatively why it was not ordered. *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979).

#### **Where No Positive Plan of Rehabilitation.**

Where defendant pleaded guilty to manslaughter charge of driving under influence of alcohol and killing driver of other car in collision, where his prior record indicated that



he was a habitual traffic offender and where presentence report suggested incarceration because no other rehabilitation seemed appropriate, sentence of indeterminate term of five years was not abuse of discretion by court since former rule providing for standards and

procedures governing presentence investigations and reports allowed a recommendation of incarceration where a positive plan of rehabilitation could not be formulated under the circumstances. *State v. Alvarez*, 102 Idaho 248, 629 P.2d 140 (1981).

### **Rule 33. Sentence and judgment.**

#### **(a) Sentence.**

(1) **Time for judgment and sentence.** After a plea or verdict of guilty, if the judgment be not arrested nor a new trial granted, the court must appoint a time for pronouncing judgment and sentence, which, in cases of felony, must, unless waived by the defendant, be at least two (2) days after the verdict. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask if the defendant wishes to make a statement and to present any information in mitigation of punishment. Pending sentence the court may commit the defendant or continue or alter the bail.

#### **(2) Method of securing defendant's appearance at sentencing.**

A. If a defendant is in custody the custodial officer shall present the defendant before the court for sentencing.

B. If a defendant, who is at liberty on own recognizance or on bail pursuant to a previous court order issued in the same criminal action, does not appear for sentencing when defendant's personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of money deposited may issue a bench warrant for defendant's arrest. Upon taking the defendant into custody pursuant to such bench warrant the executing peace officer must, without unnecessary delay, cause defendant to be brought into court for sentencing.

(3) **Notification of right to appeal.** After imposing sentence the court shall advise the defendant of the right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for leave to appeal in forma pauperis.

(b) **Judgment.** The judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) **Withdrawal of plea of guilty.** A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

(d) **Commutation of sentence and suspending or withholding judgment, conditions.** For an offense not punishable by death, the district court or the magistrates division may commute the sentence, suspend the execution of the judgment, or withhold judgment, and place the defendant upon probation as provided by law and these rules. Provided, however, that

the conditions of a withheld judgment or of probation shall not include any requirement of the contribution of money or property to any charity or other nongovernmental organization, but may include the rendering of labor and services to charities, governmental agencies, needy citizens and nonprofit organizations. The conditions of a withheld judgment or probation may also include, among other lawful provisions, the following:

(1) A requirement that the defendant make restitution to a party injured by the defendant's action.

(2) A requirement that the defendant pay a specific sum of money to the court for the prosecution of the criminal proceedings against the defendant, or a sum of money not to exceed the fine and court costs which could otherwise be assessed if the sentence were not suspended or withheld, which funds shall be distributed in the manner provided for the distribution of fines and forfeitures under section 19-4705, Idaho Code.

(3) A requirement that the defendant perform voluntary services for self-education purposes as part of a positive program of rehabilitation.

(e) **Revocation of probation.** The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation.

(f) **Waiver of fees and costs.**

(1) A person who has been sentenced by the court following a plea of guilty or finding of guilt may have his or her probation revoked or be found to be in contempt for failure to pay a fine, fee, or costs only if the court finds that the person has willfully refused to make such payment, or has failed to make sufficient bona fide efforts to legally acquire the resources to make such payment.

(2) A fee or cost imposed by statute on persons who plead guilty to or are found guilty of any offense may be waived in whole or part by the court only when there is a specific provision in statute allowing for the waiver of such fee or cost.

(3) A court may waive all or part of a fee or costs imposed by statute only upon making findings in writing or on the record that each statutory standard for the waiver of such fee or costs has been satisfied. If the court decides to waive such fee or costs in whole or in part, the court shall make such determination with regard to each offense on which the defendant is or has been sentenced, and shall determine whether such fee or costs shall be waived in whole or in part. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended March 23, 1990, effective July 1, 1990; amended March 28, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008; amended March 19, 2009, effective July 1, 2009; amended February 9, 2012, effective July 1, 2012.)

## STATUTORY NOTES

**Cross References.** Arrest of judgment,  
 §§ 19-2408 — 19-2411.  
 Judgment, §§ 19-2501 — 19-2523.

Restitution to victim, § 19-5302.  
 Suspension of judgment, parole, §§ 19-  
 2601 — 19-2607.

## JUDICIAL DECISIONS

## ANALYSIS

Alford Plea.  
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**Alford Plea.**

To enter a valid *Alford* plea for purposes of triggering a duty upon the court to inquire into the factual basis of a plea, a defendant or counsel must make the court aware of the defendant's refusal to admit the acts charged. *State v. Dye*, 124 Idaho 250, 858 P.2d 789 (Ct. App. 1993).

**Allocation.**

The right of allocation does not give the defendant the right to argue with the court during the pronouncement of the sentence; the right of allocation is the right to make a statement before the court pronounces sentence; therefore, where the district court allowed defendant to address the court before he was sentenced, the court's refusal to permit defendant to interrupt the pronounce-

ment of sentence was not a denial of defendant's right of allocation. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

Allocation is required if the trial court had not originally imposed sentence, but had withheld judgment until the probation revocation proceeding. There is, however, no right of allocation at a probation revocation proceeding when the original sentence is ordered executed. Opportunity for allocation is the preferred or better practice in all sentencing situations. *State v. Nez*, 130 Idaho 950, 950 P.2d 1289 (Ct. App. 1997).

Offering a criminal defendant the opportunity to make a statement in allocation after sentence had already been imposed was insufficient to satisfy the requirement of Idaho Crim. R. 33, especially where the trial court did not clearly indicate that the just-imposed sentence was subject to modification or honestly considered the defendant's statement. *State v. Gervasi*, 138 Idaho 813, 69 P.3d 1074 (Ct. App. 2003).

Allocation was so important a right that the trial court's failure to meet its obligation to allow a defendant the opportunity of allocation was subject to challenge on appeal as fundamental error. *State v. Gervasi*, 138 Idaho 813, 69 P.3d 1074 (Ct. App. 2003).

**Appellate Review.**

Review of a denial of a plea withdrawal is limited to the question of whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986).

Appellate review of the denial of a motion to withdraw a plea is limited to whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987); *State v. Rose*, 122 Idaho 555, 835 P.2d 1366 (Ct. App. 1992).

A motion to withdraw a plea of guilty is addressed to the sound discretion of the court, and the appellate court looks to the whole record to determine whether it is manifestly unjust to preclude the defendant from withdrawing his or her plea. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).



The correct avenue for pursuing a challenge of the validity of defendant's plea and conviction would have been to bring a motion under subsection (c) of this rule; clearly, a motion which challenges the legality of a conviction on the grounds that it was based on an invalid guilty plea is beyond the scope of a motion brought under I.C.R. 35; accordingly, because defendant failed to challenge the legality of his plea and conviction in the district court, the Court of Appeals would not address that issue on appeal. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

### **Burden of Proof.**

A motion made after sentencing may be granted only "to correct a manifest injustice." The defendant bears the burden of demonstrating a manifest injustice. A less rigorous standard applies to a motion made before sentencing, requiring that the defendant present a "just reason" for withdrawing the plea. In either situation, the defendant has the burden of proving that the plea should be withdrawn. *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992).

Under subsection (c) of this rule, a criminal defendant may withdraw a plea of guilty prior to sentencing upon a showing of just cause. The standard for review on appeal in cases where a defendant has attempted to withdraw a guilty plea is whether the district court abused its discretion in denying the motion. *State v. Rose*, 122 Idaho 555, 835 P.2d 1366 (Ct. App. 1992).

### **Construction with Other Law.**

Although defendant did not file a timely motion to withdraw his guilty plea pursuant to subsection (d) of this rule, he is not foreclosed from pursuing post-conviction relief challenging his guilty plea. *Odiaga v. State*, 130 Idaho 915, 950 P.2d 1254 (1997).

### **Delay Before Sentencing.**

The two-day requirement of this rule is not jurisdictional. *State v. Goldman*, 107 Idaho 209, 687 P.2d 599 (Ct. App. 1984).

### **Denial of New Trial.**

Where defendant claimed that he was at a bar at the time of the alleged incidents, and where a duly diligent search for corroboration of this claim would at least encompass the employees of the establishment where the person claims to have been; but neither defendant's motion for a new trial, nor any other portion of the record suggests any reason why the bartender's testimony was unavailable to defendant prior to trial, the denial of the motion for a new trial was proper. *State v. Morris*, 101 Idaho 120, 609 P.2d 652 (1980).

### **Discretion of Court.**

Where the court, at time of sentencing the defendant upon his plea of guilty, simply imposed an identical sentence as that given the same defendant for a similar offense in another county, the court did not abdicate the proper exercise of its discretion by replicating the sentence, where the record contained the judge's remark that he had considered the criteria in § 19-2521, and that he regarded the sentence imposed in the companion case as fair. *State v. Salinas*, 103 Idaho 54, 644 P.2d 376 (Ct. App. 1982).

The determination of an appropriate sentence is vested within the sound legal discretion of the trial court; refusal to grant a withheld judgment will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a withheld judgment would not be appropriate. *State v. Geier*, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985).

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986).

A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

Where, in the plea bargain agreement, the defendant acknowledged that the state would be released from its commitments if the defendant failed to appear for the sentencing, the state was entitled to bring escape charges against him and to withdraw its recommendation on sentencing when he failed to show up for the sentencing; therefore, the defendant did not demonstrate a just reason for withdrawal of his plea when he alleged that the state breached the agreement; and it was not an abuse of discretion for the district court to deny the motion to withdraw the plea. *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

A district judge did not abuse his discretion by ruling prejudice to the State was a sufficient reason for denying a murder defendant's motion to withdraw his guilty plea where the plea was made following seven days of presentation of evidence by the State, where the State had spent \$65,000 in an aborted trial, where the State's strategy had been fully exposed, where a retrial would place a heavy burden upon the State and its witnesses (some of whom had traveled from North Carolina to testify), and where the passage of time from the first trial to a second trial was likely to affect the memories of witnesses. *State v. Hawkins*, 115 Idaho 719, 769 P.2d 596 (Ct.

App. 1989), *aff'd*, 117 Idaho 285, 787 P.2d 271 (1990).

Magistrate did not abuse his discretion by failing to grant a withheld judgment for a DUI offense, even though magistrate had a personal policy of not granting withheld judgments, where the transcript of the sentencing hearing shows the magistrate knew the true scope of his sentencing discretion, where he recognized that a withheld judgment was available, not proscribed, as a sentencing alternative and where he articulated a policy that was not totally inflexible. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

#### **Immediate Sentencing Improper.**

Where the defendant pled guilty to kidnapping a woman with intent to rape her, and the district judge pronounced sentence immediately upon acceptance of the plea, without ordering a presentence investigation and without asking the defendant or defense counsel whether they wished to speak or to present information in mitigation of punishment, the sentence was imposed by improper procedure and had to be vacated. *State v. Goldman*, 107 Idaho 209, 687 P.2d 599 (Ct. App. 1984).

#### **Manifest Injustice.**

Where there was an open admission of guilt and a factual basis for the guilty plea, where the record showed that the district court followed the requirements of constitutional due process in accepting the plea, where the alleged misadvice of counsel as to the terms of plea bargain occurred before the arraignment and sentence hearings and, at those hearings, defendant was interrogated, precisely and at length, by the court as to any alleged promises made to him by anyone and was informed that the plea bargain was only a recommendation and that the judge would not know the disposition of the case until the presentence report was received, and where the record further disclosed that defendant had repeated contacts with the criminal justice system, the plea of guilty was freely, understandingly, and voluntarily entered and no "manifest injustice" resulted from acceptance of the plea; neither did the ten-year indeterminate sentence for second-degree arson indicate "manifest injustice" since it was within the statutory maximum authorized by law and, in view of defendant's prior record, was not excessive. *Russell v. State*, 105 Idaho 497, 670 P.2d 904 (Ct. App. 1983).

Under subsection (c), a plea of guilty may be withdrawn after sentencing only to correct a manifest injustice and the defendant has the burden of demonstrating a manifest injus-

tice. An established abridgement of a constitutional right is deemed a manifest injustice as a matter of law. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

#### **Plea Bargain Agreement.**

The trial court did not abuse its discretion in accepting a plea bargain agreement whereby the defendant entered a plea of guilty to second-degree murder in exchange for a recommendation by the prosecutor to the court for a sentence not to exceed 16 years and a promise that if the court adjudged a longer sentence, an opportunity to withdraw his plea. *State v. Cleverly*, 101 Idaho 596, 618 P.2d 774 (1980).

Where a defendant is told, before his plea of guilty is accepted, that the sentencing judge is not bound by the terms of the plea arrangement, the defendant is not entitled to withdraw his plea under subsection (c) of this rule when the judge imposes a sentence different from the one recommended by the prosecutor. *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985).

The district court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea, where the motion was filed after sentencing was completed, neither the signing of the information nor the disclosure of the case disposition resulted in manifest injustice, the defendant sought relief because his anticipated benefit from the plea bargain — extradition to another state did not materialize, and this result, a risk inherent in the plea bargain agreement from the beginning, did not amount to manifest injustice. *State v. Jaramillo*, 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987), review denied, 116 Idaho 467, 776 P.2d 829 (1988).

#### **Plea Upheld.**

Where the defendant was fully advised of his right to plead not guilty to first degree murder, was questioned concerning his knowledge of the charge, was advised of the sentencing consequences of a guilty plea, was informed that by pleading guilty he would relinquish the constitutional protections provided by a trial, and was represented by counsel prior to the hearing when he entered his guilty plea and where his counsel was present at the hearing, it was not manifestly unjust to allow defendant's guilty plea to first degree murder to stand. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985).

Where the defendant claimed that he asked to withdraw his guilty plea just three days after making the plea and before he had any knowledge of the presentence report, but he failed to show facts sufficient to support his assertion, the district court did not abuse its

discretion by denying the defendant's motion to withdraw his guilty pleas. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986).

Where, in prosecution for grand theft and petit theft, the court followed the requirements of I.C.R. 11(c) in accepting the defendant's plea, the defendant was advised by the court of the requisite element of intent for grand theft, the defendant acknowledged the intent element and admitted that he had the intent to deprive the owner of his property, the defendant did indicate doubt concerning his guilt as to the petit thefts but elected to plead guilty to gain the benefit of plea negotiations, and even if the counsel's performance were deficient, the defendant did not show how he was prejudiced thereby, the defendant did not prove a manifest injustice requiring the withdrawal of his guilty plea. *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (Ct. App. 1988).

Where the defendant (1) was specifically informed regarding the effect of his guilty plea on his rights, (2) was informed in detail of the elements of the crime to which he was pleading guilty, and (3) understood fully the implications of the guilty plea, the record fully sustains the district court's conclusion that the defendant's guilty plea was given knowingly and intelligently, and was voluntarily made. *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

Defendant's desire to confront an informant was not sufficient ground, by itself, to withdraw his guilty plea where defendant had not identified any questions he might have asked, or any other benefit his defense might have gained, if the informant had testified at trial. *State v. Hocker*, 115 Idaho 137, 765 P.2d 162 (Ct. App. 1988).

Although defendant allowed his attorney to summarize the details of his offense, rather than stating them himself, his admission of guilt was full and unconditional where defendant did not make a statement refusing to admit the facts showing commission of the crime charged, rather, he freely admitted his guilt on each element of the crime and when asked whether he believed he was innocent, he stated that he was guilty. *State v. Hocker*, 115 Idaho 137, 765 P.2d 162 (Ct. App. 1988).

Where the defendant had a full understanding of his rights, the nature of the offense, the possible punishments, and the consequences of the plea and at no time prior to his motion to withdraw did he indicate confusion as to the above points, nor had he provided facts demonstrating that his plea was coerced or that he did not understand what was taking place, the record revealed that the

magistrate followed the requirements of subsection (c) of this rule establishing a prima facie showing that the plea was voluntary and knowing. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

Record supported the district court's finding that defendant was informed of and understood the nature of the charge when he pleaded guilty; the words used in the information and by the trial court were sufficient to inform a person of common understanding that an intent to sexually penetrate was being alleged, such that when the trial court referred to the charge as battery with intent to commit rape, it sufficiently conveyed that the charge alleged an intent to sexually penetrate the victim. *State v. Mayer*, 139 Idaho 643, 84 P.3d 579 (Ct. App. 2004).

#### **Prerequisites to Review.**

Before an appellate court can decide whether a guilty plea was appropriately accepted the issue must be preserved by the defendant by first moving to have the plea withdrawn, and because the defendant did not seek to withdraw the guilty plea below, the question of the validity of the pleas was not appropriately before the appellate court. *State v. Green*, 130 Idaho 503, 943 P.2d 929 (1997).

#### **Proceedings Following Nullification.**

Where a judgment has been vacated, it is a nullity and the effect is as if it had never been rendered at all; and the court of appeal's opinion reversing the district court's decision denying the defendant a psychological evaluation and vacating the defendant's sentences nullified those sentencing proceedings; and consequently on remand, the defendant's case proceeded as if the original sentences had never been entered; and under this rule, the district court should have utilized the less rigorous standard of just reason in determining whether to grant the defendant's request to withdraw his Alford pleas. *State v. McFarland*, 130 Idaho 358, 941 P.2d 330 (Ct. App. 1997).

#### **Proportionality Challenge.**

A proportionality challenge to a sentence is inapplicable to other than death penalty cases, and the claim of defendants convicted of misdemeanor battery and sentenced to jail time, fines and probation that the sentences are out of proportion to the gravity of the offense committed were rejected. *State v. Donohoe*, 126 Idaho 989, 895 P.2d 590 (Ct. App. 1995).

#### **Recommendation of Judge.**

Where the judge recommended that the Commission of Pardons and Parole not con-



sider commutation of the sentence for at least 20 years, his recommendation was purely advisory, and it did not mean that the judge intended for the defendant to serve only 20 years or that the judge was depending upon the Commission of Pardons and Parole to accomplish that particular result by an exercise of its own independent executive authority. *State v. Hoffman*, 111 Idaho 966, 729 P.2d 441 (Ct. App. 1986).

### **Right to Speak.**

#### **—By Defendant.**

The failure by the trial judge to afford the right of allocution is not grounds for reversing the judgment of conviction, but requires a remand to permit resentencing after defendant is granted the right to speak. *State v. Carey*, 122 Idaho 382, 834 P.2d 899 (Ct. App. 1992).

#### **—On Behalf of Defendant.**

Affording defense counsel the right to speak on the accused's behalf does not constitute compliance with the rule. *State v. Carey*, 122 Idaho 382, 834 P.2d 899 (Ct. App. 1992).

### **Subject-Matter Jurisdiction.**

Since district court improperly allowed defendant to withdraw earlier guilty plea more than 42 days after final judgment, that holding and all subsequent proceedings in the matter were without subject matter jurisdiction and void. Thus, defendant's subsequent conviction and sentence on a different charge were vacated, his original conviction and sentence were reinstated, and case was remanded to effectuate this decision. *State v. Armstrong*, 146 Idaho 372, 195 P.3d 731 (Ct. App. 2008).

### **Withdrawal.**

#### **—Generally.**

To prevail on an ineffective assistance of counsel claim, the petitioner must show that his defense attorney's performance was deficient, and ordinarily the petitioner must also show that the defendant was prejudiced by the deficiency. To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Zepeda v. State*, 152 Idaho 710, 274 P.3d 11 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 116 (Idaho Apr. 25, 2012).

While prejudice from ineffective assistance may be presumed when defense counsel fails to file a notice of appeal after the defendant so requests, that presumption does not apply to a defense attorney's failure to file a motion to

withdraw a guilty plea. *Zepeda v. State*, 152 Idaho 710, 274 P.3d 11 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 116 (Idaho Apr. 25, 2012).

### **Withdrawal of Plea.**

Idaho R. Crim. P. 33(c) did not include any provision extending the jurisdiction of the trial court for the purpose of hearing a motion to withdraw a guilty plea, such that where defendant did not appeal a judgment accepting his *Alford* plea, the judgment became final 42 days later, and the trial court did not have jurisdiction to entertain his motion to withdraw his guilty plea filed over six years later. *State v. Jakoski*, 139 Idaho 352, 79 P.3d 711 (2003).

Trial court properly denied defendant's motion to withdraw his guilty plea because the trial court was without jurisdiction to consider the motion because the motion was untimely, having been filed nearly five months after the entry of the withheld judgment. Because defendant did not appeal the order withholding judgment, it was final 42 days after entry pursuant to Idaho Crim. R. 54.3. *State v. Woodbury*, 141 Idaho 547, 112 P.3d 835 (Ct. App. 2005).

Dismissal of the inmate's petition for post-conviction relief was appropriate because it was untimely filed. She asserted in the letter to the district court that she did not understand her guilty plea, which appeared to have been a basis to request to have her guilty plea withdrawn; however, a motion to withdraw a guilty plea was not considered as an application for post-conviction relief even where the motion also included claims of ineffective assistance of counsel. *Schwartz v. State*, 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008).

District court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea to grand theft because defendant failed to demonstrate he did not understand what charges he was pleading guilty to or the potential length of sentence that could be imposed. *State v. Arthur*, 145 Idaho 219, 177 P.3d 966 (2008).

Defendant showed a just reason for withdrawal of his guilty plea to grand theft for stealing a newborn calf, because defendant had been affirmatively misled to believe that the value of the calf was irrelevant to his guilty plea, and defendant therefore had no reason to question the value of the calf and the record provided no basis to conclude that he had any personal knowledge of its value. Defense counsel apparently made no independent investigation to determine the market value of the calf, and defense counsel had admitted that he mistakenly believed that even if the value threshold applied, the

State's evidence was sufficient to prove a value of more than \$ 150. *State v. Salazar-Garcia*, 145 Idaho 690, 183 P.3d 778 (Ct. App. 2008).

Defendant did not show error in the denial of his motion for withdrawal of the guilty plea; defendant's motion was untimely and the court lacked subject matter jurisdiction to address the merits. *State v. Peterson*, 148 Idaho 610, 226 P.3d 552 (2010).

#### —Denied.

Where review of the record established that defendant understood the consequences of his plea of guilty, that he had been questioned in detail by the court concerning every aspect of it and had acknowledged that the agreement was not binding upon the court and that no promises had been made to him concerning the sentence and at no time before sentencing did defendant indicate a desire to withdraw his plea, he knowingly, intelligently and voluntarily entered the plea and as there was no manifest injustice court did not abuse its discretion in denying defendant's motion. *State v. Gomez*, 124 Idaho 177, 857 P.2d 656 (1993).

The district court did not err by denying defendant's request to withdraw his guilty pleas where defendant's pleas were entered voluntarily, intelligently, and knowingly. *State v. Dye*, 124 Idaho 250, 858 P.2d 789 (Ct. App. 1993).

Defendant's motion to withdraw guilty plea was denied where mental therapist testified that defendant was neither severely depressed nor mentally ill and that the plea was thereby intelligent, knowing and voluntary. *State v. Dopp*, 124 Idaho 481, 861 P.2d 51 (1993).

Where defendant failed to show that a specific sentencing recommendation was part of any plea agreement, there was no error in the conclusion that defendant had not shown a manifest injustice which would permit withdrawal of guilty plea. *State v. Banuelos*, 124 Idaho 569, 861 P.2d 1234 (Ct. App. 1993), cert. denied, 510 U.S. 1098, 114 S. Ct. 936, 127 L. Ed. 2d 227 (1994).

Defendant was not entitled to withdraw guilty plea where prosecutor breached negotiated plea agreement because defendant misrepresented his prior criminal history and where defendant claimed plea was induced by the pressures of family circumstances. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).

The district court did not err in finding that defendant was informed regarding the nature of the charge of aggravated battery to which he pled guilty. *State v. Izzard*, 136 Idaho 124, 29 P.3d 961 (Ct. App. 2001).

Trial court was not deprived of jurisdiction to accept defendant's plea of guilty to a lesser offense because the parties entered into a mutually agreeable amendment of the information in open court; and under such circumstances, the defendant waived any objection that a written pleading documenting the amendment was not filed prior to the acceptance of the plea. *State v. Izzard*, 136 Idaho 124, 29 P.3d 961 (Ct. App. 2001).

Trial court did not err in denying defendant's motion under I.C.R. 33(c) to withdraw a plea because (1) defendant's plea was knowingly and voluntarily entered into and (2) defendant failed to support the claims of perjury and discovery violations. *State v. Hayes*, 138 Idaho 761, 69 P.3d 181 (Ct. App. 2003).

Court would not set aside defendant's plea of guilty to two counts of issuing a check without funds in the absence of any showing of just cause. *State v. Akin*, 139 Idaho 160, 75 P.3d 214 (Ct. App. 2003).

Denial of defendant's motion to withdraw his guilty plea was proper pursuant to Idaho Crim. R. 33(c) where more than 42 days had passed since final judgment was rendered. Further, the holding in another case did not create new law or overrule past precedent and thus, rules governing retroactivity did not apply. *State v. Moon*, 140 Idaho 609, 97 P.3d 476 (Ct. App. 2004).

Defendant failed to show that a manifest injustice resulted from the denial of his motion to withdraw his guilty plea where his personal family circumstances were not attributable to the state and did not constitute impermissible coercion rendering his guilty plea invalid or involuntary; record did not support defendant's allegation that a strained relationship with the trial court affected the voluntariness of his plea. *State v. Nath*, 141 Idaho 584, 114 P.3d 142 (Ct. App. 2005).

Trial court properly denied defendant's motion to withdraw his guilty plea because the trial court was without jurisdiction to consider the motion because the motion was untimely, having been filed nearly five months after the entry of the withheld judgment. Because defendant did not appeal the order withholding judgment, it was final 42 days after entry pursuant to Idaho Crim. R. 33(c). *State v. Woodbury*, 141 Idaho 547, 112 P.3d 835 (Ct. App. 2005).

Defendant's motion to withdraw his guilty plea, filed over two years after his conviction was final, was denied, as the trial court no longer had jurisdiction to grant the motion. *State v. Wegner*, 148 Idaho 270, 220 P.3d 1089 (2009).

Where defendant filed an "Amended Motion for Withdrawal of Plea of Guilty and Motion

for Post-Conviction Relief” in his criminal case five months after the judgment of conviction was entered, the motion was time-barred by subsection (c) of this rule and could not be treated as a petition for postconviction relief. *State v. Allen*, — Idaho —, 283 P.3d 114 (Ct. App. 2012).

**—Erroneously Denied.**

Where the court record showed that when defendant entered his guilty plea the trial court did not attempt to re-advise him of the rights he was waiving and the consequences of his plea, and where, although defendant had been previously advised of that information at the district court level, the record did not affirmatively show that defendant understood that information and on such a record the order of the district court denying the defendant’s motion to withdraw his guilty plea was reversed. *State v. Rodriguez*, 117 Idaho 292, 787 P.2d 278 (1990).

**—Erroneously Permitted.**

Where the trial court made no express finding that the defendants had suffered a manifest injustice, the withdrawal of their guilty pleas could not stand. *State v. Harbaugh*, 123 Idaho 835, 853 P.2d 580 (1993).

**—Following Sentencing.**

A stricter standard is applied to motion for plea withdrawal following sentencing to insure that the accused does not plead guilty merely to test the weight of potential punishment and then to withdraw the plea if the sentence is unexpectedly severe. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

Considering the fact that defendant spoke no English, and had no prior encounter with the state legal system, even though he was provided with an interpreter, the language barrier coupled with his lack of experience with the court system may have made it difficult for him to grasp the information concerning his right to a jury trial, to confront witnesses against him, and his right against self-incrimination and information concerning the minimum and maximum penalty that could be imposed, and considering the record as a whole, from both the initial arrangement and the change of plea hearing, the record does not support a finding that the guilty plea was entered voluntarily, knowingly and intelligently. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

After sentencing, a court may allow the withdrawal of a plea of guilty only to correct manifest injustice; therefore, it is defendant’s burden to demonstrate that manifest injustice would result if his motion to withdraw his guilty plea is denied. *State v. Gomez*, 124 Idaho 177, 857 P.2d 656 (1993).

Defendant was entitled to withdraw his plea of guilty to the charge of aggravated battery where there was no mention at his plea hearing of the possibility of a consecutive sentence or of a restitution order, and nothing indicated that defendant had learned of these consequences earlier. *State v. Shook*, 144 Idaho 858, 172 P.3d 1133 (Ct. App. 2007).

Motion for withdrawal of a plea filed after sentencing is subject to a different standard—one requiring a showing of “manifest injustice.” The stricter standard after sentencing is justified to insure that the accused is not encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence is unexpectedly severe. *State v. Stone*, 147 Idaho 330, 208 P.3d 734 (2009).

**—Generally.**

Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that he was denied the effective assistance of counsel. *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (Ct. App. 1988).

The defendant’s review of the presentence report is a proper factor to weigh in deciding whether a motion to withdraw a plea should be granted. *State v. Howell*, 104 Idaho 393, 659 P.2d 147 (Ct. App. 1983).

A plea may be withdrawn without an allegation that the defendant is innocent of the charge to which the plea was entered. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

A defendant’s constitutional rights, such as the right to a jury trial and the right to put the government to its burden of proof, are not impermissibly abridged by requiring a just reason for withdrawing a plea which the defendant voluntarily made and which the court accepted after careful inquiry. *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

The trial court’s failure to engage in a dialogue reminding defendant once again of his rights at the time of entry of the plea is not required, nor does failure to contemporaneously advise entitle defendant to withdraw his plea as a matter of law. *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990).

The failure to comply with Idaho Criminal Rule 11 does not, by itself, constitute manifest injustice, as that rule was not constitutionally mandated in order to fulfill the requirement of a voluntary, knowing, and intelligent plea. *State v. Flowers*, 150 Idaho 568, 249 P.3d 367 (2011).

**—Guilty.**

Where the plea of guilty had been made knowingly, intelligently and voluntarily, the defendant had been informed of the intent



requirement twice, by a reading of the information and by the court's rephrasing of that information, the motion for withdrawal of the plea, citing lack of intent as a ground, was not made until one hour before the sentencing hearing was scheduled to begin and, at that time, more than two months had elapsed since defendant was informed of the intent requirement and during the interim defendant had reviewed his presentence report, the district court properly exercised its discretion in denying motion to withdraw guilty plea. *State v. Howell*, 104 Idaho 393, 659 P.2d 147 (Ct. App. 1983).

The proper exercise of discretion to allow or refuse withdrawal of a guilty plea requires identifying the conflicting factors which should bear on the decision, and arriving at a decision based on a well-reasoned consideration of those factors. To assure that discretion has been exercised in this manner, and to provide for meaningful appellate review, the trial court should state on the record the factors upon which its decision is grounded. *State v. Howell*, 104 Idaho 393, 659 P.2d 147 (Ct. App. 1983).

That a court may accept an otherwise valid guilty plea, even though the defendant denies criminal intent, does not necessarily preclude the court from later allowing the defendant to withdraw the plea. The granting or denial of a motion to withdraw a plea of guilty, before sentence is imposed, is within the discretion of the trial court; generally such discretion should be exercised liberally. *State v. Howell*, 104 Idaho 393, 659 P.2d 147 (Ct. App. 1983).

The fact that the defendant may not specifically recall or admit to committing the act did not foreclose him from voluntarily pleading guilty since the defendant agreed that the evidence made a strong factual case against him, and where the record of the hearing in which the defendant pleaded guilty to a lewd and lascivious act with a minor child disclosed that he freely and voluntarily pleaded guilty with full knowledge of all the consequences, the district court properly denied the defendant's motion to withdraw the guilty plea after the sentence was imposed. *State v. Harmon*, 107 Idaho 73, 685 P.2d 814 (1984).

A motion to withdraw a guilty plea is addressed to the sound discretion of the district court. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985).

While written findings may be required in rulings on motions brought pursuant to the Uniform Post-Conviction Relief Act, nothing in subsection (c) of this rule requires a trial court to make written findings when ruling on a motion to withdraw a guilty plea after sentencing. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985).

In deciding whether to allow a guilty plea to be withdrawn, a judge can weigh the fact that the defendant sought to withdraw his plea only after reviewing a presentence report recommending lengthy incarceration. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986).

Ordinarily, a plea of guilty—made knowingly, voluntarily and intelligently—may not be withdrawn after sentencing. *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (Ct. App. 1988).

After sentencing, the court may set aside a judgment of conviction and permit a defendant to withdraw the plea to correct a manifest injustice; this strict standard is applied following sentencing to insure that the accused does not plead guilty merely to test the weight of potential punishment and then to withdraw the plea if the sentence is unexpectedly severe. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).

A motion to withdraw a guilty plea made after sentencing may be granted only "to correct manifest injustice"; a less rigorous standard applies to a motion made before sentencing. *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

In order to seek to withdraw a plea of guilty before sentencing, the defendant must present a just reason for withdrawing the plea; once the defendant has met this burden, the state may avoid the granting of the motion by demonstrating that prejudice would result from withdrawal of the plea. *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

It is well established that the granting or denial of a motion to withdraw a guilty plea is within the discretion of the trial court, and that such discretion should be liberally exercised. *State v. Hawkins*, 117 Idaho 285, 787 P.2d 271 (1990).

Where defendant who changed his plea to guilty, had been present during five days of jury selection and seven days of the state's evidence, this was not a case where a defendant pled guilty without having heard the evidence against him; defendant was well aware of the evidence against him and made a voluntary choice to change his plea, and under these circumstances, where the trial was into its third week, great deference must be given to the discretion of the district judge who has been present during all the proceedings and has conducted an extensive inquiry prior to accepting a change of plea. *State v. Hawkins*, 117 Idaho 285, 787 P.2d 271 (1990).

Court did not abuse its discretion in denying motion to withdraw guilty plea where the

defendant entered a knowing, intelligent and voluntary guilty plea as part of a plea bargain agreement from which he and his wife received benefits, and where he was represented by competent trial counsel who concurred in the decision to plead guilty under the terms of the plea agreement. *State v. Rodriguez*, 118 Idaho 957, 801 P.2d 1308 (Ct. App. 1990).

The record demonstrates that in denying defendant's motion to withdraw his guilty plea, the trial court reviewed the colloquy that initially took place between the court and the defendant at the time he entered his guilty plea; the trial court noted that to accept defendant's contention that he was assured that the presiding judge would honor the terms of the plea bargain, including an indeterminate sentence, would require the reviewing court to ignore the record and defendant's own statements contained therein regarding the extent of the plea arrangement; the trial court properly rejected defendant's contentions and determined that denying his motion to withdraw his guilty plea would not constitute a manifest injustice under the circumstances of this case. *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

Failure of the defendant to present and support a plausible reason for withdrawing the guilty plea, even absent prejudice to the prosecution, militates against granting the motion. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Ordinarily, a plea of guilty may not be withdrawn after sentencing. Court of appeals will look to the whole record to determine whether it would be manifestly unjust to preclude the defendant from withdrawing his plea. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Court properly exercised its discretion in denying defendant's motion to withdraw his pleas of guilty to burglary and grand theft where evidence included testimony from other participants in the burglary and theft who identified defendant as a participant. Moreover, the court considered the testimony defendant had given when he tendered his pleas of guilty and had admitted his complicity in the offenses. *State v. Knowlton*, 122 Idaho 548, 835 P.2d 1359 (Ct. App. 1992).

The presentence withdrawal of a guilty plea is not an automatic right. The defendant has the burden of proving that the plea should be withdrawn. Failure to present and support a plausible reason, even absent prejudice to the prosecution, will weigh against grant with-

drawal. *State v. Rose*, 122 Idaho 555, 835 P.2d 1366 (Ct. App. 1992).

Defendant claimed that it was manifestly unjust to deny the withdrawal of his guilty plea because the trial court failed to ascertain whether there was a factual basis for the guilty plea to the charge of leaving the scene of an accident resulting in injury, and therefore his plea was unconstitutional. However, the record showed that at the change of plea hearing, defendant conceded that he did hit the victims with his truck and that he subsequently fled the scene. The judge did ascertain that there was a strong factual basis for the plea, and that defendant did enter his plea knowingly and voluntarily. *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

#### —Just Reason Standard.

District court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea under the just reason standard; record showed his plea was voluntarily, knowingly, and intelligently given and he did not demonstrate a just reason to withdraw his plea. *State v. Acevedo*, 131 Idaho 513, 960 P.2d 196 (Ct. App. 1998).

#### —Proper.

District court did not abuse its discretion by vacating defendant's guilty plea in order to give defendant an opportunity to change his mind after being informed of the correct maximum penalty for the charge of felony eluding a police officer was five years imprisonment, a \$50,000 fine, and suspension of driving privileges for one to three years. *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996).

**Cited in:** *State v. Mason*, 102 Idaho 866, 643 P.2d 78 (1982); *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982); *State v. Knight*, 106 Idaho 496, 681 P.2d 6 (Ct. App. 1984); *State v. Browning*, 107 Idaho 870, 693 P.2d 1072 (Ct. App. 1984); *Gawron v. Roberts*, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987); *Jones v. State*, 118 Idaho 842, 801 P.2d 49 (Ct. App. 1990); *Banuelos v. State*, 127 Idaho 860, 908 P.2d 162 (Ct. App. 1995); *State v. Medina*, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999); *State v. Wilson*, 136 Idaho 771, 40 P.3d 129 (Ct. App. 2001); *State v. Huffman*, 137 Idaho 886, 55 P.3d 879 (Ct. App. 2002); *State Ex Rel. City of Sandpoint v. Whitt*, 146 Idaho 292, 192 P.3d 1116 (2008); *State v. Thomas*, 146 Idaho 592, 199 P.3d 769 (2008).

## OPINIONS OF ATTORNEY GENERAL

Subsection (d) of this rule and subsection (d) of M.C.R. 10 require that any moneys paid as a condition of a withheld judgment be distributed in the manner provided for in § 19-4705. OAG 83-1.

Subsection (d) of this rule limits the discretion of the court in directing the distribution of moneys levied as part of a withheld judgment for purposes other than those enumerated in the rule; pursuant to such subsection, any fines levied by a court as part of a withheld judgment must be turned over to the county auditor for distribution under the terms of § 19-4705. OAG 83-1.

A person who is pardoned or who has successfully completed the period of a withheld judgment and had his or her guilty plea or conviction negated or expunged, may possess and transact firearms without violating the federal Gun Control Act; however, during the probationary period of a withheld judgment and during and after the term which a person serves on probation with a suspended sentence or on parole, such person is a convicted felon for the purposes of the Gun Control Act. OAG 86-16.

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Discretion of Court.**

Where defendant who pled guilty to robbery admitted at his mitigation hearing that he had been out of prison only three and a half months before he had committed the robbery and had escaped twice from minimum security confinement, the trial court's rejection of probation as an alternative to incarceration and its imposition of sentence without a pre-

sentence investigation was not an abuse of discretion. *State v. Roderick*, 97 Idaho 82, 540 P.2d 267 (1975).

Former provision governing commutation and suspension of sentence implemented the court's exercise of the authority granted by § 19-2601. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

## RESEARCH REFERENCES

**A.L.R.** Propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Racial discrimination in punishment for crime, 40 A.L.R.3d 227.

Right of state or Federal prisoner to credit for time served in another jurisdiction before delivery to state or Federal authorities, 90 A.L.R.3d 408.

**Rule 33.1. Procedure where death penalty is authorized and jury is waived for special sentencing proceeding.**

(a) **Findings of the trial court in capital offenses.** In special sentencing proceedings in capital cases where a jury has been waived the trial court shall make written findings as required by section 19-2515(8)(b), Idaho Code. The trial court shall serve copies of these written findings upon the defendant or defendant's counsel and the prosecuting attorney.

(b) **Form of findings.** The written findings of the trial court to be made after the special sentencing proceeding shall be in substantially the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF \_\_\_\_\_.



STATE OF IDAHO,  
Plaintiff

vs.

\_\_\_\_\_,  
Defendant.

)  
) FINDINGS OF THE COURT IN  
) CONSIDERING DEATH  
) PENALTY UNDER  
) SECTION 19-2515,  
) IDAHO CODE  
)

The above defendant having (been found guilty by a jury) (entered a plea of guilty) of the criminal offense of murder in the first degree, which under the law authorizes the imposition of the death penalty, the jury having been waived, and the court having held a special sentencing proceeding for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

- NOW THEREFORE the court hereby makes the following findings:
1. *Conviction.* That the defendant while represented by counsel was found guilty of the offense of murder in the first degree (by jury verdict) (pursuant to a plea of guilty).
2. *Sentencing Hearing.* That a sentencing hearing was held on \_\_\_\_\_, and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.
3. *Facts and Arguments Found in Mitigation.*

[Summarize and Itemize]

4. *Facts and Arguments Found in Aggravation.*

[Summarize and Itemize]

5. *Statutory Aggravating Circumstances Found Under Section 19-2515(9), Idaho Code.*

[Describe in detail if any are found.]

6. *Reasons Why Death Penalty Was Imposed.*

[Set forth the finding and reasons why the court finds no mitigating circumstances would make the imposition of the death penalty unjust.]

OR

7. *Reasons Why Death Penalty Was Not Imposed.*

[Set forth finding why court finds the mitigating circumstances outweigh the gravity of any aggravating circumstances so as to make unjust the imposition of the death penalty.]

CONCLUSION

That the death penalty (should) (should not) be imposed on the defendant for the capital offense of which he was convicted.

DATED \_\_\_\_\_

/s/ \_\_\_\_\_  
District Judge

(Adopted December 27, 1979, effective July 1, 1980; amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

**Cross References.** Death sentence, § 19-2701 et seq.

JUDICIAL DECISIONS

ANALYSIS

Failure to Consider Presentence Report.  
Hearsay Evidence.

**Failure to Consider Presentence Report.**

If a defendant is convicted of first degree murder and subject to the death penalty, probation in all probability is not a viable alternative; however, the failure to consider a presentence report in such a circumstance would without question constitute reversible error. *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

**Hearsay Evidence.**

Hearsay evidence presented in a presentence

investigation report in the manner and in the form articulated in this rule, as well as in § 19-2516, I.C.R. 32, and *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), is appropriate at sentencing hearings. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

**Cited in:** *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

**Rule 33.2. Report of imposition of death penalty.**

(a) **Sentencing report.** Whenever a trial court imposes the sentence of death upon a defendant, the sentencing trial court shall forthwith prepare a written report with regard to the imposition of the death penalty as

required by section 19-2827, Idaho Code. Upon preparation of the report, the trial court shall file the original thereof with the Supreme Court of the State of Idaho, file a signed copy in the district court file of the criminal action, and serve copies of the report upon the defendant, the defendant’s counsel, the prosecutor and the Attorney General and the Governor of the state of Idaho.

(b) **Form of report.** The sentencing report to be prepared by the sentencing trial court with regard to the imposition of the death penalty as required by this rule shall be in substantially the following form:

IN THE SUPREME COURT OF THE STATE OF IDAHO

State of Idaho,

Plaintiff,

vs.

\_\_\_\_\_

Defendant,

)

)

) REPORT ON IMPOSITION

) OF DEATH PENALTY

) UNDER SECTION 19-2827,

) IDAHO CODE

)

)

The court having sentenced the above defendant to death for the conviction of the offense of \_\_\_\_\_,

NOW, THEREFORE, the court hereby makes a report to the Idaho Supreme Court pursuant to section 19-2827, Idaho Code, as follows:

1. Facts regarding defendant:
- (a) Age \_\_\_\_\_
- (b) Sex \_\_\_\_\_
- (c) Race \_\_\_\_\_
- (d) Marital Status \_\_\_\_\_
- (e) Family Relationships \_\_\_\_\_
- (f) Dependents \_\_\_\_\_
- (g) Occupation or Trade \_\_\_\_\_
- (h) Educational Background \_\_\_\_\_
- (i) Relationship to Victim of Offense \_\_\_\_\_
- (j) \_\_\_\_\_
- (k) \_\_\_\_\_
- (l) \_\_\_\_\_
- (m) \_\_\_\_\_
- (n) \_\_\_\_\_
2. Name and Address of Counsel Representing Defendant.
- \_\_\_\_\_
3. Summary of any Prior Convictions of Defendant.
- \_\_\_\_\_
4. Findings in Support of Imposition of Death Penalty Made Pursuant to Section 19-2515, Idaho Code. A copy is attached.

DATED: \_\_\_\_\_



/s/ \_\_\_\_\_

District Judge

(Adopted December 27, 1979, effective July 1, 1980; amended March 28, 1986, effective July 1, 1986.)

**STATUTORY NOTES**

**Cross References.** Death sentence, §§ 19-2704 — 19-2719.

**JUDICIAL DECISIONS**

**Cited in:** State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).

**Rule 33.3. Evaluation of persons guilty of domestic assault or domestic battery.**

(a) **Evaluators.** Evaluators of persons who plead guilty or are found guilty of domestic assault or domestic battery under Idaho Code Section 18-918 shall be approved and shall serve under the following provisions:

(1) **Qualifications.** An evaluator under Idaho Code Section 18-918 shall have the following qualifications:

(A) Licensed physician, licensed psychologist, licensed master social worker, licensed social worker if approved prior to July 1, 2008, licensed professional counselor, licensed marriage and family therapist, licensed registered nurse, licensed nurse practitioner or physician's assistant; an evaluator may be licensed in the state of Idaho or any other state;

(B) Twenty (20) hours of specialized education or training in domestic violence within the previous two years that meets the criteria set out in subsection (2), as evidenced by an attached certificate of completion or other supporting documentation. Up to ten (10) hours may be satisfied through approved participatory online CEU programs;

(C) One year experience after licensure in assessment or treatment of domestic violence related issues;

(D) Approved by the Domestic Assault and Battery Evaluator Advisory Board and maintained on a roster by the Administrative Director of the Courts as persons eligible to conduct evaluations of persons guilty of assault or domestic battery. In the event there is no evaluator approved within the judicial district, then the requirements of (B), (C), and (D) may be waived by the court; and

(E) The evaluator must, at his or her own expense, submit to a criminal history check as provided for in Rule 47, I.C.A.R. Further, the evaluator must sign an Indirect Access Agreement and any other confidentiality agreements required by the Idaho State Police to allow the evaluator access to criminal justice information as required by subsection (c)(2)(K) of this rule.

(2) **Continuing Education of Evaluators.** Beginning the next July 1 after an evaluator has been approved by the Domestic Assault and

Battery Evaluator Advisory Board, the evaluator must take at least sixteen (16) hours of specialized training in domestic violence, or related topics in courses approved by the Domestic Assault and Battery Evaluator Advisory Board, in each and every two (2) year period following the July 1 date. An evaluator must file proof of compliance with this requirement with the Administrative Director of the Courts by July first of the year the continuing education is due. Along with proof of compliance, an evaluator must also send proof of current licensing.

(A) The sixteen (16) hours of training required in this section shall be in one or more of the following areas: (a) domestic violence; (b) violence in families; (c) child abuse; (d) anger management; (e) risk factors for future dangerousness; (f) psychiatric causes of violence; or (g) drug and alcohol abuse. No more than four (4) of the sixteen (16) required hours may be in the area of drug and alcohol abuse. Up to eight (8) of the sixteen (16) required hours may be satisfied through approved participatory online CEU programs.

(B) The sixteen (16) hours of required training in this section shall be acquired by completing a program approved or sponsored by one of the following associations: (a) Idaho Psychiatric Association; (b) Idaho Psychologists Association; (c) Idaho Nursing Association; (d) Idaho Association of Social Workers; (e) Idaho Counselors Association; (f) Council on Domestic Violence and Victim Assistance; (g) Idaho Coalition Against Sexual Assault and Domestic Violence, or the national equivalent of any of these organizations; or (h) the Idaho Supreme Court.

(C) Any program that does not meet the criteria set out in both section (a)(2)(A) and section (a)(2)(B) may be submitted to the board for approval either prior to or after completion.

(3) **Appointment Approval.** All evaluators under Idaho Code Section 18-918 must be approved by the Domestic Assault and Battery Evaluator Advisory Board. Any person desiring to be approved as an evaluator shall file an application for approval with the Administrative Director of the Courts indicating the qualifications of the applicant and the dates and content of relevant training courses attended. An evaluator approved by order of the Domestic Assault and Battery Evaluator Advisory Board may continue in service from one calendar year to the next unless otherwise ordered by the Domestic Assault and Battery Evaluator Advisory Board. The Administrative director of the Courts shall maintain a statewide list of approved evaluators by the Domestic Assault and Battery Evaluator Advisory Board.

**(b) Advisory Board.**

(1) **Members.** There is hereby created a Domestic Assault and Battery Evaluator Advisory Board consisting of six (6) members with experience and training in domestic violence, as follows:

(A) A district judge or magistrate judge appointed by the Supreme Court for a term of two years, who shall serve as chair,

(B) The Administrative Director of the Courts, or his or her designee,

(C) A social worker appointed by the Supreme Court for a term of two years, upon submission of three (3) names by the State Board of Social Work Examiners or appropriate association,

(D) A counselor appointed by the Supreme Court for a term of two years, upon submission of three (3) names by the Idaho State Counselors Licensing Board or appropriate association,

(E) A psychologist appointed by the Supreme Court for a term of two years, upon submission of three (3) names by the Idaho State Board of Psychologist Examiners or appropriate association, and

(F) A psychiatrist appointed by the Supreme Court for a term of two years, upon submission of three (3) names by the State Board of Medicine or appropriate association.

(2) **Powers of Advisory Board.** The Domestic Assault and Battery Evaluator Advisory Board shall have the power to make the following recommendations to the Supreme Court:

(A) Recommend qualifications and continuing education of evaluators under Rule 33.3(a);

(B) Review and recommend for approval or rejection applications of persons to be evaluators under this rule;

(C) Recommend the required content and scope of reports of evaluators under this rule.

(c) The scope and content of the evaluator's report shall be as follows:

(1) **Identifying Information.**

(A) Name

(B) Address

(C) Date of Birth

(D) Occupation

(E) Current Incident

(F) Marital Status

(G) Children

(H) Military Service

(2) **Risk Assessment.**

(A) Current and past violent behavior

(B) Exposure to violence

(C) Threats of homicide/suicide/violence

(D) Ideation of homicide/suicide/violence

(E) Weapons access

(F) Obsessed with or dependent upon victim (Sociopathic Traits)

(G) History of rage and impulsivity

(H) History of sexual abuse (perpetrator or victim)

(I) History of child abuse (perpetrator or victim)

(J) Access to victim

(K) Criminal History Record Information (CHRI) through a National Criminal History Background Check System from local law enforcement or any other authorized individual or agency.

(L) Cultural issues



- (M) History of domestic violence protection orders
- (N) Prior treatment for aggressive violence
- (O) Danger of reoffending
- (3) **Substance Abuse.**
  - (A) Present usage of drugs
  - (B) Prior treatment for drug abuse or addiction
  - (C) Involvement of substance abuse in incident
  - (D) Assessment
- (4) **Self-Assessment.**
  - (A) Description of current incident in person's own words
  - (B) Person's acceptance of responsibility for incident
  - (C) Remorse evidenced by person
  - (D) Person's own view of need for treatment
  - (E) Person's willingness to get treatment
- (5) **Test Results.** (If any — substance abuse testing, psychological testing, I.Q., etc.)
- (6) **Collateral Information.**
  - (A) Police Report
  - (B) Victim interview
  - (C) Prior treatment — review of past records
- (7) **Personality/Character Assessment.**
- (8) **Behavioral Observations/Mental Status.**
  - (A) Level of cooperativeness
  - (B) Victim interview
  - (C) General present mental status
- (9) **Recommendation.**
  - (A) A summary formulation that identifies the factors causing and/or contributing to the defendant's domestic violence that form the basis for the evaluator's opinion as to the treatment recommendation
  - (B) Further assessment opinions and if needed
  - (C) Treatment recommendations
  - (D) Providers available to treat
  - (E) Cost of treatment (estimate)
  - (F) Cost of alternate treatment
  - (G) Resources available to defendant.

(d) In the event the evaluator submits an evaluation that is not in compliance with subsection (c) of this rule, the court may return the evaluation with instructions to prepare an evaluation in compliance with the rule at no additional cost to the defendant. In the event an evaluator fails to submit an evaluation in compliance with this rule after such an instruction, the court may forward the evaluation to the Board as a sealed confidential document along with a written request that the evaluator be removed from the roster for failure to comply with the rule. If the Board determines the evaluation fails to meet the requirements of the rule, the evaluator may be removed from the roster. (Adopted effective August 8, 1995; amended August 23, 1996; effective November 1, 1996; amended

January 30, 1997, effective February 1, 1997; amended August 3, 1998, effective August 4, 1998; amended March 9, 1999, effective July 1, 1999; amended January 30, 2001, effective July 1, 2001; amended April 22, 2004, effective July 1, 2004; amended May 22, 2006, effective July 1, 2006; amended March 21, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008; amended and effective January 22, 2009; amended and effective January 3, 2011; amended April 27, 2011, effective July 1, 2011; amended May 9, 2011, effective July 1, 2011.)

### **Rule 34. New trial.**

The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by court without a jury the court on motion of a defendant for new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two (2) years after final judgment. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence, or within such further time as the court may fix during the fourteen (14) day period. (Adopted December 27, 1979, effective July 1, 1980.)

### **STATUTORY NOTES**

**Cross References.** New trial, §§ 19-2404  
— 19-2407.

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Construction with Other Law.  
Discretion of Court.  
In General.  
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—Bias.  
—Communications with.  
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New Trial Properly Denied.  
Newly Discovered Evidence.  
Prerequisites for Review.  
Prosecutorial Misconduct.  
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Standard for Review.

#### **Construction with Other Law.**

Section 19-2406 sets forth the only grounds permitting the grant of a new trial and the limits of instances in which the trial court's discretion may be exercised. Although this rule allows a trial court to grant a new trial if required in the interest of justice, this rule

does not provide an independent ground for a new trial. Rather, this rule simply states the standard that the trial court must apply when it considers the statutory grounds. *State v. Cantu*, 129 Idaho 673, 931 P.2d 1191 (1997).

Neither section 19-2406 nor this rule prohibit the grant of a new trial on grounds not argued by the defendant, so long as the defendant has requested a new trial and the ground relied upon by the court is one of those specified in the statute. *State v. Mack*, 132 Idaho 480, 974 P.2d 1109 (Ct. App. 1999).

#### **Discretion of Court.**

The question of whether the interests of justice require a new trial under the circumstances of a particular case is directed to the sound discretion of the trial court; and the trial court's decision thereon will not be disturbed absent an abuse of that discretion. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982); *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

The question of whether the interests of

justice require a new trial is directed to the sound discretion of the trial court and will not be disturbed absent an abuse of this discretion. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Whether the magistrate abused his discretion in denying a motion for a new trial was not properly preserved on appeal where the record did not reflect any motion for a new trial in the magistrate division, but it did contain a letter from the magistrate informing the defendant that he would not reconsider the case. *State v. Palmer*, 114 Idaho 895, 761 P.2d 1247 (Ct. App. 1988).

A trial judge does not abuse his or her discretion with regard to the granting of a new trial unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interest of justice. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Ordinarily, when a judge makes a discretionary ruling by reference to an incorrect standard, the proper appellate remedy is to vacate the ruling and to remand the case for further consideration in light of the clarified standard, however, such a remand is unnecessary if it is plain from the judge's own expressed reasoning that the result would not change. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

The district court did not abuse its discretion in denying a new trial motion where the testimony of a newly discovered witness was offered solely for impeachment purposes; moreover, it was not likely to produce an acquittal. *State v. Pugsley*, 119 Idaho 62, 803 P.2d 563 (Ct. App. 1991).

The record showed that the district court perceived and treated defendant's motion for new trial as a matter within its discretion; the district court acted within the boundaries of its discretion regarding defendant's claim of ineffective assistance of counsel; the record supported the district court's conclusion that the interest of justice did not require that defendant be granted a new trial. *State v. Thornton*, 122 Idaho 326, 834 P.2d 328 (Ct. App. 1992).

#### **In General.**

This rule invokes the trial court's discretion and plainly is broad enough to embrace all of the statutory grounds for new trial contained in § 19-2406. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

#### **Ineffective Assistance of Counsel.**

In order to prevail on a claim of ineffective assistance of counsel, the defendant must

show: (1) that his counsel's representation was deficient, and (2) that he was prejudiced by his counsel's deficient performance. *State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

#### **Juror Misconduct.**

The proper test of determining whether a defendant is entitled to a new trial due to juror misconduct is essentially two-fold: first, the defendant must present clear and convincing evidence that juror misconduct has occurred; second, the trial court must be convinced that the misconduct reasonably could have prejudiced the defendant. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

Motion for a new trial was properly denied because defendant failed to raise the issue of juror inattentiveness or sleeping during the trial where several affidavits showed that he was aware of such; moreover, another affidavit from a spectator did not rise to the level of requiring a new trial based on general allegations that a juror was nodding off and appeared to not be paying attention. *State v. Bolen*, 143 Idaho 437, 146 P.3d 703 (Ct. App. 2006).

Defendant was not entitled to a new trial under this rule, based on three jurors' complaints that they had difficulties hearing defense counsel during the trial. Defendant failed to show juror misconduct by clear and convincing evidence, because the jurors testified that they could hear every question asked of a witness and all of the answers. *State v. Strange*, 147 Idaho 686, 214 P.3d 672 (2009).

#### **Jury.**

##### **—Bias.**

Although the juror's parents, with whom the juror did not reside, may have been victims of a burglary committed by the defendant's son, there was no evidence that the juror knew of any such connection, she gave no false information during voir dire, she had no prior acquaintance with the defendant, and she harbored no prejudice against him that would have rendered the trial unfair. Therefore, the juror was not biased and the district court properly denied the defendant's motion for a new trial. *State v. Foster*, 110 Idaho 848, 718 P.2d 1286 (Ct. App. 1986).

##### **—Communications with.**

The trial court did not err in denying a motion for a new trial based upon one juror's communications with a third party who was a cousin of the defendant, where the record showed that the short conversation took place



while the cousin was repairing a flat tire for the juror and that the conversation was sympathetic toward the defendant. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982).

#### **Knowledge Imputed to Prosecution.**

Where a police officer was merely a paid informant at the time of the investigation at issue, information he possessed about his own ongoing criminal activity could not be imputed to the prosecution, and the district court properly denied the defendant's motion for a new trial. *State v. Avelar*, 132 Idaho 775, 979 P.2d 648 (1999), cert. denied, 528 U.S. 1022, 120 S. Ct. 533, 145 L. Ed. 2d 413 (1999).

#### **New Trial Properly Denied.**

The district court did not err in denying motion for new trial where, in prosecution for rape, the defendant was convicted because of the credibility of the testimony of the victim, which was fully corroborated by the circumstances and the testimony of a witness, and by the incredibility of the defendant's alibi, the defendant did not meet his burden of showing that he was convicted because of the manipulation of the scientific evidence or that the new evidence would have resulted in acquittal. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Where, upon defendant's motion for a new trial in light of juror misconduct, it was clear that the outcome of the prejudice issue would have been the same, whether addressed in an actual prejudice context or upon the determination of whether prejudice reasonably could have occurred, the judge's denial of defendant's motion for a new trial was upheld. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

Trial court did not abuse its discretion in denying defendant's motion for a new trial where testimony from inmates was not credible and where testimony from the non-inmates was not reliable because the witnesses lacked first-hand knowledge. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

Where district court conducted a hearing on defendant's motion for a new trial where counsel presented oral argument, upon review of the record under I.C.R. 34, the Court of Appeals held that the district court properly exercised its discretion in denying a new trial in the matter. *State v. Egersdorf*, 126 Idaho 684, 889 P.2d 118 (Ct. App. 1995).

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unrepresented alibi testimony, such evidence would not have likely

produced an acquittal, thus denial of motion for new trial was not error. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

Where district court found that defendant admitted signing employer's name on a certain check that represented loan proceeds from certain properties, that defendant's employer testified that he had never given her permission to endorse his name on such check nor did the powers of attorney executed by employer include such authority and although there was evidence in the record that defendant was given authority to conduct business on employer's behalf and that employer testified that he and defendant were equally involved in the properties but that he was unaware of the check and denied that he had ever authorized defendant to sign his name on any documents but defendant testified that they had discussed the check and she informed him that it would be in both their names but since he would be out of town she would sign both their names, the verdict reflects that the jury rejected defendant's testimony and the record was sufficient to sustain the jury's verdict and court's denial of new trial or acquittal was not error. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

Where defendant's motion for a new trial was filed 15 years after judgment was rendered in defendant's case, the motion was filed well beyond the required time limit and was therefore, untimely. *State v. Parrott*, 138 Idaho 40, 57 P.3d 509 (Ct. App. 2002).

#### **Newly Discovered Evidence.**

Affidavit of a male individual acquainted with the rape victim's sister who said the sister told him that the victim had told the sister she had not been forcibly raped by defendant was not newly discovered evidence warranting new trial since the information in the disputed affidavit was inadmissible as being compounded hearsay which could only be used, if at all, to impeach the rape victim insofar as her testimony indicated the use of force which issue was material because consent was not a defense to statutory rape charge; moreover, it was unlikely that the information provided by affidavit could have produced an acquittal since the sister, who was the crucial link in the chain of hearsay, flatly denied making the statement attributed to her. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

A new trial should be held, where the defendant submits an affidavit by a government witness in which the witness recants his or her testimony and specifies in what ways he

or she dishonestly testified and would, if given the opportunity to testify again, change that testimony, and the defendant makes a showing that such changed testimony may be material to a finding of his or her guilt or innocence. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Where the codefendant who testified against the defendant sent a note to the defendant which stated, "Please forgive me Shawn I was worry [sic] by not telling the truth and about you as well," the note was subject to multiple inferences and did not constitute an affidavit; therefore, the record was not sufficiently developed to permit the Supreme Court to conclude that the trial court abused its discretion in denying the motion for a new trial. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

In order to succeed on a motion for new trial based on newly discovered evidence, a defendant must show, inter alia, that the new evidence will probably produce an acquittal. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Although the content of an absent witness' testimony may be predicted, it is not "known" until that witness is contacted; therefore, if the witness cannot be contacted until after trial, the witness' testimony is "newly discovered evidence." *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

Although the testimony of a witness whose whereabouts were discovered only after trial was arguably cumulative insofar as it would corroborate the defendant's own story, it was not merely cumulative, where it added substantially to the defendant's defense by presenting independent evidence of his whereabouts during the alleged time of the assault; thus, this newly discovered evidence met the requirement of "materiality." *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

A motion for a new trial based on newly discovered evidence must satisfy the test adopted in *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976): (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

A motion for a new trial based specifically on newly discovered evidence, must satisfy all of the following tests: (1) the evidence is newly

discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Pugsley*, 119 Idaho 62, 803 P.2d 563 (Ct. App. 1991).

Where the defendant had not requested a new trial in the district court on the basis of newly discovered evidence, review of the issue by the appellate court was precluded. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

In a case involving lewd conduct with a minor, defendant's motion for a new trial should have been granted based on newly discovered evidence because an alibi witness had not been contacted, the testimony was material to impeachment and an alibi, diligent efforts were used to secure the witness, and it would have likely caused an acquittal based on other contradictory evidence. The testimony contradicting the victim's story was important due to the fact that the victim's own mother contradicted her testimony, there was evidence calling the victim's general veracity into question, and the jury apparently distrusted most of the victim's story. *State v. Hayes*, 144 Idaho 574, 165 P.3d 288 (Ct. App. 2007).

In a murder case, the court did not err by denying defendant's motion for a new trial based on newly discovered evidence regarding the removal of the child's eyes because substantial and competent evidence supported a conclusion that the primary evidence that the child's eyes were removed after embalming--the mortuary embalming report--was available before trial. Defendant was aware the State would use expert witness testimony about injuries to the child's eyes to support its theory that defendant killed the child during a battery. *State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008).

In a murder case, the court did not err by denying defendant's motion for a new trial based on newly discovered evidence that the child might have died from medication side effects because the court recognized that the jury was presented with a question as to what caused the massive and fatal skull fracture the child suffered and was presented with two alternate theories. That one theory might have had additional support after trial did not mean that the supporting evidence was material; the jury rejected that theory and determined that defendant's actions caused the injuries. *State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008).

In a murder case, the court did not err by

denying defendant's motion for a new trial based on newly discovered evidence because the record supported the district court's conclusion that a simple glance at the State's expert's resume during the trial would have revealed that he could not have been affiliated with Temple for both the seven years he stated at trial and the three years he stated on his resume. Therefore, the court properly concluded that the discrepancy was not newly discovered evidence. *State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008).

### **Prerequisites for Review.**

Defense counsel was aware of the evidence and had the opportunity to raise any objection to its nondisclosure to the district court, and because he failed to do so the record on appeal did not establish whether the evidence was disclosed or, if it was not, how the nondisclosure may have affected the results of the proceedings below, and the failure to raise the issue below precluded its consideration on appeal. *State v. Osborne*, 130 Idaho 365, 941 P.2d 337 (Ct. App. 1997).

### **Prosecutorial Misconduct.**

In DUI prosecution, prosecutor committed prejudicial misconduct during his closing argument, warranting a new trial. Prosecutor's misconduct included accusing defense counsel of lying or facilitating defendant's lying and making general pleas to the jury to believe his case because he and the State were only motivated by the truth. *State v. Gross*, 146 Idaho 15, 189 P.3d 477 (Ct. App. 2008).

### **Recanted Testimony.**

In a situation where a defendant requests a new trial because of recanted testimony, the trial court must be satisfied that the original testimony was false and that the new testimony is true if the judge is to grant a new trial; accordingly, it is vital that the trial judge be allowed to ask questions for clarification and for the gathering of information during a hearing on such a motion for new trial, and the court did not err in interrogating the recanting witness during the hearing, or in striking his testimony upon failing to get a desired response. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

### **Standard for Review.**

The general standard for reviewing the grant or denial of a motion for a new trial under this rule is well settled; the trial judge's decision will be upheld on appeal absent an abuse of discretion, and in determining whether such discretion has been properly exercised the Appellate Court conducts a

multi-tiered inquiry whereby it must determine: (1) Whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

Pursuant to a jury trial or a nonjury trial, an appellate court will not set aside a judgment of conviction entered upon a verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; on appeal after conviction, the evidence will be viewed most favorably to the prosecution. The record will be reviewed to determine if substantial evidence exists and the appellate court is precluded from substituting its judgment for that of the fact finder as to the credibility of the witnesses, the weight of the testimony, and the reasonable inferences to be drawn from the evidence, and the mere possibility of innocence will not invalidate a guilty verdict on appeal. *State v. Hickman*, 119 Idaho 366, 806 P.2d 959 (Ct. App. 1991).

When the sufficiency of the evidence is challenged in a jury verdict context, the Court of Appeals will not set aside the judgment of conviction if there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and where a finding of guilt is by the court, the same standard of review applies. *State v. Olson*, 119 Idaho 370, 806 P.2d 963 (Ct. App. 1991).

Court of Appeals reviewed the district court's decision not to grant defendant's motion on the basis of whether the motion should have been granted in the interest of justice rather than upon the failure of the motion to specify a ground recognized in § 19-2513. *State v. Thomas*, 126 Idaho 299, 882 P.2d 466 (Ct. App. 1994), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

**Cited in:** *State v. Estes*, 111 Idaho 423, 725 P.2d 128 (1986); *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987); *State v. Brazzell*, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990); *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993); *Lankford v. State*, 127 Idaho 100, 897 P.2d 991 (1995); *State v. Davis*, 127 Idaho 62, 896 P.2d 970 (1995); *Cochran v. State*, 133 Idaho 205, 984 P.2d 128 (Ct. App. 1999); *State v. Dunn*, 134 Idaho 165, 997 P.2d 626 (Ct. App. 2000).



DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.  
Inadequate Counsel.  
Newly Discovered Evidence.

**Discretion of Court.**

Where affidavits in support of motion for new trial were relevant only to a collateral issue, the credibility of the state's witness, and were largely cumulative of evidence which was presented at trial, the trial courts' denial of defendant's motion for a new trial was not an abuse of its discretion and was not error. *State v. Powers*, 100 Idaho 290, 596 P.2d 802 (1979).

**Inadequate Counsel.**

Where defendant was convicted of the crime of unlawful sale of a narcotic and upon defendant's appeal from denial of a new trial it appeared that defendant's trial counsel may have failed to discover the existence of a tape recording of conversations between defendant and two narcotic agents because of his inadequate pre-trial investigation, the case was properly remanded for purposes of determining whether a new trial should be granted on

the grounds of inadequacy of counsel. *State v. Tucker*, 97 Idaho 4, 539 P.2d 556, 1975 Ida. LEXIS 353 (1975).

**Newly Discovered Evidence.**

In a prosecution for kidnapping and assault with intent to commit infamous crime against nature, the trial court did not abuse its discretion in denying defendant's motion for a new trial which was based on allegation that cellmate's affidavits came into defendant's possession a month after trial, where defendant could have called the cellmate as witness at trial and where the allegedly newly discovered evidence would have rendered a different verdict unlikely. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where new evidence consisted of two letters which tended to support defense offered at trial, where the case had been decided largely based on circumstantial evidence and where the judge clearly felt that under the circumstances justice required defendants to have new trial, it was not abuse of discretion to order new trial under former rule governing the granting of new trial. *State v. Keely*, 101 Idaho 711, 620 P.2d 284 (1980).

RESEARCH REFERENCES

**A.L.R.** Prejudicial Effect of Juror Misconduct Arising from Internet Usage. 48 A.L.R.6th 135.

Justification and Correction of Remarks or

Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Otherwise Requiring New Trial or Reversal. 54 A.L.R.6th 429.

**Rule 35. Correction or reduction of sentence.**

(a) **Illegal sentences.** The court may correct a sentence that is illegal from the face of the record at any time.

(b) **Sentences imposed in an illegal manner or reduction of sentence.** The court may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation. Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion; provided, however that no defendant may file more than one motion seeking a reduction of sentence under this Rule.

(c) **Credit for time served.** A motion to correct a court's computation of credit for time served, granted pursuant to Idaho Code Sections 18-309 or 19-2603, may be made at any time. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 23, 1983, effective July 1, 1983; amended May 2, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended February 10, 1993, effective July 1, 1993; amended effective December 9, 2009; amended March 18, 2011, effective July 1, 2011.)

## JUDICIAL DECISIONS

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 Illegal Sentence.  
 —Grand Jury Expired.  
 —Question of Law.  
 Impermissible Second Motion.

Imposition of Sentence.  
 Improper Lesser Sentence.  
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 Inappropriate Description of Sentence.  
 Indeterminate Period of Confinement.  
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 —Reconsideration.  
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 Need to Protect Society.  
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 Plea for Leniency.  
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 Probation Violation.  
 Progress Report.  
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 —After Court Relinquishes Jurisdiction.  
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 Review of Record.  
 Revocation of Probation.  
 —Writing Not Required.  
 Running of Appeal Period.  
 Scope of Review.  
 Sentence Enhancement.  
 Sentence Upheld.  
 State Recommendation.  
 Stipulated Sentence.  
 Successive Motion.  
 Time Limitation.  
 —Mailbox Rule.  
 Trial Judge.  
 Vacation of Judgment.  
 Validity of Guilty Pleas.  
 Withheld Judgment.

### Absence of Defendant.

Where defendant was not present at the hearing on his motion under this rule and his counsel went forward with the hearing, not

objecting to defendant's absence, defendant did not waive his right to be present at his sentencing, nor was there any acquiescence on his part in the *ex parte* procedure used to "correct" the illegal sentence. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

There was no constitutional infirmity in the district court's decision not to permit the defendant to be present at the hearing, where there was no evidence that the district court unduly limited the available information, the defendant had an attorney present at the hearing to argue his motions, the defendant's position was thoroughly presented to the court, and the defendant did not indicate that his attorney failed to present any pertinent information to the district court. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

#### **Abuse of Discretion.**

District Court did not abuse its discretion when it denied defendant's motion for reconsideration of his sentence; defendant's sentence was not excessive simply because it delayed his drug rehabilitation treatment until one year or less before his parole hearing. *State v. Coassolo*, 136 Idaho 138, 30 P.3d 293 (2001).

Defendant's motion for reduction of sentence was properly denied where his enhanced sentence for burglary was due to his ten prior felony convictions, and the fact that he committed burglary while on parole. Further, the defendant did not offer any new or additional information demonstrating that the sentence was excessive as required under this rule. *State v. Marsh*, — Idaho —, 283 P.3d 107 (Ct. App. 2011), review denied, — Idaho —, 2012 Ida. LEXIS 51 (Idaho Feb. 21, 2012).

#### **Alford Plea.**

##### **—Factors Considered.**

In sentencing defendant for involuntary manslaughter, the court was entitled to consider all relevant information regarding the crime, including a defendant's lack of remorse, even though defendant had entered an *Alford* plea. *State v. Howry*, 127 Idaho 94, 896 P.2d 1002 (Ct. App. 1995).

#### **Appeal.**

An order denying a motion for reduction of sentence under this rule is appealable under I.A.R. 11(c)(6), but where the Rule 35 motion had not been made — much less decided — when the notice of appeal was filed, the untimely appeal from the original judgment could not be viewed as appeal from the Rule

35 order. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

The question presented by appeal from the denial of a motion under this rule is whether facts presented in connection with the motion, when viewed in the context of information already in the record, show that discretion was abused in failing to grant the leniency requested. *State v. Dusenbery*, 109 Idaho 730, 710 P.2d 640 (Ct. App. 1985); *State v. Haggard*, 110 Idaho 335, 715 P.2d 1005 (Ct. App. 1986).

The Appellate Court's scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).

The question presented on appeal from the denial of a motion under this rule is whether the facts presented in connection with the motion, when viewed in the context of information in the record, show that the district judge abused his discretion in failing to grant the leniency requested. *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

A lower court's denial of a motion for reduction of sentence will not be disturbed in the absence of an abuse of discretion based upon a review of the entire record and application of the same criteria used to determine the reasonableness of the original sentence, and those criteria focus on the nature of the offense and character of the offender. *State v. Smith*, 117 Idaho 657, 791 P.2d 38 (Ct. App. 1990).

The time for appealing from the denial of a motion made pursuant to this rule is not extended under I.A.R. 14 by the filing of a motion to alter or amend. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

Although the record revealed that the sentence imposed for the drug possession count was clearly in excess of that provided by § 37-2732(c)(1) which limits the period of confinement to a maximum of three years, the Idaho Supreme Court will not address on appeal a challenge to the legality of a sentence where the trial court was not given an opportunity to consider the issue. *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

A Rule 35 motion extends the time for filing an appeal under I.A.R. 14(a) only if it is filed "within 14 days of the entry of judgment, which if granted, could affect the judgment, order or sentence in the section." *State v. Repici*, 122 Idaho 538, 835 P.2d 1349 (Ct. App. 1992).

Although defendant's direct appeal from a judgment of conviction was filed before his



motion to modify the sentence was dismissed, the appeal of conviction encompassed the denial of his motion to modify; a notice of appeal from a judgment is deemed to include all post-judgment orders, and an order denying a motion to modify a sentence is such a post-judgment order. *State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993).

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multitiered inquiry to determine (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Roberts*, 126 Idaho 920, 894 P.2d 153 (Ct. App. 1995), overruled on other grounds, *State v. Knutsen*, 138 Idaho 918, 71 P.3d 1065 (Ct. App. 2003).

Criteria for examining rulings denying a request for leniency under this rule are the same as those applied in determining whether the original sentence was reasonable; if the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion for reduction. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

On appeal, the criteria for review of the rulings on Rule 35 motions are the same as those applied in determining whether the original sentence was reasonable, so if a sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *State v. Williams*, 135 Idaho 618, 21 P.3d 940 (Ct. App. 2001).

Defendant must submit new or additional information in support of a motion for sentence reduction, and an appeal from the denial of motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new evidence. *State v. Shumway*, 144 Idaho 580, 165 P.3d 294 (Ct. App. 2007).

When an appellate court reviews a sentence that is ordered into execution following a period of probation, it will examine the entire record encompassing events before and after the original judgment. It will base its review upon the facts existing when the sentence was imposed, as well as events occurring between the original sentencing and the revocation of probation. *State v. Hanington*, 148 Idaho 26, 218 P.3d 5 (2009).

#### **Application.**

A motion under this rule was not an appro-

priate vehicle for multi-pronged constitutional attack on the conditions of defendants' confinement. *State v. Roach*, 112 Idaho 173, 730 P.2d 1093 (Ct. App. 1986).

Potentially improper administration of the defendant's prison sentences did not require judicial intervention under the guise of a reduction under this rule. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

A claim of excessive sentencing must be made by a motion under this rule, unless the sentence is unlawful. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987).

A motion under this rule is an inappropriate proceeding to attack the Board of Correction's interpretation of a sentence. *State v. Vega*, 113 Idaho 756, 747 P.2d 778 (Ct. App. 1987).

A motion to reduce a sentence is addressed to the sound discretion of the district court; such a motion is essentially a plea for leniency which may be granted if the sentence originally imposed was, for any reason, unduly severe. *State v. Buzzard*, 114 Idaho 384, 757 P.2d 247 (Ct. App. 1988); *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

A motion under this rule leaves intact the plea or verdict of guilty and the adjudication of guilty under the judgment of conviction and the motion essentially is a plea for sentencing leniency and not a plea for relief from a determination of guilt. *State v. Flora*, 115 Idaho 397, 766 P.2d 1278 (Ct. App. 1988).

Allegations attacking the validity of defendant's conviction are beyond the scope of a motion under this rule. Other remedies, such as appeal or a petition for post-conviction relief, are available to set aside a wrongful conviction. A motion under this rule serves a narrower purpose. It subjects only the sentence to reexamination. *Housley v. State*, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991).

This rule does not vest a trial court with the power to set aside guilty pleas and to dismiss an action. *State v. Harbaugh*, 123 Idaho 835, 853 P.2d 580 (1993).

Where habeas petitioner contended that he had not received credit for time he served in jail in Arizona after his arrest on an Idaho warrant for the escape offense, because the claim was previously presented on a motion for correction of the sentence under I.C.R. 35, it could not be presented again by a habeas corpus petition, and if and to the extent that petitioner contended that the sentencing court never acted upon his rule 35 motion, that was a matter to be taken up with the sentencing court through a request for a ruling on the motion. *Lake v. Newcomb*, 140 Idaho 190, 90 P.3d 1272 (Ct. App. 2004).

This rule applies to criminal sentences in

general, but is superseded in death sentences by § 19-2719. *State v. Leavitt*, 141 Idaho 895, 120 P.3d 283 (2005).

Defendant's conviction was vacated on appeal and he sought reimbursement of the fines, fees, and restitution he had paid related to the conviction. These circumstances did not constitute the basis for correction of an illegal sentence under this rule. The sentence was legal when imposed, but upon vacation of the conviction there was no longer an order imposing the fines, fees and costs that could be corrected. *State v. Peterson*, — Idaho —, 280 P.3d 184 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 164 (Idaho June 22, 2012).

#### **Assistance of Counsel.**

Where the record showed no request by the defendant for assistance of counsel in filing his motion under this rule, but it did show the defendant received assistance of counsel through the plea negotiations, the sentencing hearing and the probation hearings, the defendant was not denied the right to assistance of counsel in filing his motion under this rule. *State v. Sutton*, 114 Idaho 899, 761 P.2d 1251 (Ct. App. 1988).

A claim of ineffective assistance of counsel, based upon counsel's alleged failure to file a motion under this rule, properly may be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992).

The evidence was unrefuted that, before the time expired for filing a motion under this rule, defendant knew some action needed to be taken and that his attorney already had expressed an unwillingness to act on defendant's behalf; based on this evidence, the district court concluded that the responsibility lay with defendant to either contact his counsel for further assistance or to write to the court, requesting some further action; inasmuch as the objective standard of reasonableness is the measure to determine whether counsel's performance may be found to have been "ineffective assistance," the court's decision to deny relief to defendant is consistent with a conclusion that the public defender's failure to pursue a motion under this rule on defendant's behalf was reasonable under the circumstances. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992).

Where defendant's Rule 35 motion was without merit, he was not entitled to appointment of counsel to represent him on the motion, and the district court's error in failing to address defendant's request for counsel prior to denial of his Rule 35 motion was harmless. *State v. Wade*, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994).

#### **Breach of Plea Agreement.**

Where defendant made a plea agreement and agreed to plead guilty to petit theft under § 18-2403 subsection (3) and § 18-2407 subsection (2) and as part of his plea agreement the prosecutor agreed not to recommend incarceration, State did not breach plea agreement when it filed brief with appellate court urging affirmance of the sentence and of the magistrate's denial of Rule 35 relief as at the appeal stage the sentence was already pronounced and the State's role was no longer that of making a recommendation as to what would be an appropriate sentence. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

The state's plea agreement with defendant was not breached when the state opposed defendant's motion for reduction of sentence after having honored its promise to "remain silent at the time of sentencing"; therefore, the district court's exercise of discretion in denying defendant's Rule 35 motion was not subject to attack on that basis. *State v. Cole*, 135 Idaho 269, 16 P.3d 945 (Ct. App. 2000).

Motion for a reduction of sentence was properly denied, and the State did not breach its previous agreement not to oppose the motion if the defendant would admit his probation violations, because: (1) a deputy prosecuting attorney who initially opposed the motion immediately corrected his error when it was called to his attention; and (2) he did not say or do anything afterward that could be construed as opposing the motion. *State v. Timbana*, 145 Idaho 779, 186 P.3d 635 (2008).

Defendant agreed to plead guilty to harboring and protecting a felon, and the State agreed to recommend probation with no prison time; after hearing the victim impact statements of three officers who were injured while attempting to take defendant's husband into custody, the court sentenced defendant to five years in prison. When defendant filed her motion for reduction of sentence, the State violated the plea agreement by objecting to a reduction. *State v. Lampien*, 148 Idaho 367 223 P.3d 750 (2009).

#### **Burden of Proof.**

In ruling on a motion to reduce or correct a sentence the burden of showing that the original sentence was unduly severe is upon the moving party; when a discretionary decision related to sentencing is challenged on appeal, the appellant bears the burden of presenting a sufficient record to evaluate the merits of the challenge. *State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (1984).

It is not necessarily cruel and unusual punishment to imprison someone who has health problems; the burden is on the person



asserting a constitutional violation to show the sentence is actually cruel and unusual. Thus, where the defendant contended that even a three-year prison sentence was cruel and unusual as applied to her, but failed to explain why except in generalities and by speculation, she failed to carry her burden. *State v. Stansbury*, 108 Idaho 652, 701 P.2d 272 (Ct. App. 1985).

A motion under this rule places on the movant the burden of showing that the original sentence was unduly severe; on appeal, the appellant also bears the burden of presenting a sufficient record to evaluate the merits of the challenge of a discretionary decision related to sentencing. *State v. Martinez*, 113 Idaho 535, 746 P.2d 994 (1987).

The burden of showing that the original sentence was unduly severe is upon the moving party. When a discretionary decision relating to sentencing is challenged on appeal, the appellant bears the burden of presenting a record sufficient to evaluate the merits of the challenge. *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

#### **Conditions of Confinement.**

A motion under this rule was not an appropriate vehicle for multi-pronged constitutional attack on the conditions of confinement, namely, that serving a sentence for driving under the influence and driving without privileges without an available alcoholism treatment program constituted cruel and unusual punishment in violation of the Eighth Amendment. *State v. Garza*, 115 Idaho 32, 764 P.2d 109 (Ct. App. 1988).

#### **Construction.**

The two terms, "made" and "filed", are used interchangeably in this rule. Therefore, only a single motion for reduction of sentence, whether written or oral, is allowed in all circumstances contemplated by the rule, an interpretation consistent with the result reached by the Idaho Supreme Court. *State v. Hurst*, 151 Idaho 430, 258 P.3d 950 (Ct. App. 2011).

#### **Construction with Other Laws.**

Where the defendant filed a motion to reduce his sentence under this rule, arguing that the sentence imposed by the trial court was disproportionate to sentences imposed in similar cases and that it was improper for the State to seek a fixed penalty under § 37-2739B(c) without proper notice, the Supreme Court upheld the district court ruling denying defendant's motion on the grounds that defendant was not given an enhanced sentence under § 37-2739B, but was sentenced under § 19-2513, the unified sentencing statute

which allows the court to specify a minimum period of confinement within the maximum period of confinement provided for the offense of conviction. *State v. Killinger*, 126 Idaho 737, 890 P.2d 323 (1995).

#### **Correction in Written Judgment.**

Where the oral pronouncement of sentence could be considered illegal because it imposed two concurrent life sentences on defendant, one on the lewd conduct charge and one for being a persistent violator, the subsequent written judgment of conviction showing that only one life term had been imposed would be deemed a correction of the sentence pursuant to this rule. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

#### **Correction of Sentence.**

Costs and fees are not a part of the defendant's sentence, for they do not constitute punishment for the offense, but are more in the nature of fees used to finance the courts and other state and local government operations. Thus, the district court was not authorized to add them to defendant's original sentence in a review hearing conducted under subsection (a). *State v. Steelsmith*, — Idaho —, 288 P.3d 132 (Ct. App. 2012).

Additions to a defendant's sentence made by the district court at the end of the retained jurisdiction period, which are necessary to correct a sentence that was illegal, are alterations within the court's authority under subsection (a), including imposition of a license suspension and mandatory fines that should have been part of the original sentence. *State v. Steelsmith*, — Idaho —, 288 P.3d 132 (Ct. App. 2012).

#### **Death Sentence.**

The fact that the court vacated the death sentence of co-defendant based substantially upon his youth and lack of prior criminal involvement, did not render the death penalty imposed on defendant disproportionate since proportionality review must consider a broad spectrum of first degree murder cases, not just one other case and required comparing different human beings with different personalities, traits and backgrounds. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

Forty-two day time limitation in § 19-2719(3), not this rule, applies to claims of illegality of a death sentence. Idaho Crim. R. 35 applies to criminal sentences in general, but is superseded in death sentences by § 19-2719. Because this rule did not apply to defendant's challenge to his death sentence, the appellate court dismissed his appeal from



the denial of his motion to correct an illegal sentence. *State v. Leavitt*, 141 Idaho 895, 120 P.3d 283 (2005).

#### **Delay in Ruling on Motion.**

Where the district court entered no order on the motion under this rule, but rather deferred ruling on the matter until it could receive further information concerning the timeliness of the motion, because there was no order entered on the motion under this rule either granting or denying the motion, there was no order within the meaning of I.A.R. 11(c) from which defendant could appeal. *State v. Ochoa*, 121 Idaho 536, 826 P.2d 497 (Ct. App. 1992).

Trial court did not abuse its discretion by refusing to further delay a ruling on defendant's reduction of sentence motion by waiting until it received a psychiatric report on defendant; trial court had already delayed its ruling by eight months and was not obligated to wait indefinitely for the report and risk losing jurisdiction. *State v. Matteson*, 123 Idaho 622, 851 P.2d 336 (1993).

The district court did not violate the provisions of this rule by delaying a decision on defendant's motion for reduction of sentence until after pending appeal on judgment of conviction was resolved. *State v. Nickerson*, 123 Idaho 971, 855 P.2d 56 (Ct. App. 1993).

While valid reasons may exist to delay the decision on a Rule 35 motion in a particular case, the delay may not be for the purpose or with the likely effect of assuming the function of the parole authorities. If the purpose or effect of the delay is to infringe upon the constitutional duties of the parole commission, the delay is per se unreasonable and the court loses jurisdiction to grant relief under this Rule. *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct. App. 1994).

Where the record was devoid of any articulated justification for a trial court's failure to act for over thirty-four months on a motion under this Rule, the reviewing court could not say that the delay was reasonable, and it was held that the district court no longer had jurisdiction to consider the original motion after the delay. *State v. Payan*, 132 Idaho 614, 977 P.2d 228 (Ct. App. 1998).

The district court lost jurisdiction to act upon defendant's Rule 35 motion under the state's retained jurisdiction program where the district court delayed its consideration of the motion for a period of eleven months for the sole purpose of considering the prisoner's conduct while incarcerated, and in doing so, the district court infringed upon the executive duties granted to the Commission of Pardons and Parole. *State v. Tranmer*, 135 Idaho 614, 21 P.3d 936 (Idaho App. 2001).

District court did not lose jurisdiction to decide defendant's motion under this rule by unreasonably delaying its ruling on defendant's plea for leniency; most of the delay resulted from voluntary substitution of counsel for defendant. *State v. Veloquio*, 141 Idaho 154, 106 P.3d 480 (Ct. App. 2005).

Trial court did not abuse discretion in granting motion for reduction of sentence 13 months after defendant was convicted of lewd contact with a minor, where delay was caused by delay of second psycho-sexual evaluation of defendant, which was caused primarily by the conduct of the Idaho department of correction, including canceling appointments, freezing defendant's funds, and moving him to a distant facility, and where the record did not disclose any act of the trial court taken with the purpose or effect of infringing upon the prerogatives of the parole authorities. *State v. Fisch*, 142 Idaho 781, 133 P.3d 1246 (Ct. App. 2006).

#### **Denial of Motion Proper.**

Where the record showed nothing indicating that the trial judge abused his discretion in denying the motion for reduction of sentence, and the sentence of 20 years for robbery and carrying a firearm during the commission of a crime did not appear on its face to be unlawful or excessive, the order which denied the motion to reduce the sentence was affirmed. *State v. Hirshbrunner*, 105 Idaho 168, 667 P.2d 271 (Ct. App. 1983).

Where sentences were within statutory maximums, evidence that, at or about the time he was sentenced, defendant had a habit of alcohol abuse was not sufficient to establish that the original sentences were unduly harsh or severe, and defendant failed to show the district court abused its discretion in denying his motion under this rule. *State v. Sutton*, 106 Idaho 403, 679 P.2d 680 (Ct. App. 1984).

Trial court did not abuse its discretion in refusing to reduce concurrent 15-year indeterminate sentences imposed on defendant convicted of kidnapping, burglary and robbery, despite defendant's demonstrated rehabilitation potential, since the offenses were of a serious nature and sentences could be viewed as necessary for protection of society, punishment and deterrence. *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984).

Where the defendant had been convicted of writing bad checks in Michigan and there was a high probability of repetitive conduct, the court did not abuse its discretion in determining that he had made an inadequate showing of cause for leniency. *State v. Slinger*, 109 Idaho 363, 707 P.2d 474 (Ct. App. 1985).

Where sentences for first-degree burglary and grand theft were within the allowable

maximum, and defendant had a criminal record and psychological problems which contributed to his antisocial behavior, the trial court did not abuse its discretion in determining that defendant had made an inadequate showing of cause for leniency. *State v. Russell*, 109 Idaho 723, 710 P.2d 633 (Ct. App. 1985).

Where defendant received two concurrent, indeterminate seven-year sentences for robbery, the court acted within its sound discretion by declining to reduce the sentences further, even though defendant had no prior felony record and there were mitigating circumstances. *State v. Dusenbery*, 109 Idaho 730, 710 P.2d 640 (Ct. App. 1985).

Where defendant committed crime of kidnapping with intent to rape while charges in another sex offense case were pending against him and the presentence investigation indicated a substantial probability that defendant's sexually aggressive conduct would continue, the court correctly concluded that any reduction of sentence would not be in the best interests of society. *State v. Goldman*, 109 Idaho 1031, 712 P.2d 732 (Ct. App. 1985).

The district court judge did not improperly abandon his power under this rule to reduce a sentence when he stated that the Commission on Pardons and Parole constituted the proper agency to consider a reduction, where defendant was serving a separate 30-year sentence and a reduction of the sentence would be of little practical benefit unless the concurrent sentence also were reduced. *State v. Goldman*, 109 Idaho 1031, 712 P.2d 732 (Ct. App. 1985).

The district court did not abuse its discretion in denying the defendant's motion to reduce his seven-year sentence for first-degree burglary, where the defendant's pre-sentence report indicated that he had been previously convicted of three burglaries and two assaults and rehabilitative efforts following his convictions were not effective. *State v. Hassett*, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986).

Where 11 burglaries were committed by the defendant and an accomplice during a period of several weeks, the defendant's presentence investigation report revealed numerous juvenile, misdemeanor, and felony offenses, and his criminal conduct was directly related to his need for money to support a drug habit, the trial judge did not abuse his discretion in determining that the defendant made an inadequate showing of cause for leniency. *State v. Haggard*, 110 Idaho 335, 715 P.2d 1005 (Ct. App. 1986).

Even if the defendant's claims concerning his health difficulties, good conduct, and prison overcrowding and violence were true, the district court did not abuse its discretion

in failing to exercise leniency based upon information contained in the motion without conducting a hearing, where the judge considered the nature of the crime, and the defendant's history of criminal activity, with convictions for lots of prior felonies and prior offenses when he imposed the original sentence. *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986).

Where the defendant strangled an elderly man to death with his bare hands, and the presentence report revealed that the defendant had accumulated a substantial prior criminal record, including convictions for burglary, grand theft, and battery, the trial court did not abuse its discretion in denying the defendant's motion under this rule. *State v. Sanders*, 112 Idaho 599, 733 P.2d 820 (Ct. App. 1987).

The judge did not abuse his discretion in denying the defendant's motion to reduce his three-year indeterminate sentence for first degree burglary and a concurrent six-month indeterminate term for petit theft, where the defendant had previously received and failed probation, along with numerous other alternative forms of sentencing. *State v. Clayton*, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987).

The district court did not abuse its discretion in denying the defendant's motion to reduce his sentence, where his plea for leniency presented no recognizable new information from what was available at sentencing, and his own assertion that his incarceration had a profound impact on him did not outweigh his poor reform record of past similar offenses and prison terms. *State v. Howard*, 112 Idaho 1132, 739 P.2d 431 (Ct. App. 1987).

The district court did not err by failing to express the reasons for denying the defendant's motion to reduce his sentence. *State v. Thomas*, 112 Idaho 1134, 739 P.2d 433 (Ct. App. 1987).

The district court did not abuse its discretion in denying the defendant's motion to reduce his sentence, where his work record was sporadic, there were prior misdemeanors and unresolved criminal charges pending against him in two other states, he initially lied about his identity and involvement in the crime, and while his progress report showed that the defendant was not a problem prisoner, he was "sliding by" without much attempt at availing himself of opportunities. *State v. Thomas*, 112 Idaho 1134, 739 P.2d 433 (Ct. App. 1987).

The district court did not abuse its discretion in denying the defendant's motion under this rule, where the defendant's motion and supporting evidence failed to show any undue severity in the sentences, even though the



defendant wrote a letter of apology to the victimized merchants. *State v. Forde*, 113 Idaho 21, 740 P.2d 63 (Ct. App. 1987).

Where the defendants each were tried and convicted of statutory rape, lewd and lascivious conduct, aggravated battery, and second degree kidnapping, all perpetrated upon the body of their 12-year-old cousin, and the defendants showed no remorse for their heinous crimes, but rather only a regret that the victim was not killed, and no intentions toward retribution, the ruling of the district court in denying the motion to reduce sentence was not an abuse of discretion. *State v. Martinez*, 113 Idaho 535, 746 P.2d 994 (1987).

The defendant's five-year indeterminate sentence for aggravated assault was not excessive and the district court did not abuse its discretion in refusing to reduce the sentence, where his probation was revoked when he was arrested for pointing a handgun at a woman and for possession of LSD, and after his probation was revoked, the court received a report from the Board of Correction disclosing that the defendant had made threats to kill his wife and her boyfriend. *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988).

Where the defendant was convicted of second-degree murder and sentenced to an indeterminate 20-year period, the District Court did not abuse its discretion in denying the defendant's motion under this rule as the court had anticipated, when imposing the sentence, that the defendant would serve in custody at least one-third of the indeterminate 20-year term, and the sentence was not unreasonable. *State v. Buzzard*, 114 Idaho 384, 757 P.2d 247 (Ct. App. 1988).

Where defendant's conviction was the result of a scheme to cash forged checks at several banks and he had not been rehabilitated while serving a reduced sentence for a prior felony offense but had persuaded a conspirator to join in the forgery scheme, and that a check-writing machine was found in his possession at the time of his arrest, the district court did not abuse its discretion in denying defendant's motion and defendant's sentence of 14 years with a required five year minimum to be served was not unduly harsh. *State v. Townsend*, 115 Idaho 460, 767 P.2d 835 (Ct. App. 1989).

Where, while intoxicated, defendant killed lover by dragging lover with his hand caught in the car window, judge's refusal to reduce the ten-year indeterminate sentence under this rule was correct, since defendant could have been given a ten-year fixed term and instead, she received an indeterminate sentence with an opportunity for parole, and since the sentencing judge was primarily con-

cerned in this case with retribution. *Simons v. State*, 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989).

The court properly denied a motion for a reduction of sentence by defendant convicted of possession of controlled substance with intent to deliver and of theft by possession of stolen property where defendant was sentenced to concurrent, unified sentences of seven years with three years minimum confinement and of five years with three years minimum confinement, and where these sentences were well within the statutorily permitted maximum penalties. *State v. Garcia*, 115 Idaho 559, 768 P.2d 822 (Ct. App. 1989).

A judgment of conviction imposing a ten-year prison sentence with a five-year minimum confinement period for aggravated battery, and an order denying the defendant's motion for reduction were affirmed where defendant had an extensive criminal history, where he was on probation at the time of the offense, where he had a substance abuse problem and where he had threatened the life of two teenagers with a knife without provocation. *State v. Maxfield*, 115 Idaho 910, 771 P.2d 928 (Ct. App. 1989).

Trial court did not err in denying a motion to reduce sentence made by a defendant who was sentenced to death, where, although the motion was filed within the 120 days allowed by this rule, it was not filed within the 42-day time limitation of § 19-2719. *State v. Lankford*, 115 Idaho 796, 770 P.2d 805 (1989).

Where defendant was charged with possession of a controlled substance by an inmate, the 30 day jail sentence was upheld, since the sentence imposed was exactly what defendant requested of lower court, since the sentence imposed was well within the trial court's statutory authority, and since sentence imposed was designed to deter not only appellant, but other inmates, from possessing controlled substances while incarcerated in an Idaho penal facility. *State v. Carper*, 116 Idaho 77, 773 P.2d 1164 (Ct. App. 1989).

Defendant's motion for a reduced sentence was properly denied where defendant was sentenced to concurrent, indeterminate five-year prison terms for two counts of forgery, the presentence report revealed a history of property crime and drug/alcohol abuse, and defendant had been on probation in another state before committing the forgeries at issue. *State v. Hanslovan*, 116 Idaho 266, 775 P.2d 158 (Ct. App. 1989).

A 15-year sentence with a ten-year minimum period of confinement for aggravated battery upon a correctional officer, which was to run consecutively to the indeterminate life sentence already being served by inmate was



not excessive in light of the inmate's lengthy disciplinary record while in prison and in light of the fact that the inmate acted deliberately without the slightest provocation. *State v. Matthews*, 118 Idaho 659, 798 P.2d 941 (Ct. App. 1990).

Where upon defendant's conviction for lewd conduct with a minor under 16, when the trial court rejected the prosecution's request that defendant be incarcerated for a minimum period of ten years, plus an 8-year indeterminate period, because defendant showed no evidence of being a "predator," but instead, imposed a lesser sentence which it thought more appropriately fit the crime, the court did not abuse its discretion for the record revealed that the court properly considered many conflicting facts when it imposed a sentence that addressed the appropriate sentencing goals and appeared to be reasonable in light of the facts of this case; thus motion to reduce sentence was properly denied. *State v. Young*, 119 Idaho 510, 808 P.2d 429 (Ct. App. 1991).

Defendant's sentence of a ten-year term of confinement followed by a five-year indeterminate term, for a conviction of voluntary manslaughter, was reasonable where the defendant deliberately shot into a house in which he knew the victim was standing, defendant had been drinking, defendant had a long history of alcohol abuse, and had a series of other convictions. *State v. Gunderson*, 120 Idaho 97, 813 P.2d 908 (Ct. App. 1991).

Defendant's unified sentence of one year determinate and two years indeterminate for driving without privileges was not excessive in light of the defendant's prior convictions of driving without privileges, and convictions for driving under the influence of alcohol, theft, and writing bad checks; four unsuccessful attempts at probation were also noted, with four violations reported in two years. *State v. Wilcox*, 120 Idaho 139, 814 P.2d 39 (Ct. App. 1991).

Defendant's seven-year sentence with a minimum period of confinement of two years, was well within the maximum punishment of 15 years which could have been imposed for first degree burglary, was not unduly severe, and in the absence of any factual information to support defendant's motion, the denial of the motion to modify was not an abuse of discretion. *State v. McGonigal*, 121 Idaho 123, 822 P.2d 1020 (Ct. App. 1991).

Where defendant had been charged with two separate deliveries of heroin and had pled guilty to one count of delivery under an agreement with the State, the District Court did not abuse its discretion in declining to reduce the sentence of five to eight years it had

previously imposed. *State v. Gonzales*, 122 Idaho 17, 830 P.2d 528 (Ct. App. 1992).

Where defendant previously filed a motion under this rule in 1986 after the trial court imposed an indeterminate ten-year sentence and where the trial court denied this motion, defendant was not entitled to file another Rule 35 motion and the trial court's comments at the probation revocation hearing that it would not reduce defendant's sentence pursuant to this rule were proper. *State v. Knowlton*, 123 Idaho 916, 854 P.2d 259 (1993).

Court's denial of Rule 35 motion was proper where defendant who was convicted of a felony charge of an infamous crime against nature, was sentenced to an indeterminate life term with a twenty-year minimum period of confinement and such sentence was not excessive and where court properly considered documents defendant submitted in support of his motion for reduction of sentence. *State v. Dushkin*, 124 Idaho 184, 857 P.2d 663 (Ct. App. 1993).

Denial of defendant's motion to modify sentence was not an abuse of discretion where sentence was for six months in the county jail, for misdemeanor possession of a controlled substance by an inmate, to be served consecutively with defendant's existing felony prison term; trial court concluded that defendant's sentence may serve as a deterrent to others. *State v. Trent*, 125 Idaho 251, 869 P.2d 568 (Ct. App. 1994).

Where defendant failed to show that his sentences were unreasonable in light of any new or additional information presented with his motion for reduction, the district court did not abuse its discretion in denying the motion. *State v. Shiloff*, 125 Idaho 104, 867 P.2d 978 (1994).

The district court did not abuse its discretion in denying vehicular manslaughter defendant's motion under this rule, because although the court was presented with some new information regarding the mental and emotional health of defendant's husband, the court carefully considered such information but still believed that its original sentence was the appropriate one under the circumstances. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

Defendant's claim of ineffective assistance based on his attorney's failure to timely file a Rule 35 motion was denied where the district court found that defendant had failed to show any resulting prejudice, noting that leniency and a request for reduction of the sentence had been argued twice and rejected both times by the district court. *Fox v. State*, 125 Idaho 672, 873 P.2d 926 (Ct. App. 1994).

Defendant, who was convicted of aggra-

vated assault, failed to show that a trial court abused its discretion in relinquishing jurisdiction or erred by denying defendant's motion under the rule; *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995) did not provide an avenue through which to grant the probation that defendant requested. *State v. Bartlett*, — Idaho —, — P.3d —, 2013 Ida. App. LEXIS 17 (Feb. 12, 2013).

Trial court did not abuse its discretion in denying a defendant's motion to reduce sentence where the defendant had a lengthy criminal record and was sentenced for two separate violent crimes committed on the same day. *State v. Cottrell*, 132 Idaho 181, 968 P.2d 1090 (Ct. App. 1998).

A district court properly dismissed a motion under this Rule where it was filed thirty-three months after the original judgment of conviction was imposed, and where it was the second such motion filed. *State v. Payan*, 132 Idaho 614, 977 P.2d 228 (Ct. App. 1998).

The district court did not abuse its discretion when it denied the defendant's request for court-appointed counsel, where the only issue before the court was a claim that defense counsel should have filed an I.C.R. 35 motion and the court found that claim to be frivolous and one that a "reasonable person with adequate means would not bring." *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

The district court did not abuse its discretion when it denied the defendant's motion for reduction of sentence where the information relied upon by the defendant was before the sentencing court. *State v. Burdett*, 134 Idaho 271, 1 P.3d 299 (Ct. App. 2000).

The doctrine of *res judicata* can be applied to bar consideration of subsequent Rule 35 motions to the extent those motions attempt to relitigate issues already finally decided in earlier Rule 35 motions. *State v. Rhoades*, 134 Idaho 862, 11 P.3d 481 (2000).

District court properly denied motion for reduction of sentence by defendant convicted of first degree murder where fixed life sentence was not excessive, and defendant's motion presented no new evidence indicating that the sentence was excessive. *State v. Williams*, 135 Idaho 618, 21 P.3d 940 (Ct. App. 2001).

There was no violation of a defendant's First Amendment rights where a court took his membership of a white supremacist group and his racist beliefs into consideration when it denied his motion for reduction of sentence. *State v. Warfield*, 136 Idaho 376, 34 P.3d 37 (Ct. App. 2001).

Defendant's motion to correct an illegal sentence was properly denied because defen-

dant was attempting to collaterally attack the underlying conviction, which was beyond the scope of this rule; defendant claimed that a charge of battery on a jailer should have been a misdemeanor rather than a felony. *State v. Self*, 139 Idaho 718, 85 P.3d 1117 (Ct. App. 2003).

Trial court did not abuse its discretion in denying defendant's motion to reduce his sentence where the Idaho Commission of Pardons and Parole conducted a parole violation hearing in defendant's DUI case approximately two weeks after he was sentenced in the arson case. Although the alleged act of the Commission, conducting a parole hearing in the arson case within days after his conviction for that offense and years before he would become parole eligible, may have been unlawful, it was not a factor that would compel the trial court to reduce defendant's sentence. *State v. Thomas*, 140 Idaho 632, 97 P.3d 1021 (Ct. App. 2004).

Because no new or additional information was presented in support of defendant's motion for reduction of sentence, and where her sentence was reasonable when imposed, the trial court did not abuse its discretion in denying her motion under this rule. *State v. Jafek*, 141 Idaho 71, 106 P.3d 397 (2005).

Order denying defendant's motion for reduction of sentence was upheld where defendant presented no new or additional evidence in support of the motion. The trial court acted within a reasonable time in ruling on the motion and had not lost jurisdiction when it issued the order denying the motion. *State v. Shumway*, 144 Idaho 580, 165 P.3d 294 (Ct. App. 2007).

Denial of motion for correction or reduction of sentence made by defendant convicted of aggravated battery, robbery, and burglary was appropriate because he had a lengthy criminal record of violent crimes, he was the instigator in the current criminal activity, he exerted influence over two codefendants; and he took no responsibility for the results of his actions. *State v. Mitchell*, 146 Idaho 378, 195 P.3d 737 (Ct. App. 2008).

Because pictures of the 10-year-old victim were clearly pornographic, and they documented defendant's physical molestation of the victim, concurrent sentences under I.C. §§ 18-1506, former 18-1507A, and 18-1508 did not constitute an abuse of discretion, and the sentencing was not subject to correction or reduction under this rule. *State v. Overline*, — Idaho —, 296 P.3d 420 (Ct. App. 2012), review denied, — Idaho —, 2013 Ida. LEXIS 83 (Idaho Mar. 20, 2013).

District court reasonably considered the proper factors when evaluating whether de-



defendant's sentence was excessively harsh; there was no basis for reversing the denial of defendant's Idaho Crim. R. 35 motions. *State v. Grant*, — Idaho —, 297 P.3d 244 (Ct. App. 2013).

#### **Deportation Consequences.**

Motion for a reduction of sentence was properly denied because defendant took advantage of a vulnerable underage woman who likely suffered emotional harm as a result of defendant's conduct; the 20 year age difference between defendant, the victim and defendant's prior sexual relationships with other underage women and defendant's propensity toward impulsive behaviors were factors supporting the sentence. *State v. Cobler*, 148 Idaho 769, 229 P.3d 374 (2010).

#### **Deprivation of Rehabilitative Treatment.**

An alleged deprivation of rehabilitative treatment is an issue more properly framed for review either through a writ of habeas corpus or under the Uniform Post-Conviction Procedure Act rather than through a motion for reduction of sentence. *State v. Sommerfeld*, 116 Idaho 518, 777 P.2d 740 (Ct. App. 1989).

Although defendant convicted of sexual abuse of a minor under the age of 16, contended that the sentencing judge should have placed him on probation to allow treatment because continued incarceration would diminish his chances of eventual rehabilitation, rehabilitation — important as it may be — is not the sole objective of the criminal justice system, and a sentence of confinement is not rendered unreasonable simply because it will have an arguably negative impact upon defendant's rehabilitation. *State v. Morrison*, 119 Idaho 229, 804 P.2d 1360 (Ct. App. 1991).

Rehabilitation — important as it may be — is not the sole objective of our criminal justice system, and a sentence of confinement is not rendered unreasonable simply because it will have an arguably negative effect on a prisoner's rehabilitation. *State v. Wargi*, 119 Idaho 292, 805 P.2d 498 (Ct. App. 1991).

Claims of deprivation of rehabilitative treatment and attacks on the conditions of confinement are preferably addressed in post-conviction or habeas corpus proceedings. *State v. Sherman*, 120 Idaho 464, 816 P.2d 1021 (Ct. App. 1991).

#### **Discretion of Court.**

Where, at the time of sentencing, the district court noted that, even if defendant previously had not been convicted of a felony, he had lived for several years by deception and theft, where the presentence report revealed

that defendant had a ten-year history of convictions for theft-related offenses in Colorado and Utah, and where, although he was able to complete probation successfully in connection with at least one of the earlier convictions, he later was convicted of other theft-related offenses, in its order denying defendant's motion under this rule, the district court properly concluded that defendant's rehabilitation is only one of the court's concerns in sentencing and, although important, it is less important than the protection of society, the deterrent effect upon defendant and others of similar mind, and certainly no more important than punishment and retribution, and upon the facts of this case, defendant failed to show that the district court abused its discretion in denying his motion under this rule. *State v. Findeisen*, 119 Idaho 903, 811 P.2d 513 (Ct. App. 1991).

There was no abuse of discretion in the district court's denial of defendant's motion for reduction of four unified sentences of five years each for three counts of grand theft and one count of forgery with a minimum period of confinement of one year; defendant presented no convincing evidence that his sentences were excessive when pronounced and no new evidence supporting his contention regarding excessiveness. *State v. Reeves*, 120 Idaho 104, 813 P.2d 915 (Ct. App. 1991).

Beyond arguing that he had made rehabilitative progress while incarcerated, defendant presented no reasons to support his contention that the court abused its discretion in denying the motion to reduce his sentences, therefore the district court did not abuse its discretion by denying the Rule 35 motion on the conviction for forgery. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Where defendant received two concurrent unified ten-year sentences, each with a five-year minimum term of confinement for grand theft by false promise involving over 24 victims, the sentence was not an abuse of discretion. *State v. Bianchi*, 121 Idaho 766, 828 P.2d 329 (Ct. App. 1992).

The district judge believed that any further reduction in sentence would depreciate the seriousness of the defendant's crime, namely, shooting a pistol at police officers chasing him on foot, [regardless] of defendant's current institutional adjustment, rehabilitation goals, and conditions at the penitentiary; the reasoning of the judge in denying the motion under this rule indicated no abuse of discretion. *State v. White*, 121 Idaho 876, 828 P.2d 905 (Ct. App. 1992).

The district court's decision to proceed with a motion under this rule without the previously ordered progress report on defendant



was not an abuse of discretion; it cannot be said that the burden of obtaining that report was upon the court or the state and furthermore, when considering the motion, the court assumed that the progress report would be favorable to defendant; in addition, defendant did not present any specifics which that report would have contained to support the reduction of his sentence to a lesser period of incarceration. *State v. Bianchi*, 121 Idaho 766, 828 P.2d 329 (Ct. App. 1992).

In consideration of motion to reduce fixed portion of sentence from 25 to 15 years, the court did not abuse its discretion in refusing to consider the defendant's mental health. The court stated that it considered the defendant's depression at the time to be a mitigating factor, although it also ruled that the fact that the defendant had no disabling mental disease to be an aggravating factor. The court carefully considered the evidence and did not abuse its discretion. *State v. Copenhaver*, 129 Idaho 494, 927 P.2d 884 (1996).

Defendant did not show that district court abused its discretion by ruling on his Rule 35 motion without waiting further for defendant to present support for the motion; (1) he did not submit any evidence in support of the motion; (2) he did not advise the court of any then available evidence which would be forthcoming, the nature thereof, or approximate date it would be filed; and (3) he gave no reason why he thought a hearing would be necessary. *State v. Bayles*, 131 Idaho 624, 962 P.2d 395 (Ct. App. 1998).

Where the district court carefully considered the applicant's arguments and concluded that it would not have exercised its discretion by reducing his sentence had a motion been filed under this Rule, the court did not err in summarily dismissing applicant's ineffective assistance of counsel claim. *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

Court did not err in denying defendant's motion for a reduction of sentence in the murder case where, although the defendant's husband refused to testify as to whether he forged the defendant's name on a tax document, the refusal was not a lie. *State v. Jensen*, 137 Idaho 240, 46 P.3d 536 (Ct. App. 2002).

#### **Discretion of Sentencing Court.**

Where, the legality of the initial sentence is not disputed and the motion under this rule simply seeks to have the sentence reduced, the motion is addressed to the sound discretion of the sentencing court; such a motion is essentially a plea for leniency, which may be granted if the court decides that the sentence originally imposed was, for any reason, unduly severe. *State v. Sutton*, 106 Idaho 403,

679 P.2d 680 (Ct. App. 1984); *State v. Yarbrough*, 106 Idaho 545, 681 P.2d 1020 (Ct. App. 1984).

The decision whether to reduce a sentence rests in the sound discretion of the sentencing court. *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984).

Where the defendant was party to a burglary where a large amount of money (over \$20,000) was stolen from an aged, blind woman on two separate occasions, and told others of the location of the easy money, which resulted in a further theft of over \$22,000, some of which was given to the defendant for repayment of a debt, an indeterminate sentence of 14 years for first degree burglary, to run consecutively with concurrent indeterminate sentences for conspiracy to commit the crime of burglary in the second degree, §§ 18-1701 and 18-1401, burglary in the second degree, § 18-1402 (now repealed), and preventing the attendance of a witness, § 18-2604, was not an abuse of discretion. *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985).

A sentence may represent an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); *State v. Hassett*, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986).

A sentence which is within the allowable maximum will not be disturbed unless a clear abuse of discretion is shown. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); *State v. Hassett*, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986).

A motion to reduce a legally imposed sentence is addressed to the sound discretion of the district court; such a motion essentially is a plea for leniency which may be granted if the sentence originally imposed was, for any reason, unduly severe. *State v. Russell*, 109 Idaho 723, 710 P.2d 633 (Ct. App. 1985); *State v. Goldman*, 109 Idaho 1031, 712 P.2d 732 (Ct. App. 1985); *State v. Haggard*, 110 Idaho 335, 715 P.2d 1005 (Ct. App. 1986); *State v. Hassett*, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986); *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986).

Whether to conduct a hearing on a motion under this rule has always been directed to the sound discretion of the district court. *State v. Hoffman*, 112 Idaho 114, 730 P.2d 1034 (Ct. App. 1986).

A motion to reduce a legally imposed sentence is essentially a plea for leniency and is directed to the sound discretion of the trial court. *State v. Roach*, 112 Idaho 173, 730 P.2d 1093 (Ct. App. 1986).

The decision whether even to conduct a

hearing on a motion under this rule has always been discretionary with the district court; a district judge abuses that discretion when he or she unduly limits the information considered in deciding the motion. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

A Rule 35 motion is addressed to the sound discretion of the sentencing court; such a motion essentially is a plea for leniency which may be granted if the sentence originally imposed was, for any reason, unduly severe. *State v. Stanfield*, 112 Idaho 601, 733 P.2d 822 (Ct. App. 1987).

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court; such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Forde*, 113 Idaho 21, 740 P.2d 63 (Ct. App. 1987).

A motion for a reduction of prison sentences is addressed to the sound discretion of the lower court. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

A motion under this rule to reduce sentence is essentially a plea for leniency, and a decision thereon is vested in the sound discretion of the sentencing court. *State v. Martinez*, 113 Idaho 535, 746 P.2d 994 (1987).

This rule imposes no obligation upon the district court to correct, amend, or modify a legal sentence. *State v. Vega*, 113 Idaho 756, 747 P.2d 778 (Ct. App. 1987).

The decision whether to reduce a sentence rests in the sound discretion of the sentencing court. *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988).

The decision whether to conduct a hearing on a motion under this rule is directed to the sound discretion of the district court. *State v. Puga*, 114 Idaho 117, 753 P.2d 1263 (Ct. App. 1987).

Both the length of a sentence and the decision whether to reduce a sentence rest in the sound discretion of the sentencing court. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).

Absent a clear abuse of discretion, a sentence or a decision to deny reduction will not be disturbed if the sentence imposed is within the maximum period allowed by statute as punishment for the particular crime. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).

A motion under this rule is addressed to the sound discretion of the lower court. *State v. Buzzard*, 114 Idaho 384, 757 P.2d 247 (Ct. App. 1988).

Sentences of five years' imprisonment without parole for three years for driving while under the influence, and three years' concurrent imprisonment without parole for two years, for driving without privileges, were not unduly severe and the district court did not abuse its discretion in not exercising leniency by reducing the sentences where numerous attempts had been unsuccessful in deterring defendant from driving while intoxicated. *State v. Garza*, 115 Idaho 32, 764 P.2d 109 (Ct. App. 1988).

In a prosecution for forcible rape, the district court did not abuse its discretion in failing to find the defendant a worthy candidate for probation where evidence was presented which tended to inculcate the defendant in the making of a threatening telephone call to his sister, who was a close friend of the young victim, allegedly containing threats of violence toward the sister and toward the victim. *State v. Carman*, 114 Idaho 791, 760 P.2d 1207 (Ct. App. 1988), *aff'd*, 116 Idaho 190, 774 P.2d 900 (1989).

Trial court did not abuse its discretion in declining to reduce an indeterminate five-year sentence which had previously been suspended and which the court ordered into execution after defendant was found to have violated his probation. *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1989).

A judge did not abuse his discretion in imposing a 15-year sentence with a minimum of six-years confinement, or in later refusing to reduce the sentence for a defendant convicted of bombing a public structure where the judge explained the sentence in terms of protecting society, retribution and deterrence and also took rehabilitation into account. *State v. Langley*, 115 Idaho 727, 769 P.2d 604 (Ct. App. 1989).

A trial court did not abuse its discretion by imposing a five-year minimum period of confinement which was equal to the maximum punishment allowed for aggravated assault in light of the court's concern for the defendant's history of violent crime and the fact that defendant was on parole when he committed the charged offense. *State v. Gibson*, 116 Idaho 265, 775 P.2d 157 (Ct. App. 1989).

Where defendant pled guilty to charges relating to residential burglaries and property thefts, defendant committed these crimes while he was on parole; he pled guilty pursuant to an agreement which resulted in the state's dismissal of several other charges, including a persistent violator charge; it was understood that the state would be recommending sentences requiring five years minimum incarceration; defendant had a long history of criminal activity, and usually his

criminal conduct had been accompanied by the use of alcohol or drugs; and defendant had been given the opportunity to attend numerous alcohol treatment programs, but all efforts to rehabilitate him had failed, the sentencing judge did not abuse his discretion by declining to reduce defendant's sentences of five years confinement for burglary and ten years with a five-year minimum period of confinement for grand theft. *State v. Bingham*, 117 Idaho 53, 785 P.2d 178 (Ct. App. 1990).

The district court did not err by considering the fact that defendant refused to admit, even after conviction, that she had committed the acts with which she was charged, when it denied defendant's motion brought pursuant to this rule. *State v. Sanchez*, 117 Idaho 51, 785 P.2d 176 (Ct. App. 1990).

The district judge did not abuse his discretion in refusing to modify a sentence for vehicular manslaughter, where the defendant's prior record of serious alcohol-related offenses precluded probation and while house arrest proposal presented an innovative alternative to imprisonment, cannot say its rejection by the judge was unreasonable. *State v. Howard*, 119 Idaho 100, 803 P.2d 1006 (Ct. App. 1990).

Defendant failed to establish that the district court abused its discretion in denying his motion for reduction of his sentence for first degree burglary, where defendant's criminal record included prior convictions for first degree burglary, and he had been released from custody on the last conviction just 5 months before committing the instant burglary. *State v. Gorham*, 120 Idaho 576, 817 P.2d 1100 (Ct. App. 1991).

Defendant had been convicted of driving under the influence on seven occasions, three of them charged as felonies; defendant's current DUI was committed while he was still on probation for a previous DUI conviction for which the district court ordered a four-year unified sentence with one year fixed where the sentence was suspended and defendant was placed on probation and ordered to serve one year in jail; and defendant's criminal record also included a conviction for delivery of a controlled substance, therefore defendant's sentence of one year's fixed confinement and four years indeterminate is reasonable in light of the nature of the crimes he committed and his character as revealed by his extensive criminal history of alcohol-and-drug-related offenses and defendant failed to establish that the district court abused its discretion in denying his motion for reduction of his sentence. *State v. Jimenez*, 120 Idaho 753, 819 P.2d 1153 (Ct. App. 1991).

The court did not abuse its discretion by denying defendant's motion under this Rule because although defendant does not have a prior criminal record, he has a history of sexual misconduct with young males. *State v. Homeier*, 120 Idaho 648, 818 P.2d 352 (Ct. App. 1991).

The district court did not abuse its discretion by refusing to reduce defendant's concurrent five-year sentences with a minimum period of confinement of one year for burglary and grand theft by unauthorized control. *State v. Sherman*, 120 Idaho 464, 816 P.2d 1021 (Ct. App. 1991).

The imposition of a ten-year fixed term and an additional ten-year indeterminate term for a conviction of lewd conduct with a minor was not an abuse of discretion. *State v. Powell*, 120 Idaho 707, 819 P.2d 561 (1991).

There was no abuse of discretion in the court's denial of defendant's motion where the court found the following factors dispositive: While serving his sentence, defendant was also serving a rider on a separate first degree burglary charge; in that case, the jurisdictional review committee recommended that the court relinquish jurisdiction because defendant had committed numerous disciplinary offenses while in custody, including possession of controlled substances; and he now had five burglary convictions. *State v. Simmons*, 120 Idaho 672, 818 P.2d 787 (Ct. App. 1991).

Where the record showed that the court actively considered the nature of the offense and the character of the offender when it imposed the sentence and also showed that the court addressed the appropriate goal of punishment and the related goal of the possibility of rehabilitation, the court did not abuse its discretion when it imposed ten-year determinate terms of confinement, to be followed by indeterminate periods of 15 years, concurrently, for delivery of cocaine charges and also did not abuse its discretion when it denied the motion to reduce the sentences. *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991).

Defendant's five-year sentence was well within the maximum punishment of 15 years which could have been imposed for aggravated battery and in the absence of any factual information to support defendant's ICR 35 motion, beyond the record existing when he was initially sentenced, the Court of Appeals found that the District Court had not abused its discretion by denying the ICR 35 motion. *State v. Prieto*, 120 Idaho 884, 820 P.2d 1241 (Ct. App. 1991).

Where defendant was charged with two counts of issuing a check without funds, and



at that time was on parole for a previous forgery conviction, defendant failed to show that his sentence was unreasonable, or that the District Court abused its discretion in denying his motion to reconsider a three-year unified sentence with one year fixed. *State v. Elliott*, 121 Idaho 48, 822 P.2d 567 (Ct. App. 1991).

The three-year minimum period of confinement imposed by the trial court did not represent an abuse of discretion where defendant was charged with three counts of delivery of a controlled substance, cocaine, based on three separate and substantial transactions involving a total amount in excess of \$8,000 despite progress reports that were quite favorable. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

In order for defendant to show that his sentence is excessive, he must establish that, under any reasonable view of the facts, a period of confinement of three years for his conviction of sexual battery of a minor was an abuse of discretion. Where reasonable minds might differ, this Court will not substitute its own view for that of the sentencing judge. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

The district court's denial of defendant's motion for reduction of sentence was upheld where the defendant did not submit new or additional information for the court to consider in support of her motion. *State v. Wright*, 134 Idaho 73, 996 P.2d 292 (2000).

Although defendant's sentence of twenty years with five years fixed was one of the longest given in the state to a first time youthful drug offender, the district court did not abuse its discretion in denying defendant's motion for reduction of sentence. *State v. Chareunsouk*, 135 Idaho 1, 13 P.3d 1 (Ct. App. 2000).

A Rule 35 motion is committed to the discretion of the sentencing court. *State v. Williams*, 135 Idaho 618, 21 P.3d 940 (Ct. App. 2001).

Trial court did not abuse its discretion in refusing to further reduce defendant's sentence under Idaho Crim. R. 35 because the trial court had already reduced defendant's minimum period of confinement from four years to two years to allow defendant's immediate admission into a therapeutic substance abuse treatment program. *State v. Hanson*, 150 Idaho 729, 249 P.3d 1184 (Ct. App. 2011).

#### —Abuse.

In prosecution for unlawful delivery of heroin and cocaine, the judge abused his discretion by pronouncing a 30-year indeterminate sentence and by declining to reduce the sentence when requested to do so pursu-

ant to this rule, where the defendant had no prior criminal record, was of good character before his involvement in these drug transactions, and his participation in the transactions was encouraged by offers of large sums of money from government agents; 20 years was the heaviest appropriate sanction. *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988), reversed on other grounds, 117 Idaho 295, 787 P.2d 281 (1990).

Based upon the facts and circumstances of the offenses and defendant's character, the district court did not clearly abuse its discretion in sentencing defendant or in denying his I.C.R., Rule 35 motion where defendant was convicted of first degree burglary, first degree kidnapping, and aggravated battery against his ex-wife. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

#### Disparity of Sentences.

The disparity of sentences between different defendants who have committed similar crimes does not establish the unreasonableness of any particular defendant's sentence. *State v. Pena*, 121 Idaho 1032, 829 P.2d 1381 (Ct. App. 1992).

#### Effective Counsel.

The defendant was not denied effective counsel at the hearing under this rule, where the new counsel informed the court that he had been briefed extensively, the new attorney had spoken with still another attorney who had represented the defendant on a workman's compensation matter and who was thoroughly familiar with the defendant's personal situation, the new attorney had obtained information about the defendant's physical condition and had spoken with prison officials about the defendant's opportunities for parole, and the transcript revealed that the new attorney presented argument to the court that reflected thorough familiarity with the record and with the defendant's position. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

An attorney who did not file a motion pursuant to this rule did not thereby provide ineffective assistance of counsel where the attorney, by written correspondence to his client, indicated that such a motion would most likely be unsuccessful but left the decision regarding making of such a motion up to the client, and where the client did not follow up on the attorney's letter. *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

Proof that defendant's original lawyer was ineffective regarding defendant's rights under this rule was a necessary predicate to defendant's right to pursue an untimely Rule 35 motion and to the court's jurisdiction to hear

such a motion. *State v. Jensen*, 126 Idaho 35, 878 P.2d 209 (Ct. App. 1994).

In a post-conviction relief proceeding the district court is required to make findings of fact and conclusions of law sufficient to provide a record for appellate review. However, findings are neither required nor possible where no evidence was presented upon which to base such a finding; thus, where defendant presented no evidence regarding his counsel's alleged failure to preserve and pursue defendant's Rule 35 rights, the district court did not err by failing to make any findings regarding that allegation. *State v. Jensen*, 126 Idaho 35, 878 P.2d 209 (Ct. App. 1994).

Defendant's assertion that his attorney was deficient in failing to file motion for reduction of sentence was without merit where no evidence existed demonstrating prejudice and defendant failed to show that any evidence existed which his counsel could have presented in support of the motion which would have created a reasonable likelihood the judge would have reduced defendant's sentences. *Menchaca v. State*, 128 Idaho 649, 917 P.2d 806 (Ct. App. 1996).

Sentence imposed by district court was proper because little evidence was presented at defendant's sentencing hearing that portrayed the co-defendant as more culpable, because the sentencing court properly focused on the issues presented by the facts of defendant's case, and because defendant did not intend to call co-defendant to testify at sentencing hearing, defendant failed to show actual conflict existed and that he was denied effective assistance of counsel because counsel also represented co-defendant at his sentencing hearing. *McCoy v. State*, 129 Idaho 70, 921 P.2d 1194 (1996).

Because evidence of defendant's substantial rehabilitation that had occurred during his incarceration would not have been available to support a timely Rule 35 motion if filed by counsel, defendant did not provide any basis to believe district court abused its discretion in sentencing or that counsel was ineffective for failing to provide evidence indicating a lesser sentence was appropriate. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

Since a new trial may not be ordered for a reason other than those specified in § 19-2406, an allegation of ineffective assistance of counsel does not state a basis for a new trial; such claims may appropriately be presented through an application for post-conviction relief. Denial of motion based on this claim was not an abuse of discretion. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995).

#### **Evidence.**

Where defendant did not identify what evi-

dence he might have produced at a hearing that he was unable to produce through affidavits the district court did not abuse its discretion in refusing to hold a hearing or to allow defendant to be present at such hearing on his Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

Despite defendant's challenge that one violation serving as the basis for the revocation of his probation was unsupported by evidence, where the record made clear the district court would have revoked defendant's probation based on three other unchallenged grounds, the revocation was affirmed. *State v. Upton*, 127 Idaho 274, 899 P.2d 984 (Ct. App. 1995).

The court did not abuse its discretion when it sentenced the defendant to a fixed term of 25 years. The court clearly took note of the defendant's lack of prior violent conduct, and stated that it was troubled by one incident of violence, although an affidavit presented at the Rule 35 hearing stated that the defendant had done nothing wrong. The court considered that affidavit at the Rule 35 hearing, and the record clearly reflected that the defendant's clean record for violence was a mitigating factor. *State v. Copenhaver*, 129 Idaho 494, 927 P.2d 884 (1996).

#### **—Introduction of Additional Evidence.**

A movant under this rule wishing to submit additional evidence should make an "offer of proof" in the motion itself or by an accompanying affidavit to enable the district judge to make a reasoned decision on whether to hold an evidentiary hearing and to create a record upon which appellate review may be based. *State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993).

Where the trial court had not abused its discretion in the sentence originally imposed on defendant after conviction of lewd conduct with a child, any motion for reduction of sentence as excessive could be based only on new evidence or changed circumstances; therefore, defendant's failure to present any new information doomed the appeal. *State v. Kuhn*, 139 Idaho 710, 85 P.3d 1109 (Ct. App. 2003).

#### **—Weight.**

Because the trial court did not address the significance of what had been presented concerning defendant's fear for his life if he revealed his drug sources, the Supreme Court found it necessary to remand the case for reconsideration of the denial of the motion for reduction of the sentences, so that the trial court could give the weight the trial court considers appropriate to the fear asserted by defendant. *State v. Griffin*, 122 Idaho 733, 838 P.2d 862 (1992).



**Excessive Sentence.**

In prosecution for two counts of lewd conduct with a minor under 16 years of age, a sentence to a fixed term of life in prison, without a retained jurisdiction period, was excessive where defendant who had a prior conviction for similar behavior admitted that he had molested his stepdaughters, since the behavior involved did not involve penetration of any type, nor were there any allegations of force, where counseling that defendant underwent after prior conviction was not part of a recognized sex-offender treatment program, where he has indicated that he wished to undergo treatment and would cooperate in every way necessary, where he took full responsibility for his conduct and did not blame the victims in anyway and has abstained from drugs and alcohol and has worked fairly steadily throughout his adult life. *State v. Jackson*, 130 Idaho 293, 939 P.2d 1372 (1997).

Based on the nature of defendant's offenses and the absence of any prior serious criminal record, the district court abused its discretion in imposing the harshest possible penalty by directing that the sentences for defendant's two counts of drawing a check without funds be served consecutively. *State v. Hoskins*, 131 Idaho 670, 962 P.2d 1054 (Ct. App. 1998).

Appellate court would not consider whether defendant's sentence was excessive when originally pronounced in the judgment of conviction, and its review was limited to whether the sentence was excessive in light of the circumstances existing when the court revoked probation; defendant's claim that his sentences violated constitutional double jeopardy prohibitions did not implicate a new decision or exercise of discretion by the trial court upon revocation of probation, was a challenge to the original imposition of sentence and judgment, and as such was not timely to raise a double jeopardy challenge to his sentences. *State v. Jensen*, 138 Idaho 941, 71 P.3d 1088 (Ct. App. 2003).

Trial court did not abuse its discretion by denying defendant's motion to reduce the sentence following his guilty plea to one count of lewd conduct with a minor under sixteen, where defendant had had sex with the victim 35 to 40 times beginning when she was 13, he had violated probation for two former felonies, he made excuses for his actions, and he was a moderate to high risk to reoffend. *State v. Knighton*, 143 Idaho 318, 144 P.3d 23 (2006).

**Factors Considered.**

A term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or

all of the related goals of deterrence, rehabilitation and retribution; these criteria also apply to rulings on motions to reduce sentences under this rule. *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985).

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the judge who rules on it and it is within that judge's discretion to hear testimony or argument on the motion and since the motion essentially is a plea for leniency which may be granted if the sentence originally imposed was, for any reason, unduly severe, it would ill serve the purpose of this rule to preclude the defendant from presenting fresh information about himself or his circumstances; moreover a change in judicial personnel should not deprive the defendant of an opportunity to produce such information. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

Although rehabilitation and family circumstances may be pertinent factors to weigh in considering a motion for reduction of a sentence, they are not necessarily controlling; rehabilitation is but one of several objectives considered in formulating an appropriate sentence, other factors include deterrence, retribution and the protection of society. *State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (1984).

In a motion for sentence reduction a defendant should not be precluded from presenting fresh information about himself or his circumstances. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

A term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation and retribution. These criteria also apply to rulings on motions to reduce sentences under this rule. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985).

The criteria for evaluating a judge's refusal to reduce a sentence are the same as those applied in determining whether the original sentence was excessive; the judge may consider facts presented at the original sentencing, as well as any new information concerning the defendant's rehabilitative progress in confinement. *State v. Goldman*, 109 Idaho 1031, 712 P.2d 732 (Ct. App. 1985).

The judge may consider facts presented at the original sentencing as well as any new information concerning the defendant's rehabilitative progress while in confinement. *State v. Hassett*, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986).

The criteria for evaluating rulings on mo-



tions to reduce sentences under this rule are the same as those applied in determining whether the original sentence was excessive. *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986).

Where no motion to reduce the sentence was made under this rule, nor was any suggestion made to the judge that under § 19-2603 he could choose not to reinstate the full ten-year sentence, the district court did not abuse its discretion in reinstating the remainder of the defendant's ten-year indeterminate sentence, where the defendant was found to be in possession of a dangerous weapon while in jail. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Although rehabilitation and health problems are factors to consider in a motion for reduction of a sentence, they are not necessarily determining factors. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

The criteria for evaluating rulings on motions to reduce sentences under this rule are the same as those applied in determining whether the original sentence was reasonable; however, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion for reduction. *State v. Forde*, 113 Idaho 21, 740 P.2d 63 (Ct. App. 1987).

The court did not abuse its discretion in refusing to grant leniency from the additional confinement of approximately two years and four months presumed to flow from the seven-year sentence for grand theft, where the reviewing judge was entitled to believe that the defendant still posed a serious rehabilitation quandary based on his extensive record of felonies and misdemeanors, brief incarcerations, probationary conduct and fines. *State v. Liggins*, 113 Idaho 62, 741 P.2d 349 (Ct. App. 1987).

District judge did not abuse his discretion in declining to reduce the defendant's prison sentences for sexual abuse of children, in spite of his good behavior in a highly structured institutional setting, where he had a prior record of juvenile offenses and misdemeanors, his sexual misconduct had a long history and a profoundly disturbing effect upon his family, and the psychologist found a substantial risk that the defendant's sexual misconduct would be repeated in the future. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

In considering a motion under this rule, a judge may consider facts presented at the original sentencing as well as any other information concerning the defendant's rehabilitative progress in confinement. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

A motion under this rule is a plea for leniency which may be granted if the sentence imposed was, for any reason, unduly severe; the judge may consider facts presented at the original sentencing as well as any new information concerning the defendant's rehabilitative progress in confinement. *State v. Puga*, 114 Idaho 117, 753 P.2d 1263 (Ct. App. 1987).

The criteria for evaluating a judge's refusal to reduce a sentence are the same as those applied in determining whether the original sentence was excessive. *State v. Buzzard*, 114 Idaho 384, 757 P.2d 247 (Ct. App. 1988).

In considering a motion under this rule, the trial court may consider facts presented at the original sentencing as well as any other information concerning the defendant's rehabilitative progress in confinement; on appeal, the Court of Appeals similarly examines the record of the original sentencing when such a record is provided, together with information subsequently presented in support of the motion. *State v. Buzzard*, 114 Idaho 384, 757 P.2d 247 (Ct. App. 1988).

A defendant's initial claim for post-conviction relief from improperly imposed consecutive sentences, although failing to recite the illegality of the sentences or to raise a claim for relief under § 19-4901, sufficiently invited the district court to consider the legality of the consecutive sentences under this rule. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

The rehabilitative effect of the defendant's drug treatment program was not by itself sufficient basis for a reduction of his sentence. *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

It was not an abuse of district court's discretion where it denied a motion to reduce the defendant's sentence from an indeterminate seven years to an indeterminate five years under this rule, where the motion was based on the nonviolent nature of the forgery conviction, and the rehabilitative effect of a drug treatment program. *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

A sentence may represent an abuse of discretion if it is shown to be unreasonable upon the facts of the case; a term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all the related goals of deterrence, rehabilitation and retribution. These criteria also govern rulings on motions to reduce sentences under this rule. *State v. Wright*, 114 Idaho 451, 757 P.2d 714 (Ct. App. 1988).

Although a Rule 35 motion is addressed to the judge's discretion, and although the judge

may choose whether or not to conduct an evidentiary hearing on the motion, he may not wholly disregard proffered information about the defendant simply because it goes beyond the evidence presented at sentencing. *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988).

The district court did not unduly limit the information considered in deciding a motion under this rule by denying defendant's request for production of progress reports from the Idaho State Correctional Institution, where the court had already accepted the defendant's statements regarding her good conduct during incarceration. *State v. Pattan*, 116 Idaho 699, 778 P.2d 821 (Ct. App. 1989).

Good conduct of defendant while in prison is worthy of consideration with regard to a motion brought under this rule, however, it may not be an accurate indicator of future conduct in a noncustodial setting. *State v. Sanchez*, 117 Idaho 51, 785 P.2d 176 (Ct. App. 1990).

A sentence of a fixed life term for first degree murder and an indeterminate life term for robbery enhanced by an additional ten years for use of a firearm in the commission of robbery was not an abuse of discretion in light of the cold blooded nature of the murder; the defendant's addiction to cocaine and troubled childhood did not excuse his crime or mandate a lesser sentence. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

The primary consideration in sentencing is the good order and protection of society; though humanitarian considerations and rehabilitation are important to our society, they cannot be allowed to control or defeat punishment, or to force courts to ignore or subordinate other factors to the detriment of society. *State v. Kern*, 119 Idaho 295, 805 P.2d 501 (Ct. App. 1991).

Several factors are relevant in deciding whether a particular sentence is reasonable. The primary consideration in sentencing is the good order and protection of society; though humanitarian considerations and rehabilitation are important to society, they cannot be allowed to control or defeat punishment, or to force courts to ignore or subordinate other factors to the detriment of society. *State v. Young*, 119 Idaho 430, 807 P.2d 648 (Ct. App. 1991).

A motion to reduce a sentence under this rule is essentially a plea for leniency, addressed to the sound discretion of the sentencing court; the appellate courts will not disturb the sentencing court's decision regarding a request to reduce a sentence unless an abuse

of discretion is shown, moreover on appeal, the appellate court consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Young*, 119 Idaho 510, 808 P.2d 429 (Ct. App. 1991).

Where the judge was faced with defendant's contentions that he was sincerely motivated to receive treatment for his underlying mental problems and that the present episode was defendant's only violent crime, but the judge also had to consider that defendant inflicted life-threatening wounds with a deadly weapon in an unprovoked attack upon a random victim while defendant was on parole for another felony, the district court did not abuse its discretion in refusing to reduce the ten year fixed portion of the sentence. *State v. King*, 120 Idaho 955, 821 P.2d 1010 (Ct. App. 1991).

Although the good conduct of a defendant while in prison merits consideration in evaluating a motion under this rule, it may not be an accurate litmus test of future conduct in a noncustodial setting. *State v. Gonzales*, 122 Idaho 17, 830 P.2d 528 (Ct. App. 1992).

The criteria for examining a decision made upon a request for sentence reduction are the same as those applied in determining whether the original sentence was reasonable. *State v. Schorzman*, 122 Idaho 201, 832 P.2d 1136 (Ct. App. 1992).

The district court commented at the hearing on the motion to reduce defendant's sentence for lewd conduct with a minor that defendant had made inconsistent statements concerning his guilt before and after sentencing and that the time for defendant to express remorse and exhibit a suitability for treatment should have been between the time of the guilty verdict and sentencing. In determining not to grant leniency, the district court emphasized that any lesser sentence would depreciate the seriousness of the crime, the need to deter others, and that society must be protected from a person who was not amenable to treatment at the time of sentencing. *State v. Fullerton*, 122 Idaho 319, 834 P.2d 321 (Ct. App. 1992).

The factors considered by the district court in determining whether to reduce a sentence are the same as those considered in evaluating whether the original sentence was too severe, that is, whether the sentence serves the goals of protecting society, deterrence, rehabilitation and punishment. *State v. Springer*, 122 Idaho 544, 835 P.2d 1355 (Ct. App. 1992).

The district court did not abuse its discretion by denying a motion to modify defendant's sentence of an indeterminate term of

life with a minimum period of confinement of ten years for robbing a bank, where the defendant had an extensive prior criminal record and indicated she had committed the crime so that she could reenter the penitentiary where she felt more comfortable than she did living outside a penal facility. *State v. Yates*, 122 Idaho 625, 836 P.2d 571 (Ct. App. 1992).

Where defendant's criminal record spanned ten years, including his juvenile record, a sentence of five years with two years' fixed for first degree burglary, to be served concurrently with an identical sentence previously imposed in a separate case, and a sentence of ten years with three years' fixed for battery with the intent to commit rape, to be served consecutively to the sentence on the first degree burglary conviction were reasonable sentences under the circumstances. *State v. Acha*, 122 Idaho 744, 838 P.2d 873 (Ct. App. 1992).

Where defendant drove his truck into a group of people causing serious injuries, including the loss of one victim's arm, and where defendant later led police on a high speed chase, a unified sentence of five years with four years fixed was reasonable for a plea to the charge of leaving the scene of an accident resulting in injury. *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

The district court did not err in imposing a unified sentence of five years, including a two year minimum term of confinement on defendant's felony DUI conviction where the district court was persuaded that defendant's lengthy DUI record, the fact that he had reoffended while released on his own recognizance pending sentencing, and the recommendation of the Jurisdictional Review Committee, all indicated that society would be best protected by denying probation. *State v. Cardona*, 123 Idaho 16, 843 P.2d 166 (Ct. App. 1992).

A Rule 35 motion may be granted if the original sentence was unduly severe in light of additional or new evidence submitted with the motion. A sentence may be an abuse of discretion if it is shown to be unreasonable upon the facts of the case, but a sentence will not be disturbed if it is within the allowable maximum unless there is a clear abuse of discretion. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Since a sentencing court may, with due caution, consider the existence of a defendant's alleged criminal activity for which no charges have been filed or where charges have been dismissed, there was no error in sentencing court's determination of the significance to be placed on victim's account of defendant's

prior, uncharged criminal acts against her. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

#### —Appeal.

The issue presented on appeal from denial of a motion under this rule is whether the facts presented in connection with the motion, when viewed in the context of information already in the record, show that discretion was abused in ailing to grant the leniency requested. *State v. Stanfield*, 112 Idaho 601, 733 P.2d 822 (Ct. App. 1987).

The judge did not abuse his discretion by denying the motion under this rule, where the defendant committed violent and depraved acts upon his seven-year-old daughter, and the presentence investigation report noted that the defendant might pose a continuing threat to the girl unless confined. *State v. Stanfield*, 112 Idaho 601, 733 P.2d 822 (Ct. App. 1987).

Because the issues raised in the petition for post conviction relief were adjudicated on direct appeal, there was no error in the district court's res judicata ruling. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989).

#### —Excessive.

If the sentence is not excessive when pronounced, the defendant must show that it is excessive in view of new or additional information presented with his motion to reduce. *State v. Springer*, 122 Idaho 544, 835 P.2d 1355 (Ct. App. 1992).

#### —Hearsay Statements.

In hearing a defendant's motion for sentence reduction a judge may properly admit hearsay statements so long as both parties are accorded the right to rebut them. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

#### —Mistaken Number of Convictions.

Where in its order denying reconsideration of defendant's sentence, under this rule, the court mistakenly believed defendant had seven prior felony convictions, when in fact there were only six prior convictions, this was not a "materially" false assumption of fact. *State v. Gawron*, 124 Idaho 625, 862 P.2d 317 (Ct. App. 1993); *State v. Mosqueda*, 123 Idaho 858, 853 P.2d 603 (Ct. App. 1993).

While post-conviction behavior is a factor to be considered in rendering a sentence, it is not necessarily determinative. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

#### —Rehabilitation.

Despite defendant's progress towards reha-



bilitation during his incarceration, the trial court did not abuse its discretion in refusing to make his rehabilitation the determining factor in ruling on a motion to reduce his sentence for vehicular manslaughter. *State v. Mosqueda*, 123 Idaho 858, 853 P.2d 603 (Ct. App. 1993).

#### **Failure to Appeal.**

Where the defendant failed to appeal the denial of his motion to reconsider the sentences, he waived his right to challenge the court's sentencing discretion. *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985).

The issue of an alleged involuntary plea of guilty was not properly before the court; no appeal was taken within 42 days of the judgment, and defendant's motion under this rule was not filed within 14 days of the judgment of conviction and sentence; as such, the motion filing was inadequate to preserve the right to appellate review of defendant's conviction and sentence. *State v. Jardin*, 121 Idaho 1030, 829 P.2d 1379 (Ct. App. 1992).

#### **Filing of Motion.**

Where no claim of deficiency in the presentation of a Rule 35 motion is raised as a ground for post-conviction relief, the filing of a Rule 35 motion beyond the fourteen-day limit provided by I.A.R. 14(a) does not extend the time for filing a post-conviction application. *Mills v. State*, 126 Idaho 330, 882 P.2d 985 (Ct. App. 1994).

#### **—Time for Appeal.**

The filing of a Rule 35 motion more than fourteen days after the entry of judgment did not serve to enlarge the time to file an appeal from the judgment of conviction and sentence. *State v. Mosqueda*, 123 Idaho 858, 853 P.2d 603 (Ct. App. 1993).

#### **Findings of Court.**

The trial court is not required to enter findings in support of its decision on a Rule 35 motion. *State v. Ojeda*, 119 Idaho 862, 810 P.2d 1148 (Ct. App. 1991).

#### **Harmless Error.**

Trial court's use of the words "consecutive sentence" to describe a five-year enhancement of defendant's robbery and aggravated battery sentences was inappropriate but did not give rise to relief under this Rule. *State v. Phillippi*, 116 Idaho 826, 780 P.2d 148 (Ct. App. 1989).

Although district court committed error in failing to act upon defendant's motion for appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred

more than a year before his application was filed and therefore frivolous. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

#### **Hearing.**

The decision whether to conduct a hearing on a motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

#### **Illegal Sentence.**

A claim that credit for prejudgment incarceration was not properly given is a claim that the sentence is illegal, since the sentence would have been imposed in violation of § 18-309, and defendant's motion filed two-and-one-half years after imposition of the judgment was timely and was properly considered on the merits by the district court. *State v. Rodriguez*, 119 Idaho 895, 811 P.2d 505 (Ct. App. 1991).

This rule permits the trial court to correct an illegal sentence at any time, upon the motion of the prosecution or the defense. However, as contended by the State, the issue of "illegality" may not be raised for the first time on appeal without the trial court having first had an opportunity to consider the legality of the terms of the sentence. *State v. Howard*, 122 Idaho 9, 830 P.2d 520 (1992).

Because Idaho Crim. R. 35 is limited to legal questions surrounding defendant's sentence, the factual issue of the divisibility of conduct for purposes of I.C. 19-2520E had to be apparent from the face of the record and determined before defendant filed a Rule 35 motion; by reexamining the facts underlying the crimes to determine that defendant's sentence was illegal, the district court exceeded the "narrow" scope of Rule 35 and thus exceeded the scope of its authority. *State v. Clements*, 148 Idaho 82, 218 P.3d 1143 (2009).

#### **—Grand Jury Expired.**

Where a grand jury that indicted defendant was acting without authority because its term had expired, the district court erred in denying defendant's Idaho Crim. R. 35 motion for correction of an illegal sentence, and his conviction was accordingly vacated. Because the grand jury's term had expired, no valid indictment or information was returned. *State v. Lute*, 150 Idaho 837, 252 P.3d 1255 (2011).

#### **—Question of Law.**

In an appeal from the denial of a motion under this rule to correct an illegal sentence, the question of whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court. *State v. Josephson*, 124 Idaho 286, 858 P.2d 825 (Ct. App. 1993).

**Impermissible Second Motion.**

Trial court correctly denied appellant's written Idaho Crim. R. 35 motion on the ground that it was an impermissible second motion for reduction of sentence. *State v. Hurst*, 151 Idaho 430, 258 P.3d 950 (Ct. App. 2011).

**Imposition of Sentence.**

A sentence is "imposed" when it is initially pronounced, even though jurisdiction is retained after I.C. § 19-2601(4) or the sentence is suspended. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987).

A sentence is "imposed" when it is initially pronounced. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

District court did not abuse its discretion in denying defendant's Rule 35 motion because defendant did not present the district court with any new information in support of his motion and the appellate court had already upheld defendant's initial sentence. *State v. Fuhrman*, 137 Idaho 741, 52 P.3d 886 (Ct. App. 2002).

**Improper Lesser Sentence.**

Section 18-4004 requires, upon conviction for first degree murder, punishment of either death or a life sentence. The trial judge may not impose a lesser, fixed term sentence; thus, the twenty-five year fixed sentence the defendant received was illegal, and was therefore vacated and remanded to the district court to impose a legal sentence. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985).

**Improper Separate Sentences.**

Where, in a prosecution for kidnapping, the trial court imposed a separate sentence because the defendant was a persistent violator, such separate sentence was an error of law which rendered the entire sentence invalid ab initio; thus, the trial court was obligated to correct the sentence under this rule. *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).

**Inappropriate Description of Sentence.**

The term "consecutive" is inappropriate when referring to a sentence enhancement for use of a firearm, as a firearm enhancement is part of a single sentence; however, the mere choice of an inappropriate word by the court in characterizing a sentence as "consecutive" rather than "enhanced" does not give rise to relief pursuant to this section absent a showing that the court has caused the enhanced sentence to be administered improperly. *State v. Camarillo*, 116 Idaho 413, 775 P.2d 1255 (Ct. App. 1989).

**Indeterminate Period of Confinement.**

Where the defendant, if all minimum terms

were served before the indeterminate portion of his sentence, would have to serve 15 years, his argument that he would have to serve more than 15 years was nothing more than speculation. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

Defendant convicted of conspiracy to traffic in at least 28 grams of heroin, was properly sentenced to a unified term of life imprisonment with 15 years determinate, and the district court properly denied his motion for reduction of sentence since defendant failed to prove that the indeterminate portion of his sentence was excessive. *State v. Lopez*, 140 Idaho 197, 90 P.3d 1279 (Ct. App. 2004).

On appellate review of a sentence, the court ordinarily considers the determinate term as the probable duration of incarceration, and the indeterminate portion of a sentence will be examined only if the defendant shows that special circumstances require consideration of more than the fixed period of confinement. *State v. Lopez*, 140 Idaho 197, 90 P.3d 1279 (Ct. App. 2004).

**Information Limited.**

An abuse of discretion is shown where the judge unduly limits the information considered in deciding a motion under this rule. *State v. Hoffman*, 112 Idaho 114, 730 P.2d 1034 (Ct. App. 1986).

Where, although the judge did not hold a hearing, he considered the information provided by defendant's motion, affidavit, and attachments, which tended to show that the defendant had made good rehabilitative progress since sentencing, he had a good record in prison, and he had a place to live and work outside of prison, and after reviewing all the information presented, the judge concluded that a hearing was unnecessary and that reduction of defendant's sentence was not justified, the judge did not unduly limit the information he considered, and no abuse of his discretion was shown. *State v. Hoffman*, 112 Idaho 114, 730 P.2d 1034 (Ct. App. 1986).

No undue limitation was presented, although in-court testimony was not permitted, where the court did provide an opportunity for oral argument, and the defendant was allowed to submit affidavits in support of his motion; therefore, the court did not abuse its discretion by denying the defendant an evidentiary hearing. *State v. Puga*, 114 Idaho 117, 753 P.2d 1263 (Ct. App. 1987).

**Inventory.**

In considering a motion for return of property, the court will be assisted in its determination of what was actually seized by the state by a proper inventory of the seized items created at the time of the seizure. *Butler*

Trailer Mfg. v. State, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

### **Jurisdiction.**

The filing limitation of this section is a jurisdictional limit on the authority of the court to consider the motion, and unless filed within the period, a district court lacks jurisdiction to grant any relief. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

Where the defendant's notice of appeal was filed within 42 days after his motion under this rule was denied by the district court, the order denying the motion to modify was properly before the Court of Appeals. *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988).

Application of an exception to jurisdictional requirements of this rule was warranted where the court misapplied the jurisdictional limit by informing a defendant whose probation had been revoked that he could not move for a reduction of sentence at the time of his revocation hearing. *State v. Corder*, 115 Idaho 1137, 772 P.2d 1231 (Ct. App. 1989).

Where defendant's motion for probation or reduction of sentence was filed five days before the 120-day deadline but no decision was made on the motion for 29 months and three more months elapsed before the court's final decision to suspend the sentence and release the defendant, the court had lost its jurisdiction to consider the motion. *State v. Chapman*, 121 Idaho 364, 825 P.2d 87 (Ct. App. 1991).

The Court of Appeals has construed this section to authorize district judges to reduce a sentence which is being reinstated when the reduction is made at the time probation is revoked; therefore, the district court had authority to reduce defendant's sentence at the time it revoked his probation; because the district judge reduced defendant's original sentence "upon" revoking his probation, the state's argument that the court lacked jurisdiction was unfounded. *State v. Peterson*, 121 Idaho 775, 828 P.2d 338 (Ct. App. 1992).

A district court does not lose jurisdiction to act upon a timely-filed motion under this rule merely because the 120-day period expires before the judge can reasonably consider and act upon the motion. Allowing a trial court to rule within a "reasonable" time will allow the court to fulfill its own duties, yet will prevent cases in which the defendant files a motion under this rule at the very end of the 120-day period, for instance on the 119th day, leaving the court only one day to rule on the motion. A strict interpretation would, in such a case, be highly impractical and would most often cause the trial court to lose jurisdiction without ever having a chance to consider the

motion. *State v. Chapman*, 121 Idaho 351, 825 P.2d 74 (1992).

Where the 17-year-old defendant failed to attack the district court's jurisdiction over him for an attempted robbery charge, he waived his right to raise the issue either in later motions to the district court or to the appellate court on review. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

Where the trial court unreasonably delayed its ruling on defendant's Idaho Crim. R. 35 motion to modify defendant's sentence, the trial court was deprived of jurisdiction to initially grant the motion. *State v. Parvin*, 137 Idaho 783, 53 P.3d 834 (Ct. App. 2002).

Defendant's motion was not one for correction of an illegal sentence, and even if it was, the motion was untimely, and the district court had no jurisdiction to grant the motion. *State v. Peterson*, 148 Idaho 610, 226 P.3d 552 (2010).

### **—Reconsideration.**

A motion to reconsider the denial of a Rule 35 motion is an improper successive motion and is prohibited. The prohibition of successive motions under Rule 35 is a jurisdictional limit. *State v. Bottens*, 137 Idaho 730, 52 P.3d 875 (Ct. App. 2002).

### **Limitation.**

A motion under this rule subjects only the sentence to re-examination. It cannot be used as the procedural mechanism to attack the validity of the underlying conviction. *State v. McDonald*, 130 Idaho 963, 950 P.2d 1302 (Ct. App. 1997).

### **Modification by Appellate Court.**

Where the defendant had already spent two years in jail before successfully appealing his sentence, the appellate court itself modified the judgment instead of remanding the case to the trial court for further consideration as to resentencing. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982).

### **Need to Protect Society.**

Judge did not abuse his discretion in sentencing defendant, convicted of grand theft for shooting a cow and appropriating the two hind quarters therefrom, to a term not to exceed eight years with a three year minimum period of confinement, where the judge took defendant's crime, his past criminal activity and his potential for rehabilitation, and balanced them against the need to protect society. *State v. Johnson*, 117 Idaho 650, 791 P.2d 31 (Ct. App. 1990).

Where a district judge concluded that a rape defendant was a threat to society and would likely offend again due to his minimal ability to comprehend and complete any pro-



grams that might be used in treating him, denial of the defendant's motion to reduce his ten-year fixed minimum sentence was not an abuse of discretion. *State v. Ward*, 120 Idaho 182, 814 P.2d 442 (Ct. App. 1991).

The district court did not unduly limit the information considered before deciding to deny defendant's Rule 35 motion, where although the court refused to grant a hearing for the presentation of further evidence, the district court stated that it was accepting all of defendant's representations regarding his rehabilitation as true, but the truth of those representations did not overcome the court's concern about the need to protect society. *State v. Elliott*, 121 Idaho 48, 822 P.2d 567 (Ct. App. 1991).

Trial court did not abuse its discretion in denying defendant's motion for a reduced sentence as defendant did not show the sentence was excessive and the trial court determined that defendant presented a high risk to re-offend. *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002).

Court did not abuse its discretion in denying defendant's motion for a reduction of sentences after defendant was convicted of three counts of lewd conduct with a minor child under the age of 16; lesser sentences were not warranted due to the serious nature of the crimes and the risk of reoffending. *State v. Gain*, 140 Idaho 170, 90 P.3d 920 (Ct. App. 2004).

Trial court did not abuse its discretion when it denied defendant's motion for a reduced sentence under this rule; the trial court properly considered the egregious nature of the rape and robbery offenses and the need to protect society from defendant's conduct. *State v. Piro*, 141 Idaho 543, 112 P.3d 831 (Ct. App. 2005).

#### **New or Additional Information.**

If a sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion for reduction. If he fails to make this showing, it cannot be said that denial of a Rule 35 motion by the district court represented an abuse of discretion. *State v. Caldwell*, 119 Idaho 281, 805 P.2d 487 (Ct. App. 1991).

On review of a denial of a Rule 35 motion, if the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of additional information presented with his motion for reduction. *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).

Because defendant did not present any new or additional information with his motion for a reduction of sentence, the denial of his

motion was affirmed. *State v. Farwell*, 144 Idaho 732, 170 P.3d 397 (2007).

Even though not all information was specifically mentioned by trial counsel at the sentencing hearing, defendant's motion under Idaho Crim. R. 35 presented no new information for the trial court to consider in reducing her sentences for felony injury to a child, and even granting defendant the benefit of the doubt that this information was new to the district court, no abuse of discretion was shown. *State v. Halbesleben*, 147 Idaho 161, 206 P.3d 867 (2009).

Trial court did not abuse its discretion by denying defendant's motion for a sentence reduction, because he presented no new information pertaining to his sentence as to invoke this rule; his contention that he presented additional information in the form of an audiotape, where his accomplice allegedly takes responsibility for a story written about the murder, was insufficient to find an abuse of discretion. *State v. Adamcik*, 152 Idaho 445, 272 P.3d 417 (2012).

#### **Parole Eligibility.**

The determination of whether an inmate has served a commensurate amount of his sentence such that he is eligible for parole rests with the Department of Corrections, not the sentencing judge. *State v. Sherman*, 120 Idaho 464, 816 P.2d 1021 (Ct. App. 1991).

#### **Permissible Number of Motions.**

The Criminal Rules do not allow a motion to alter or amend after denial of motion pursuant to this rule, and where a motion was nothing more than a renewed request to reduce sentences, the Rules specifically provide that only one Rule 35 motion to reduce sentence may be filed; consequently, defendant's motion was prohibited and the court could have summarily denied it. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

#### **Plea for Leniency.**

A motion under this Rule is essentially a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. McCulloch*, 133 Idaho 351, 986 P.2d 1017 (Ct. App. 1999).

#### **Probation for Life.**

District court not abuse its discretion when it imposed a term of lifetime probation upon child sexual abuse defendant's motion for reconsideration of sentence. He was convicted of two felonies, each carrying the possibility of life imprisonment, thus making the imposition of probation for life legal under Idaho law. The district court considered all the mitigating information submitted by defendant and balanced it against the facts of the case.

State v. Crockett, 146 Idaho 13, 189 P.3d 475 (Ct. App. 2008).

#### **Probation Violation.**

After a probation violation has been proven, the court may order the suspended sentence to be executed or, in the alternative, the court is authorized under this rule to reduce the sentence upon revocation. State v. Martin, 122 Idaho 423, 835 P.2d 658 (Ct. App. 1992).

When a reduction of a sentence is sought upon revocation of probation, the motion must be made at the time probation is revoked; it cannot be filed after revocation and after the prison sentence has been ordered into execution. State v. Russell, 122 Idaho 488, 835 P.2d 1299 (1992).

#### **Progress Report.**

When a reduction of a sentence is sought upon revocation of probation, the motion must be made at the time probation is revoked; it cannot be filed after revocation and after the prison sentence has been ordered into execution. State v. Russell, 122 Idaho 488, 835 P.2d 1299 (1992).

In an action for post-conviction relief, defendant argued that his motion for a progress report raised an "issue of fact" regarding his rehabilitative progress that could have been considered by the court had his attorney filed a timely Rule 35 motion; however, even if the defendant had provided the court with a progress report that was substantially favorable and the court accepted the facts asserted, the appellate court had discretion to deny the motion. Hassett v. State, 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995).

#### **Proper Procedure.**

If objection to the illegality of a sentence has not been otherwise raised before the trial court by either the state or the defendant, it may not be raised for the first time on appeal. The state or a defendant may challenge the legality of the sentence in the trial court under I.C.R. 35 and appeal from the trial court's ruling if necessary. State v. Martin, 119 Idaho 577, 808 P.2d 1322 (1991).

The court lacked jurisdiction to remove the defendant from the custody of the Department of Corrections and grant him probation since the order was not made by a prompt ruling on a timely and properly filed Rule 35 motion, but on an application for post-conviction relief filed more than ten months after the defendant was committed to the custody of the Department of Corrections. The defendant's post-conviction application could not be used to obtain a reduction of a legal sentence, and it failed to state a claim entitling him to relief. State v. Heyrend, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

Where defendant's motion complaining of ex parte procedure used in relinquishing jurisdiction was not a challenge to the manner in which sentence was imposed, a motion under this rule to correct or reduce his sentence was not the proper procedural mechanism to raise the issue. State v. Alvarado, 132 Idaho 248, 970 P.2d 516 (Ct. App. 1998).

The proper procedure for handling a motion under this Rule during the pendency of an appeal is to rule on the motion, and then to consolidate any appeal from that ruling into the pending appeal. State v. Payan, 132 Idaho 614, 977 P.2d 228 (Ct. App. 1998).

#### **Purpose.**

A motion to reduce a legally imposed sentence is addressed to the sound discretion of the district court and such a motion is essentially a plea for leniency which may be granted if a sentence originally imposed was, for any reason, unduly severe. State v. Thomas, 112 Idaho 1134, 739 P.2d 433 (Ct. App. 1987).

A motion under this rule is essentially a request for leniency from an unduly severe sentence, and such a motion is addressed to the sound discretion of the trial court. State v. Clayton, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); State v. Howard, 112 Idaho 1132, 739 P.2d 431 (Ct. App. 1987).

A motion under this rule is a plea for leniency which may be granted if the sentence imposed upon the defendant was unduly severe. State v. Maxfield, 115 Idaho 910, 771 P.2d 928 (Ct. App. 1989); State v. Springer, 122 Idaho 544, 835 P.2d 1355 (Ct. App. 1992).

A motion under this rule for reduction of a sentence essentially is a plea for leniency which may be granted if, in the sound discretion of the trial court, the sentence imposed was, for any reason, unduly severe. State v. Woodman, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989); State v. Repici, 122 Idaho 538, 835 P.2d 1349 (Ct. App. 1992).

The purpose of a motion pursuant to this section is either to correct or reduce a sentence as imposed, and allegations of ineffective assistance of counsel and of judicial bias made part of such a motion are improperly raised. State v. Johnson, 117 Idaho 650, 791 P.2d 31 (Ct. App. 1990).

#### **Reconsideration of Denial.**

A motion for reconsideration of a denial of a motion for a reduction of a sentence is a renewed motion under this rule and is not permitted, but where the court nonetheless entertains such a motion and denies it on its merits, the court's exercise of discretion in that regard may be asserted as an issue on

appeal. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

Defendant's second motion to reduce his sentence was not an order entered after judgment affecting substantial rights of the defendant, because defendant had no right to file a renewed motion; therefore, defendant was not entitled to appeal the order under I.A.R. 11(c)(9). *State v. Atwood*, 122 Idaho 199, 832 P.2d 1134 (Ct. App. 1992).

#### **—After Court Relinquishes Jurisdiction.**

There is no exception to this rule which would allow a defendant to file a first motion under this rule after the original sentencing hearing, and a second motion after a court decides to relinquish jurisdiction. *State v. Atwood*, 122 Idaho 199, 832 P.2d 1134 (Ct. App. 1992).

Authority conferred by this rule for the trial court to modify a sentence, included the authority to suspend a sentence, and place defendant on probation; therefore, the trial court was empowered by this rule to, in substance, "reconsider" the relinquishment of jurisdiction on a timely motion from defendant, and to then suspend defendant's sentence, and place defendant on probation. *State v. Knutsen*, 138 Idaho 918, 71 P.3d 1065 (Ct. App. 2003).

Following the district court's decision to relinquish jurisdiction, she filed a timely Idaho Crim. R. 35 motion, specifically asking the court to reconsider the relinquishment decision and to place her on probation or to reinstate her to the retained jurisdiction program; thus, defendant took the opportunity afforded by Rule 35 to place before the court her challenge to the accuracy of the addendum to the presentence investigation report and the validity of its recommendations, such that the district court had to reconsider defendant's Rule 35 motion. *State v. Goodlett*, 139 Idaho 262, 77 P.3d 487 (Ct. App. 2003).

#### **Reduction by Trial Court.**

In prosecution of defendant who suffered from alcoholism for lewd conduct with a minor, while sentence of 15 years was well within the statutory limit of § 18-6607 (now § 18-1508), since it appeared that the trial court did not give proper consideration to defendant's alcoholic problem, the part it played in the crime and the suggested alternatives for treatment, the Supreme Court under a Rule 35 motion some 30 months after the sentence was imposed directed the trial court to determine whether a reduction of the sentence was in order. *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

A district court may reduce a sentence upon revocation of probation, but it is not required

to do so and where the sentences imposed upon violation of probation were not unduly harsh and did not represent an abuse of discretion, the court did not err by declining to reduce them. *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983).

It is well established that a motion to reduce a legally imposed sentence is addressed to the sound discretion of the district court; such a motion essentially is a plea for leniency which may be granted if the sentence originally imposed was, for any reason, unduly severe. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); *State v. Slinger*, 109 Idaho 363, 707 P.2d 474 (Ct. App. 1985).

The district court did not abuse its discretion in declining to reduce the defendant's indeterminate sentence of five years for aggravated assault for striking and seriously injuring his infant daughter, where the judge found the risk to society if the defendant were released early upon reduction of his sentence greater than the risk of impaired rehabilitation if the defendant remained in confinement. *State v. Galbraith*, 111 Idaho 379, 723 P.2d 923 (Ct. App. 1986).

The judge did not abuse his discretion in denying the motion under this rule to reduce the sentence, where the court determined the protection of society outweighed rehabilitation and health problems. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

The motion to reduce sentence under this rule may be granted if the sentence originally imposed was for any reason unduly severe. *State v. Martinez*, 113 Idaho 535, 746 P.2d 994 (1987).

There was no abuse of discretion in a sentence imposed for delivery of methamphetamine, which consisted of a unified prison term of seven years with three years determinate, or in a district court's decision not to reduce defendant's possession of methamphetamine sentence upon revocation of probation. Defendant had a twenty-year history of criminal offenses relating to alcohol and drug abuse. *State v. McCarthy*, 145 Idaho 397, 179 P.3d 360 (Ct. App. 2008).

Defendant's motion for reduction of sentence was properly denied where, in denying the motion, the district court stated that defendant had not presented, in conjunction with the motion, any evidence that was not considered by the trial court at the time of the sentencing hearing. *State v. Hedgecock*, 147 Idaho 580, 212 P.3d 1010 (2009).

#### **Restitution Order.**

An appeal for relief from a restitution order was considered by appellate court, even though the motion was pursued under this rule instead of I.C. § 19-5304(10), since the



state raised no issue regarding the procedural error and the appeal was timely filed. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Relief from a restitution order cannot be pursued by motion under this rule instead, a defendant may, within 42 days of the entry of the restitution order, appeal the order or request relief from the order in accordance with I.C. § 19-5304(10). *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

A motion under this rule is not an appropriate means by which to challenge an order of restitution. *State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993).

Relief from a restitution order cannot be pursued by a motion to reduce or correct a sentence pursuant to I.C.R. 35; rather, a defendant may seek relief pursuant to § 19-5304(10). *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

### Review of Record.

Defendant's claims under Idaho's since-repealed multiple-punishment statute, former § 18-301, could not be brought in a Idaho Crim. R. 35 motion because the claims involved significant questions of fact, and it would, thus, not be clear, from the face of the record, whether everything done in furtherance of one of the crimes charged was also done in furtherance of another crime. *State v. McKinney*, — Idaho —, 291 P.3d 1036 (2013).

This rule allows a district court to correct only those sentences that are illegal from the face of the record, i.e., do not involve significant questions of fact or require an evidentiary hearing. *State v. McKinney*, — Idaho —, 291 P.3d 1036 (2013).

### Revocation of Probation.

This rule allows reduction of the sentence "upon" revocation of probation; it does not authorize reduction in response to a motion after probation has been revoked. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

When a court determines that probation should be revoked, if a prison sentence previously has been pronounced but suspended, that sentence may be ordered into execution, or, alternatively the court is authorized under this rule to reduce the sentence upon revocation of the probation. *State v. Corder*, 115 Idaho 1137, 772 P.2d 1231 (Ct. App. 1989).

When a reduction of a sentence is sought upon revocation of probation, the motion must be made at the time probation is revoked. It cannot be filed after revocation and after the prison sentence has been ordered into execution. *State v. Hocker*, 119 Idaho 105, 803 P.2d 1011 (Ct. App. 1991).

Where the criminal history of defendant charged with violating probation granted in conjunction with a felony conviction for driving under the influence was replete with driving violations involving alcohol, and given the fact that although on more than one occasion the defendant had attempted to treat his alcohol problem, he had failed to complete the treatment programs ordered by a court, since it is entirely within the discretion of the trial court to determine that if rehabilitation measures undertaken during probation fail, and if such measures should be shifted to the more structured setting of a custodial facility, the district court did not abuse its sentencing discretion by revoking probation and imposing one of incarceration. *State v. Johnson*, 119 Idaho 107, 803 P.2d 1013 (Ct. App. 1991).

This rule motion was untimely because it was made approximately 90 days after the court had revoked probation and ordered the sentences into execution and the court therefore lacked authority to grant the motion. *State v. Morris*, 119 Idaho 448, 807 P.2d 1286 (Ct. App. 1991).

When a reduction of a sentence is sought upon revocation of probation, the motion cannot be filed after revocation and after the prison sentence has been ordered into execution. *State v. Morris*, 119 Idaho 448, 807 P.2d 1286 (Ct. App. 1991); *State v. Fox*, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992).

The district court, after revoking defendant's probation, erroneously informed defendant that he could "file proceedings under this rule challenging either the legality of the sentence or requesting leniency, further leniency, in the court's sentencing"; this rule does not allow a request for leniency to be made after revocation of probation. *State v. Barney*, 121 Idaho 368, 825 P.2d 91 (Ct. App. 1991).

After a probation violation has been proven, the decision to revoke probation and to pronounce sentence lies with the sound discretion of the trial court. Upon revoking probation, the court may order the suspended sentence executed, or, in the alternative, the court is authorized under this rule to reduce the sentence. *State v. Schorzman*, 122 Idaho 201, 832 P.2d 1136 (Ct. App. 1992).

In probation revocation proceeding, court imposed a four year determinate sentence instead of three years due to a clerical error in the original proceeding. Motion for reduction of sentence was properly denied, since court was unaware it was increasing sentence, and it could be corrected with a motion pursuant to Idaho Crim. R. 36. *State v. Timbana*, 145 Idaho 779, 186 P.3d 635 (2008).

### —Writing Not Required.

There is no requirement in this rule that a

motion made at the time of revocation of probation be made in writing. *State v. Beatey*, 123 Idaho 273, 846 P.2d 924 (Ct. App. 1993).

### **Running of Appeal Period.**

A timely motion to reduce or to correct a sentence under this rule is a motion which, if granted, could affect the judgment in the action; thus, where the defendant filed such a timely motion, the time for filing an appeal was terminated until the court ruled upon the motion. Therefore, where the defendant filed his appeal from the judgment against him within 42 days of the denial of his motion to have his sentence reduced, the defendant's appeal was timely filed. *State v. Knight*, 106 Idaho 496, 681 P.2d 6 (Ct. App. 1984).

Where, following a stipulation by the parties that the defendant had received ineffective assistance of counsel on his direct appeal, a district court vacated an original judgment of conviction for the limited purpose of allowing the period for the defendant's direct appeal to recommence, the period did not recommence for defendant to file a motion for reduction of sentence, and a motion under this Rule filed thirty-three months after the original judgment of conviction was untimely. *State v. Payan*, 132 Idaho 614, 977 P.2d 228 (Ct. App. 1998).

### **Scope of Review.**

Where an appeal is taken from denial of a motion under this rule, the Court of Appeals' scope of review includes all information presented at the original sentencing hearing and at a subsequent hearing on the motion, and its examination of the record focuses upon the nature of the offenses and the character of the offender. *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984).

Where an appeal is taken from an order refusing to reduce a sentence under this rule, the Court of Appeals' scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing on the motion. *State v. Yarbrough*, 106 Idaho 545, 681 P.2d 1020 (Ct. App. 1984).

When a judge unduly narrows the scope of his discretion in a motion for sentence reduction, by focusing upon improperly limited information, the proper appellate court response is not to usurp such discretion by exercising it themselves; rather, the proper course is to remand the case for reconsideration. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

Where an appeal is taken from an order refusing to reduce a sentence under this rule ambiguity, by itself, is not a sufficient reason to set aside the district court's order; particular passages in the order will not be viewed in

isolation; rather, the order will be considered as a whole. *State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (1984).

When reviewing indeterminate sentences, the appellate court deems the length of confinement to be one-third of the face amount of the sentence, absent a contrary indication in the record. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985).

Where an appeal is taken from an order refusing to reduce a sentence under this rule, the scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce. *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985).

Review of a motion to reduce a sentence is guided by the same criteria utilized to review the reasonableness of the original sentence. *State v. Roach*, 112 Idaho 173, 730 P.2d 1093 (Ct. App. 1986).

The criteria for evaluating rulings on motions to reduce sentences under this rule are the same as those applied in determining whether the original sentence was excessive: consideration of the primary objective of protecting society, together with the related goals of deterrence, rehabilitation, and retribution. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

The scope of review by the Court of Appeals includes all information available at both the original sentencing hearing and the hearing on this rule. *State v. Clayton*, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987).

In reviewing the court's denial of a motion under this rule the Court of Appeals applies the same criteria used for reviewing the reasonableness of the original sentence. *State v. Clayton*, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987).

In determining whether the district court abused its discretion in denying the defendant's motion under this rule, the Court of Appeals had to examine the record of the original sentencing proceeding, together with information subsequently presented in support of the Rule 35 motion, to evaluate whether the sentence imposed was for any reason unduly severe. *State v. Howard*, 112 Idaho 1132, 739 P.2d 431 (Ct. App. 1987).

On appeal of denial of a motion to reduce a sentence, the Court of Appeals examines the record of the original sentencing, together with information subsequently presented in support of the motion. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

The criteria for evaluating a judge's refusal to reduce a sentence are the same as those applied in determining whether the original sentence was excessive. *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

When the defendant filed his second application for post-conviction relief, instead of dismissing this application, the district court should have considered his continued request for relief from his sentences as a motion to correct an illegal sentence, even though this ground for relief was inadequately raised in the first application. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

When an appellate court discovers the existence of an illegal sentence, it cannot allow such a sentence to stand uncorrected. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Defendant's motion under this rule to reduce his sentence to a period of ten years based on his agreement that his plea of guilty to second degree murder was not voluntarily and knowingly entered because he had been led to believe that he would receive a sentence of not more than ten years was not relevant to a motion to reduce a sentence under this rule since the remedy for an alleged involuntary plea of guilty lies in a direct appeal from a judgment of conviction or through an application for post conviction relief under Title 19, Chapter 49 or the defendant might also file a postjudgment motion to withdraw the guilty plea under Rule 33(c). *State v. Flora*, 115 Idaho 397, 766 P.2d 1278 (Ct. App. 1988).

The appellate court's task on Rule 35 appeals is to determine whether the facts presented in conjunction with the motion, when viewed in the context of information already in the record, show that discretion was abused in failing to grant the leniency requested and in making this determination, the appellate court applies the same criteria used for reviewing the reasonableness of the original sentence. *State v. Marchant*, 115 Idaho 403, 766 P.2d 1284 (Ct. App. 1989).

The criteria for examining rulings on motions to reduce sentences under this rule are the same as those applied in determining whether the original sentence was reasonable; if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion for reduction. If he fails to make this showing, the court cannot say that denial of the motion by the district court represents an abuse of discretion. *State v. Morrison*, 119 Idaho 229, 804 P.2d 1360 (Ct. App. 1991).

The appellate court is governed by the same discretionary standard in reviewing a denial of a Rule 35 motion as is applied to sentence reviews. *State v. Haggard*, 119 Idaho 664, 809 P.2d 525 (Ct. App. 1991).

The record of the lower court proceedings showed that the Rule 35 motion involved only

the issue of the length of defendant's incarceration; no issue was raised with respect to the amount of restitution ordered, or the propriety of including restitution as a part of defendant's sentence therefore, because these issues were not raised below, the court will not consider them on appeal. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

The correct avenue for pursuing a challenge of the validity of defendant's plea and conviction would have been to bring a motion under I.C.R. 33(c); clearly, a motion which challenges the legality of a conviction on the grounds that it was based on an invalid guilty plea is beyond the scope of a motion brought under this rule; accordingly, because defendant failed to challenge the legality of his plea and conviction in the district court, the Court of Appeals would not address that issue on appeal. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

An order which denies a Rule 35 motion filed within 120 days, but more than fourteen days, after the judgment of conviction may be appealed, but the appeal will not carry with it the jurisdiction to review the judgment of conviction. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

In conducting appellate review of the denial of a Rule 35 motion, this Court considers the entire record and applies the same criteria used for determining the reasonableness of the original sentence. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

In some circumstances review of the indeterminate portion of a sentence may be appropriate. *State v. Bayles*, 131 Idaho 624, 962 P.2d 395 (Ct. App. 1998).

Defendant's claims under Idaho's former multiple-punishment statute, I.C. § 18-301, could not be brought in an Idaho Crim. R. 35 motion because they involved significant questions of fact which could not be resolved on the face of the record. *State v. McKinney*, — Idaho —, 291 P.3d 1036 (2013).

### **Sentence Enhancement.**

The issue of sentence enhancement was properly raised in a motion under this Rule, because enhancements are not considered to be a new offense for which there is a separate sentence, but an additional term which is part of a single sentence for the underlying crime. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

The issue of whether the district judge had authority under I.C. § 20-509 to enhance the defendant's sentence addressed the "legality" of the actual sentence, not the underlying conviction, and was properly brought through



a motion under this rule. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

#### **Sentence Upheld.**

A sentence of a minimum period of confinement of eight years for conviction of rape, burglary, kidnapping and the infamous crime against nature was not unreasonable where defendant was on probation at the time he committed the crimes, he violated a restraining order and had a prior criminal record. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

Sentence of six months in jail with all but 90 days suspended, a \$500 fine suspended except for court costs, and six months suspension of license was not excessive for first offense of driving without privileges; driver had more than 10 prior traffic violations, two pending charges for driving without privileges and had failed to appear eight times at hearings on those pending charges. *State v. Stewart*, 122 Idaho 284, 833 P.2d 917 (Ct. App. 1992).

Where defendant was charged with two counts of lewd conduct with two different boys under 16, and one count of sexual abuse of a third boy under 16, and defendant was sentenced to a fixed period of ten years with an indeterminate term of life imprisonment, a fixed period of 15 years followed by an indeterminate life term, and a fixed period of ten years followed by an indeterminate period not to exceed five years, all to run concurrently, and defendant was considered a "high risk offender," the sentence was well tailored to the purpose for which it was imposed. *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

A unified sentence of nine years with a minimum period of confinement of two years, for possession of a controlled substance with intent to deliver, was not an abuse of discretion, where although the evidence presented indicated that defendant's behavior and attitudes were good, and that he was taking advantage of the programs offered at the Idaho State Correctional Institution, the district court decided not to reduce the sentence imposed because of the magnitude and seriousness of the crime. *State v. Brydon*, 121 Idaho 890, 828 P.2d 919 (Ct. App. 1992), overruled on other grounds, *State v. Tranmer*, 135 Idaho 614, 21 P.3d 936 (2001).

Where defendant did not have an extensive prior criminal record, but had engaged in sexual abuse of his daughter over a long period of time, a sentence of 15 years' imprisonment with a four-year minimum period of confinement was not an abuse of discretion and sentence was reasonable. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

Where defendant received a sentence of a fixed four year term followed by an indeterminate eight year term for manufacturing of illegal drugs, the record indicated that the trial court took into consideration both the seriousness of the crimes and defendant's unique background, including his education and lack of any criminal record; furthermore, the sentence for the manufacturing count clearly was within the maximum penalty permitted pursuant to § 37-2732(a)(1)(A); consequently, the sentence imposed for the manufacturing count was not unreasonable under the facts of this case and the trial court did not abuse its discretion in denying defendant's plea for leniency. *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

A fixed sentence of two years followed by an indeterminate term of three years for second degree burglary was not unreasonable where defendant had a prior criminal record, including two felony convictions as an adult, defendant was on parole for an auto theft conviction in California at the time he committed the current offense and the presentence investigator stated that defendant appeared to be a manipulative individual who showed no remorse for his victims, and concluded that he was not a suitable candidate for probation. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

A 10-year term which included a minimum of five-years' incarceration for delivery of heroin was not an abuse of discretion where defendant was in possession of a .45 caliber pistol when he was arrested, he was a party to three drug transactions, and he purportedly was the one from whom the other two defendants got their drugs. *State v. Jardin*, 121 Idaho 1030, 829 P.2d 1379 (Ct. App. 1992).

A unified sentence of six years imprisonment with a minimum period of confinement of three years for delivery of heroin was not an abuse of discretion where defendant had only recently immigrated to the United States and the facts in the presentence report indicated that he was involved in an organized drug distribution syndicate. *State v. Pena*, 121 Idaho 1032, 829 P.2d 1381 (Ct. App. 1992).

A sentence of 20 years minimum confinement for defendant convicted of eight counts of drug related crimes was not excessive considering the serious nature of defendant's offenses, his unwillingness to interact with the court and the State in an honest and forthright manner, his unwillingness to accept responsibility for his crimes, and his lack of remorse. The sentence imposed by the District Court was a reasonable measure to promote the public's interests in protection of

society, deterrence of future crimes, and retribution. *State v. Ybarra*, 122 Idaho 11, 830 P.2d 522 (Ct. App. 1992).

Where defendant indicated that if the opportunity arose again to become involved with a teenage girl, defendant would feel no compunction about pursuing such an activity and, in the future, his aggressive nature might result in a crime of greater violence, and defendant had a history of other criminal acts, a sentence of seven years determinate followed by an additional indeterminate seven year period, for lewd and lascivious conduct with a minor under the age of sixteen, was not an abuse of discretion. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Where defendant was an adult male who had forcefully abducted a young girl who was walking to school and molested her and where defendant was a prior sex offender, a sentence of a fixed term of eighteen years for first-degree kidnapping was reasonable. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992).

Sentence of two to four years for felony D.U.I. was reasonable where the court felt constrained by defendant's record and defendant's inability to take advantage of the opportunities the courts had given him in the past. *State v. Hadley*, 122 Idaho 728, 838 P.2d 331 (Ct. App. 1992).

The district court's imposition of consecutive terms of confinement on defendant, who pled guilty to two counts of sexual abuse of a minor under the age of sixteen did not constitute an excessive sentence. *State v. Spencer*, 123 Idaho 13, 843 P.2d 163 (Ct. App. 1992).

A unified sentence of five years' fixed and five years' indeterminate for sexual abuse of a child was reasonable and the district court's decision to deny a motion for leniency did not constitute an abuse of discretion where the record revealed that the district court considered the pre-sentence investigation report, the psychological report, and the court record. *State v. Lowells*, 123 Idaho 171, 845 P.2d 589 (Ct. App. 1993).

District court did not abuse its discretion in denying defendant's request for a reduction of sentence where defendant's sentences for drug offenses were reasonable and where defendant committed several disciplinary offenses in prison during the time before the court relinquished jurisdiction. *State v. Sapp*, 124 Idaho 17, 855 P.2d 478 (Ct. App. 1993).

Trial court did not impose unreasonable sentences on defendant and did not abuse its discretion in denying defendant's motion to reduce sentence, where state argued in favor of death penalty but defendant was sentenced

to life in prison with a fixed term of thirty-five years for murder of another inmate and a fixed term of twenty years for riot, to be served concurrently. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

Sentence of eight years with a minimum period of confinement of three years for defendant convicted of sexual battery of a minor child 16 or 17 years old was not excessive nor an abuse of trial court's discretion, where the minor had been placed in defendant's home as a foster child where although defendant had no prior criminal record, had an excellent work history, and had the continued support of his wife, family and church, since the reason for the minor's placement in the foster home was her allegations of sexual abuse perpetrated on her by her father and once in the defendant's home there were approximately five acts of sexual battery over a three-month period which included acts of unprotected intercourse and the minor became pregnant and while there is support in the record for the defendant's claim that the sexual intercourse was consensual, defendant's abuse of his position of trust as a foster parent to a troubled adolescent was a very serious aggravating factor. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

District Court in denial of Rule 35 motion did not abuse its discretion in not reducing sentence of fifteen years for aggravated battery plus a consecutive enhance of twelve years, where the sentence imposed was within the statutory maximums, where the crime committed involved an act of domestic violence which caused life-threatening harm to defendant's former wife and was committed in the presence of their 14-year-old son, where although alcohol was a factor it could not be used as defense to excuse the actions, where there was no provocation for the attack which was a result of an ongoing cycle of domestic violence that escalated over the years, where the victim impact statement disclosed a long history of abuse and terror directed at former wife by defendant, where protection of victim and son were viewed as a paramount concern, and where defendant presented no evidence of any serious rehabilitation effort on his part. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Where defendant argued that the district court abused its discretion in denying defendant's motion for leniency under this rule, and Court of Appeals examined the probable duration of confinement in light of the nature of the crime, character of the offender, and objectives of sentencing, it held that as unified 10 year sentence imposed for crime of robbery was within guidelines of § 18-6503,



and that as defendant's prior history involved felony contact with the law and the potential seriousness of involvement in armed robbery it was proper for the district court to deny relief and that the sentence imposed was reasonable and did not constitute an abuse of discretion. *State v. Roberts*, 126 Idaho 920, 894 P.2d 153 (Ct. App. 1995), overruled on other grounds, *State v. Knutsen*, 138 Idaho 918, 71 P.3d 1065 (Ct. App. 2003).

In prosecution for 10 counts of robbery concurrent sentences of 25 years to life were not excessive under any reasonable view of the facts where defendant had committed robberies of two churches in different counties on the same day, and where defendant had been convicted of five previous felonies and his presentence investigation (PSI) showed a host of other charges which were dismissed or for which the disposition was unknown, where he had been placed on probation, unsuccessfully, and had been placed in prison and granted parole, all of which did not have the effect of deterring him from future crimes. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

Where sentence was not excessive when it was pronounced due to defendant's character and criminal record and defendant did not show that it was excessive in view of new or additional evidence with his motion for reduction, court did not err in its denial of defendant's Rule 35 motion and related request for a progress report. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

Where district court had the benefit of presentence investigation report containing a great deal of information about defendant's background and character, defendant refused to be interviewed by the presentence investigator or otherwise cooperate in completing the report, and defendant's prior criminal history included the rape of his 15-year-old daughter, five-year indeterminate sentence for failing to register under Sex Offender Registration Act was not excessive. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Unified life sentence with a minimum term of ten years' confinement for lewd and lascivious conduct with a minor conviction and a determinate sentence of five years for sexual abuse of a minor conviction were not unreasonable and were affirmed where evidence showed an undue risk that defendant would commit other, similar crimes and lesser sentences would depreciate the seriousness of the crimes. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

In its order denying the reduction of the sentence, the court restated its observation

that the defendant did not accept responsibility for her actions; that her explanations of her illegal conduct lacked credibility; and despite her efforts and protestations to the contrary, she showed no signs of remorse. The court concluded that it had been provided no reason for altering its original sentencing decision. Having determined that the original sentence was not excessive, the appellate court concluded that no abuse of discretion in the denial of the defendant's motion. *State v. Wheeler*, 129 Idaho 735, 932 P.2d 363 (Ct. App. 1997).

In prosecution for first degree murder where defendant pled guilty to second degree murder, where defendant did not provide any new or additional information in support of motion under this rule other than that which had been submitted at sentencing, because court had already determined that the sentence was not excessive when originally pronounced, and because nothing new or additional was provided in connection with the motion, the district court did not abuse its discretion in denying defendant's request for a modification of sentence. *State v. Robertson*, 130 Idaho 287, 939 P.2d 863 (Ct. App. 1997).

Based on defendant's lengthy criminal record and the fact the current conviction occurred while he was on parole, the district court did not abuse its discretion when it denied defendant's motion for rule 35 relief and declined to modify his consecutive sentence for forgery to one that would run concurrently with his sentence for burglary. *State v. Bayles*, 131 Idaho 624, 962 P.2d 395 (Ct. App. 1998).

Where punishment alone justified defendant's sentence because of the abhorrent nature of his crimes and the detrimental effect they had on the victims, the district court's imposition of consecutive ten years terms followed by an indeterminate life term for three counts of rape, based on the primary consideration of the protection of society, was not an abuse of discretion. *State v. McCulloch*, 133 Idaho 351, 986 P.2d 1017 (Ct. App. 1999).

District court did not abuse its discretion in denying the Rule 35 motion given the seriousness of the robbery offense, which involved terrorizing an individual with a threat of violence, and given the evidence in the record of defendant's character and poor rehabilitation potential. *State v. Behrens*, 138 Idaho 279, 61 P.3d 636 (Ct. App. 2003).

Trial court properly denied defendant's motion for a reduction in sentence under I.C.R. 35; given defendant's past history and the fact that a past rehabilitation attempts failed, the trial court properly found that probation was not appropriate, and defendant's sentence of a



unified term of 30 years in prison with 10 years determinate for defendant's convictions of robbery and eluding a police officer in violation of §§ 18-6501, 49-1404 was not excessive in violation of Idaho Const. art. I, § 6 and no reduction was required. *State v. Hayes*, 138 Idaho 761, 69 P.3d 181 (Ct. App. 2003).

Trial court properly denied defendant's motion for a reduction of his sentence of fifteen years with six years determinate for bank robbery. In light of defendant's prior felony and misdemeanor convictions, the sentence was not excessive. *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003).

District court did not err in denying defendant's Idaho Crim. R. 35 motion because defendant did not present additional information in support of his Rule 35 motion; defendant's sentences were reasonable at the time they were pronounced, and there was no additional information upon which to consider defendant's request. *State v. Dreier*, 139 Idaho 246, 76 P.3d 990 (Ct. App. 2003).

District court did not err by denying defendant's motion to reduce a sentence for conspiracy to traffic in methamphetamines because a five-year fixed sentence was mandatory. *State v. Hansen*, 138 Idaho 791, 69 P.3d 1052 (2003).

Upon defendant's conviction for methamphetamine possession, trial court did not abuse its discretion by imposing a minimum sentence of two and one-half years, or by denying defendant's motion for reduction, where defendant had a record of many prior convictions, and the minimum term imposed was intended to permit defendant to complete a prison drug rehabilitation program. *State v. Armstrong*, 142 Idaho 62, 122 P.3d 321 (Ct. App. 2005).

Although defendant argued that the trial court erred in not reducing his sentence where his lack of fluency in English prevented him from participating in meaningful rehabilitation programs while incarcerated, rehabilitation is only one factor considered when sentencing a criminal defendant; the court looked at the protection of society, deterrence, and punishment as well, and defendant failed to show that the trial court abused its discretion in denying his motion for a sentence reduction. *State v. Al-Kotrani*, 141 Idaho 66, 106 P.3d 392 (2005).

Determinate portion of defendant's sentence represented the mandatory minimum term of confinement, which the district court was required to impose, and defendant failed to demonstrate a special circumstance warranting review of the indeterminate portion of his sentence; therefore, the district court did

not abuse its discretion by denying defendant's motion for reduction in his sentence. *State v. Medrain*, 143 Idaho 329, 144 P.3d 34 (Ct. App. 2006).

Defendant entered an *Alford* plea to lewd conduct with a minor under sixteen, the district court sentenced him to a unified life sentence, with a minimum period of confinement of ten years, and defendant was required to pay a \$5,000 fine. The district court did not abuse its discretion by denying his motion for a reduction of sentence. *State v. Hillman*, 143 Idaho 295, 141 P.3d 1164 (Ct. App. 2006).

District court did not abuse its discretion by failing to further reduce defendant's sentence when granting his Rule 35 motion, because defendant's sentence of twenty-two months fixed, life indeterminate for grand theft was reasonable, where defendant's criminal history showed a record of continuing criminality for over twenty-five years, defendant clearly presented a danger to society, as the only substantial period of time he had not engaged in criminal behavior was the twelve years he spent in prison, and defendant's prior criminal acts had not been relatively minor. *State v. Arthur*, 145 Idaho 219, 177 P.3d 966 (2008).

District court properly denied defendant's motions to reduce his concurrent fixed life sentences where he had numerous prior criminal convictions involving violence and guns, he made a living selling illegal drugs, although he had been through numerous treatment and prison rehabilitation programs, he had returned to his criminal lifestyle immediately upon release, and the current offenses, aggravated assault against his former girlfriend and aggravated battery against a police officer, were extremely egregious. *State v. Perez*, 145 Idaho 383, 179 P.3d 346 (Ct. App. 2008).

#### **State Recommendation.**

In a driving under the influence case where trial judge declined to follow the State's recommendation that defendant receive a term of incarceration in the local county jail coupled with alcohol-abuse counseling and followed by a term of probation, the court was correct by not remedying its disregard for that recommendation by subsequently granting a reduction in the sentence since such a recommendation is advisory only. *State v. Allbee*, 115 Idaho 845, 771 P.2d 66 (Ct. App. 1989).

Where the presentence report disclosed that the defendant had an extensive criminal record, had violated probation on several occasions, had used numerous aliases, had never maintained steady employment and had failed to appear at some of the scheduled court proceedings despite repeated warnings

about the consequences of failing to appear, the district judge properly concluded that a period of incarceration more substantial than the state had recommended was necessary and not an abuse of discretion. *State v. Cardenas*, 119 Idaho 109, 803 P.2d 1015 (Ct. App. 1991).

In the sentencing hearing following defendant's plea to the charge of sexual battery, the prosecutor violated the plea agreement by recommending a harsher sentence; therefore, the sentence of 15 years imposed was vacated. *State v. Daubs*, 140 Idaho 299, 92 P.3d 549 (Ct. App. 2004).

### **Stipulated Sentence.**

A defendant requesting reduction of a stipulated sentence must show that his motion is based upon unforeseen events that occurred after entry of his guilty plea or new information that was not available and could not, by reasonable diligence, have been obtained by the defendant before he pleaded guilty pursuant to the agreement, and the defendant must also show that these unanticipated developments are of such consequence as to render the agreed sentence plainly unjust. *State v. Holdaway*, 130 Idaho 482, 943 P.2d 72 (Ct. App. 1997).

### **Successive Motion.**

Because the defendant's Rule 35 motion made at the second probation revocation hearing was a successive Rule 35 motion, the court properly denied it. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

### **Time Limitation.**

A motion for correction or reduction of sentence based upon imposition of an illegal sentence is not subject to the 120-day time constraint. *State v. Vetsch*, 101 Idaho 595, 618 P.2d 773 (1980).

A district court does not lose jurisdiction to act upon a timely motion under this rule merely because the 120-day period expires before the judge reasonably can consider and act upon the motion. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

An informal letter from a defendant, specifically requesting a "Rule 35 Sentence Reduction" met the 120-day deadline prescribed by this rule. *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984).

Where the defendant did not move for a reduction of the sentence under this rule until after filing his notice of appeal, the appellate court was not precluded from reviewing the sentence imposed in the judgment based on an examination of the record which was available when the sentence was imposed, but was only precluded from separately reviewing any

additional record submitted with the motion for a reduction of the sentence. *State v. Lute*, 108 Idaho 905, 702 P.2d 1365 (Ct. App. 1985).

A court can act on a timely motion under this rule for a reasonable period beyond the 120-day limit; timeliness is determined by reference to the Rules of Civil Procedure. *State v. Parrish*, 110 Idaho 599, 716 P.2d 1371 (Ct. App. 1986).

Although the 120-day period does not preclude a later decision on a timely-filed motion under this rule, it remains a jurisdictional limit on the filing itself; unless a motion to reduce a legal sentence is filed within 120 days, a district court lacks jurisdiction to grant any relief. *State v. Parrish*, 110 Idaho 599, 716 P.2d 1371 (Ct. App. 1986).

Where the defendant's motion was filed 122 days after judgment, the defendant made no attempt to augment the record to explain or excuse the lateness, and his counsel, an attorney appointed after the motion was filed, could not provide any reason to explain his client's delay in filing, the district court lacked jurisdiction to grant any relief. *State v. Parrish*, 110 Idaho 599, 716 P.2d 1371 (Ct. App. 1986).

A Rule 35 motion cannot be filed more than 120 days after a sentence is pronounced and suspended, but less than 120 days after the sentence is ordered into effect upon revocation of probation. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987).

The language of this rule is restrictive and jurisdictional and a court lacks authority to consider a motion not timely filed under it. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987).

The 120-day limitation on the filing of a Rule 35 motion is a jurisdictional limit on the power of the sentencing court. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

A sentence is "imposed," within the meaning of Rule 35, when it is originally pronounced. The 120-day period for seeking Rule 35 relief runs from that date, not from a subsequent date when jurisdiction retained under I.C. § 19-2601(4) is relinquished. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

The district court acted beyond its jurisdiction by reducing a sentence after jurisdiction had been relinquished, in response to a motion made after the 120-day period prescribed by Rule 35 had elapsed. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

The 120-day period for filing for relief under this rule begins running from the initial pronouncement of the sentence, not from the time probation is revoked and the original,

suspended sentence is reinstated. *State v. Liggins*, 113 Idaho 62, 741 P.2d 349 (Ct. App. 1987).

This rule does not equate the revocation of probation with an imposition of sentence, triggering a new 120-day filing period. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987); *State v. Fox*, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992).

Where the motion for reduction of the sentence was filed more than 120 days after the defendant's sentence was imposed, the order refusing to grant relief was proper; the 120-day limitation on the filing of a motion under this rule is a jurisdictional limit on the power of the sentencing court. *State v. Porath*, 113 Idaho 974, 751 P.2d 670 (Ct. App. 1988).

Where the record did not reflect any special circumstances or misleading conduct on the part of the state that would justify the defendant's failure to comply with the filing deadline for a motion under this rule, the District Court's order denying relief to the defendant on the motion under this rule was affirmed on the basis the court lacked jurisdiction to grant any relief on the motion. *State v. Hoffman*, 114 Idaho 139, 754 P.2d 452 (Ct. App. 1988).

An illegal sentence can be corrected at any time. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Unlike a legal but allegedly excessive sentence, an illegal sentence may be corrected at any time. *State v. Lee*, 116 Idaho 515, 777 P.2d 737 (Ct. App. 1989).

A motion filed under this rule to modify sentences did not preserve the right to appellate review of conviction and sentences, because that motion was filed more than 14 days after the entry of the judgment. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

A defendant may be excused from filing a timely motion pursuant to this rule under special circumstances or because of misleading conduct by the state, but where the defendant failed to show such circumstances, a motion to reduce the sentence, made after the court had revoked probation and ordered the sentence into execution was untimely. *State v. Hocker*, 119 Idaho 105, 803 P.2d 1011 (Ct. App. 1991).

The filing limitations of this rule are jurisdictional, and unless the motion is filed within the specified period, the court may not grant the relief sought. *State v. Morris*, 119 Idaho 448, 807 P.2d 1286 (Ct. App. 1991).

A motion for reconsideration of sentence is not timely when it is filed within 120 days of the date when a sentence is ordered into execution following a remittitur, but more than 120 days after it was imposed. *State v.*

*Munhall*, 120 Idaho 232, 815 P.2d 41 (Ct. App. 1991).

Where defendant pled guilty to felony driving under the influence and was sentenced and released on probation, the court's jurisdiction, retained pursuant to § 19-2601 was not relinquished or released while defendant was on probation, and because there was no release, the time period for filing a motion under this Rule predicated upon such an event, simply never began and the only subsequent event that could have triggered the application of this Rule was the revocation of defendant's probation, and no motion was filed at that time. *State v. Zamarripa*, 120 Idaho 751, 819 P.2d 1151 (Ct. App. 1991).

Where defendant pled guilty to felony driving under the influence, was sentenced and released on probation, violated his probation and after revocation of probation and execution of sentence only then filed a motion to reduce his sentence, motion was untimely because motion should have been filed as part of the hearing on parole revocation to be considered as an alternative disposition to revocation, and therefore the court lacked jurisdiction to grant the motion. *State v. Zamarripa*, 120 Idaho 751, 819 P.2d 1151 (Ct. App. 1991).

Defendant contended that judge's statement that she could file a motion for reconsideration of sentence "within 120 days" misled her into believing that she had additional time to file a motion under this rule for reduction of her sentence, but because she filed her motion 122 days after the revocation hearing, she is not entitled to relief on her motion as she cannot benefit from a delay in filing which is attributable to her own lack of diligence and not governmental misleading. *State v. Rambo*, 121 Idaho 1, 822 P.2d 31 (Ct. App. 1991).

Where defendant's appeal, filed on January 15, 1991, was not timely with respect to the judgment of conviction entered May 22, 1990, and defendant's Rule 35 motion was filed more than 14 days after the entry of the judgment, because the issue of the voluntariness of defendant's guilty plea was never presented in a timely appeal, the court lacked appellate authority to consider it. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

It would be contrary to the legislative intent of § 19-4902 to set a definite time limit upon challenges to convictions and sentences allowing the limitation period to be extended by the filing of a Rule 35 motion, when the denial of a Rule 35 motion is not itself reviewable under the Uniform Post-conviction Procedure Act. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).



Where it was undisputed that no appeal was ever taken from the judgment of conviction entered against defendant on October 11, 1984, defendant had until November 22, 1984, 42 days from the day judgment was entered against him to appeal his judgment of conviction; thus, under § 19-4902, defendant was barred from making an application for post-conviction relief more than five years after November 22, 1984, therefore, defendant's application was untimely and the District Court did not err in dismissing his application. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).

A careful reading of the Constitution of the State of Idaho and the legislature's codification of the Idaho Supreme Court's rule making power reveals that this Court's rule making power goes to procedural, as opposed to substantive, rules; the Idaho Supreme Court has stated that "where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail"; because of the unique nature of the death penalty, as provided in chapter 27, title 19, Idaho Code, as well as the stringent constitutional protections afforded to a person sentenced to death, § 19-2719(3), which, in turn, creates, defines, and regulates a primary right, is a substantive rule; therefore, the forty-two (42) day time limitation of § 19-2719(3) applies to claims of illegality of a sentence of death, rather than a procedural motion under this rule, to which no time limit applies. *State v. Beam*, 121 Idaho 862, 828 P.2d 891 (1992).

Although defendant's motion to reduce sentence was not timely filed following an order revoking probation, the court of appeals deemed it to be timely because the trial court might have misled defendant as to time for filing such a motion. *State v. Joyner*, 121 Idaho 376, 825 P.2d 99 (Ct. App. 1992).

A clarification of a sentence cannot be considered the imposition of a new sentence which, in turn, triggers a new jurisdictional time period for the filing of a motion for reconsideration. *State v. Lindquist*, 122 Idaho 190, 832 P.2d 761 (Ct. App. 1992).

The filing deadlines described in this rule create a jurisdictional limitation on the authority of the trial court to entertain motions under this rule; without a timely filing, the court cannot consider the motion. *State v. Fox*, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992).

Although defendant's motion for leniency was untimely, where, the lower court made an incorrect statement of the law during defendant's probation revocation hearing, the Court of Appeals concluded that defendant

had been misled by the lower court's representation and therefore construed defendant's motion to be timely. *State v. Hadley*, 122 Idaho 728, 838 P.2d 331 (Ct. App. 1992).

The amended judgment granting defendant additional credit for time served did not affect the 120-day period of this rule, as the period commenced when the sentence was imposed. *State v. Williams*, 125 Idaho 206, 868 P.2d 534 (Ct. App. 1994).

Where record was silent with regard to the reasons for the district court's determination to take the motion to reduce sentences imposed upon conviction of two counts of lewd conduct with minor under the age of 16 under advisement and to delay a decision on the motion for a period of six months, where there was no indication in the record that defendant requested additional time to supplement the record or that he intended to submit any additional evidence after the motion was filed, neither the state nor defendant requested that the motion be held in abeyance, nor was there any indication that the delay was necessitated by the court's schedule and consequently, the court had before it all information relevant to the motion on the day the motion was made and a decision on this motion should have been made thereafter within a reasonable period of time; because there was nothing in the record to show the extent of the period otherwise necessary to decide the motion, the eight-month delay was unreasonable under the principle expressed in *State v. Chapman*, 121 Idaho 351, 825 P.2d 74 (1992), forbidding an infringement on the executive authority held by the Commission of Pardons and thus order denying relief under this Rule was affirmed on the ground that the district court lost jurisdiction to grant the motion. *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct. App. 1994).

Motion under this rule filed more than 14 days after entry of the judgment does not affect the starting point for calculating the time within which an application for post conviction relief may be brought and thus defendant's motion did not operate to extend the relevant time limit governing the filing of his post-conviction relief application. *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

Defendant's ineffective assistance of counsel claim based on failure of counsel to present to the district court as part of a motion under this rule, an independent psychological evaluation, was properly raised through post-conviction procedures by application filed within one year of the expiration of the time for appeal from the order denying the motion and thus was timely and where court failed to

rule on such claim, defendant was prejudiced for had counsel been appointed to represent him, presumably such attorney would have responded to the court's dismissal notice and kept alive defendant's post-conviction claim related to the proceeding under this rule. *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

Where defendant filed his appeal challenging the relinquishment of jurisdiction more than 42 days after the entry of the court's order, and filed his motion for correction or reduction of his sentence more than 14 days after entry, the appellate court was without jurisdiction to consider the merits of the claim. *State v. Alvarado*, 132 Idaho 248, 970 P.2d 516 (Ct. App. 1998).

District court lacked jurisdiction to consider defendant's motion for a reduction of his sentence because it was untimely, having been filed 174 days after entry of the judgment of conviction, and defendant's motion did not allege that his sentence was illegal, rather, it was merely a request for leniency governed by the 120-day time limit. *State v. Bowcut*, 140 Idaho 620, 97 P.3d 487 (Ct. App. 2004).

District court had jurisdiction pursuant to Idaho Crim. R. 35 to review defendant's motion filed 12 years after his conviction in which he argued that Idaho law did not permit the addition of multiple sentencing enhancements to a single substantive crime, because, it was not a motion to withdraw his guilty pleas, but instead was a motion to correct an illegal sentence which could be brought at any time. *State v. Kerrigan*, 143 Idaho 185, 141 P.3d 1054 (2006).

#### —Mailbox Rule.

Where defendant's judgment of conviction was filed on July 9, 2009, she asserted that she timely submitted her Idaho Crim. R. 35 motion for correction of sentence to prison authorities on November 6, 2009; however, it was not file-stamped until November 13—seven days after the Rule 35 deadline had expired. Because the mailbox rule applied to the filing of defendant's Idaho Crim. R. 35 motion, the district court was required to consider whether the documents submitted along with defendant's Rule 35 motion were sufficient to establish that she timely submitted her motion to prison authorities. *State v. Johnson*, 152 Idaho 56, 266 P.3d 1161 (2011).

#### Trial Judge.

A trial judge is not required to erase from his mind all that has gone before, when faced with a Rule 25(b)(4) motion to disqualify for bias and prejudice in a post conviction or this rule proceeding, the trial judge need only

conclude that he can properly perform the legal analysis which the law requires of him, recognizing that he has already prejudged the case and has formed strong and lasting opinions regarding the worth of the defendant and the sentence that ought to be imposed to punish the defendant and protect society. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

The trial court did not err in refusing to disqualify himself from participating in the post-conviction and sentence reduction proceedings merely because he had disqualified himself from further participation in the resentencing of co-defendant, even though, in the process, he had expressed strong disagreement with this Court's action which vacated co-defendant's death penalty sentence. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

The trial judge was not required to disqualify himself from presiding over defendant's post conviction proceeding and the motion for reduction in sentence, where the trial judge refused to sentence his co-defendant on remand after the Supreme Court found co-defendant's death sentence excessive and disproportionate because the trial judge felt the aggravating factor outweighed the mitigating factors in co-defendant's case. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989).

#### Vacation of Judgment.

Where the sentencing judge relied on an oral statement from an unidentified source that defendant had violated a condition of his bond, causing his wife to be hospitalized, defendant did not have a genuine opportunity to prepare and offer responsive information; accordingly, the sentencing portion of the judgment of conviction was vacated. *State v. Morgan*, 109 Idaho 1040, 712 P.2d 741 (Ct. App. 1985).

Because it was not necessary for the judge to separately articulate the components of defendant's enhanced sentence, the sentence was capable of review. *State v. Farwell*, 144 Idaho 732, 170 P.3d 397 (2007).

#### Validity of Guilty Pleas.

Validity of guilty pleas is beyond the scope of a motion under this rule. *State v. Gomez*, 127 Idaho 327, 900 P.2d 803 (Ct. App. 1995).

Where defendant made a plea agreement and agreed to plead guilty to petit theft under § 18-2406 subsection (3) and § 18-2407 subsection (2) and as part of his plea agreement the prosecutor agreed not to recommend in-

carceration, although the sentence imposed by the magistrate was stringent for a first offense, neither the sentence as imposed or the denial of the defendant's Rule 35 motion was an abuse of the magistrate's discretion where the magistrate concluded that defendant and his wife had been engaged in a carefully orchestrated scheme using their young son to assist in the theft of store merchandise. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

Imposition of unified sentences for drug related felonies of 15 years with five years determinate on four convictions were not unduly severe and excessive where facts showed that defendant was heavily involved in drug trafficking, that he had previously been convicted in another state for two counts of selling heroin, had received a sentence of four years of which he served 18 months and that such prior incarceration had not deterred him from resuming a role in the drug trade. *State v. Gomez*, 127 Idaho 327, 900 P.2d 803 (Ct. App. 1995).

Where the trial evidence supported the findings that the defendant carefully planned the killing, carried out the killing, and bragged about committing the murder and where the defendant acknowledged that no additional information was presented to support his Rule 35 motion, the district court's imposition of a fixed life sentence and the subsequent denial of defendant's motion for reduction of the sentence was not an abuse of the court's discretion. *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

Where the original sentence was reasonable, and where no arguments to the contrary were presented at the hearing on this motion, the trial court did not abuse its discretion in denying the motion. *State v. Book*, 127 Idaho 352, 900 P.2d 1363 (1995).

### Withheld Judgment.

Even when the defendant was justifiably angry, the violent nature of the crime where he consciously shot his victim provided the district court with sufficient information from which it could reasonably determine that a withheld judgment would be inappropriate. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

**Cited in:** *State v. Greene*, 102 Idaho 897, 643 P.2d 1067 (1982); *State v. Bylama*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982); *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983); *Law v. Rasmussen*, 104 Idaho 455, 660 P.2d 67 (1983); *State v. West*, 105 Idaho 505, 670 P.2d 912 (Ct. App. 1983); *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984); *State v. Jones*, 106 Idaho 837, 683 P.2d 873 (1984); *State v. Grob*, 107 Idaho

496, 690 P.2d 951 (Ct. App. 1984); *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985); *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); *State v. Desjarlais*, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986); *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986); *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986); *State v. Goodson*, 112 Idaho 935, 736 P.2d 1389 (Ct. App. 1987); *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987); *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987); *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987); *Stedtfeld v. State*, 114 Idaho 273, 755 P.2d 1311 (Ct. App. 1988); *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988); *State v. Samuelson*, 114 Idaho 550, 758 P.2d 709 (Ct. App. 1988); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989); *Ratliff v. State*, 115 Idaho 840, 771 P.2d 61 (Ct. App. 1989); *Ferrier v. State*, 115 Idaho 886, 771 P.2d 550 (Ct. App. 1989); *State v. Adams*, 115 Idaho 1053, 772 P.2d 260 (Ct. App. 1989); *State v. Poland*, 116 Idaho 34, 773 P.2d 651 (Ct. App. 1989); *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989); *State v. Heer*, 116 Idaho 969, 783 P.2d 308 (Ct. App. 1989); *State v. Pena*, 117 Idaho 187, 786 P.2d 578 (Ct. App. 1990); *State v. Lopez*, 117 Idaho 439, 788 P.2d 254 (Ct. App. 1990); *State v. Martinez*, 117 Idaho 688, 791 P.2d 438 (Ct. App. 1990); *Brandt v. State*, 118 Idaho 350, 796 P.2d 1023 (1990); *State v. Huck*, 119 Idaho 10, 802 P.2d 1222 (Ct. App. 1990); *State v. Christiansen*, 119 Idaho 841, 810 P.2d 1127 (Ct. App. 1990); *State v. Chapman*, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991); *State v. Esparza*, 120 Idaho 578, 817 P.2d 1102 (Ct. App. 1991); *State v. Phillips*, 121 Idaho 261, 824 P.2d 192 (Ct. App. 1992); *State v. Sherer*, 121 Idaho 263, 824 P.2d 194 (Ct. App. 1992); *State v. Gillette*, 121 Idaho 629, 826 P.2d 1341 (Ct. App. 1992); *State v. Smith*, 122 Idaho 164, 832 P.2d 337 (Ct. App. 1992); *State v. Cervantes*, 122 Idaho 238, 832 P.2d 1173 (Ct. App. 1992); *State v. Warren*, 123 Idaho 20, 843 P.2d 170 (Ct. App. 1992); *State v. Tousingnant*, 123 Idaho 22, 843 P.2d 172 (Ct. App. 1992); *State v. Coffin*, 122 Idaho 392, 834 P.2d 909 (Ct. App. 1992); *State v. Justice*, 122 Idaho 407, 834 P.2d 1323 (Ct. App. 1992); *State v. Barreto*, 122 Idaho 453, 835 P.2d 688 (Ct. App. 1992); *State v. Russell*, 122 Idaho 515, 835 P.2d 1326 (Ct. App. 1991); *State v. Johnston*, 123 Idaho 222, 846 P.2d 224 (Ct. App. 1993); *State v. Dunn*, 123 Idaho 458, 846 P.2d 247 (Ct. App. 1993); *State v. Salgado*, 123 Idaho 247, 846 P.2d 249 (Ct. App. 1993); *State v. Smith*, 123 Idaho 290, 847 P.2d 265 (Ct. App. 1993); *State v. Hernandez*, 123 Idaho 506, 849 P.2d 967 (Ct. App. 1993); *State v. Robbins*, 123



Idaho 527, 850 P.2d 176 (1993); *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993); *State v. Del Rio*, 124 Idaho 52, 855 P.2d 889 (Ct. App. 1993); *State v. Teske*, 123 Idaho 975, 855 P.2d 60 (Ct. App. 1993); *State v. Searcy*, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993); *State v. Clay*, 124 Idaho 329, 859 P.2d 365 (Ct. App. 1993); *State v. Adams*, 124 Idaho 372, 859 P.2d 970 (Ct. App. 1993); *State v. Hastings*, 124 Idaho 404, 860 P.2d 20 (Ct. App. 1993); *State v. Alberts*, 124 Idaho 489, 861 P.2d 59 (1993); *State v. Maland*, 124 Idaho 830, 864 P.2d 668 (Ct. App. 1993); *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994); *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (Ct. App. 1994); *State v. Cagle*, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995); *State v. Gardiner*, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995); *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995); *State v. Viehweg*, 127 Idaho 87, 896 P.2d 995 (Ct. App. 1995); *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996); *State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Ct. App. 1997); *State v. Hills*, 130 Idaho 763, 947 P.2d 1011 (Ct. App. 1997);

*State v. Olivera*, 131 Idaho 628, 962 P.2d 399 (Ct. App. 1998); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998); *State v. Jakoski*, 132 Idaho 67, 966 P.2d 663 (Ct. App. 1998); *State v. Baer*, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999); *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000); *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000); *State v. Rounsville*, 136 Idaho 869, 42 P.3d 100 (Ct. App. 2002); *State v. Adams*, 137 Idaho 275, 47 P.3d 778 (Ct. App. 2002); *State v. Bromgard*, 139 Idaho 375, 79 P.3d 734 (Ct. App. 2003); *Gonzalez v. State*, 139 Idaho 384, 79 P.3d 743 (Ct. App. 2003); *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003); *Knutsen v. State*, 144 Idaho 433, 163 P.3d 222 (Ct. App. 2007); *State v. Allen*, 144 Idaho 875, 172 P.3d 1150 (Ct. App. 2007); *Schwartz v. State*, 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008); *State v. Jones*, 146 Idaho 297, 193 P.3d 457 (Ct. App. 2008); *State v. Dempsey*, 146 Idaho 327, 193 P.3d 874 (Ct. App. 2008); *State v. Gill*, 150 Idaho 183, 244 P.3d 1269 (2010); *State v. Mendoza*, 151 Idaho 623, 262 P.3d 266 (2011); *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### **Motion for Reduction of Sentence.**

Although the trial court erred in quashing defendant's motion for reduction of sentence imposed following conviction for possession and delivery of a controlled substance, the error was not prejudicial where the court did

reduce the sentence imposed by ordering that the three year consecutive sentence imposed on the possession count be served concurrently with the other sentences. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976).

#### RESEARCH REFERENCES

**A.L.R.** Propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like, 45 A.L.R.3d 1022.

Prosecutor's reference in opening statement to matters not provable or which he does

not attempt to prove as ground for relief, 16 A.L.R.4th 810.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

### **Rule 36. Clerical mistakes.**

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders. (Adopted December 27, 1979, effective July 1, 1980.)

#### JUDICIAL DECISIONS

##### ANALYSIS

Amended Judgment of Conviction.  
Credit for Time Served.  
Incorrect Case Numbers.  
Insertion of "Guilty."

Written Expression Consistent with Oral Sentence.

##### **Amended Judgment of Conviction.**

Order entering a second amended judgment of conviction expressing a unified sentence of

six years, with one year fixed for the offense of DUI, which the trial court said it issued to correct a clerical error in its first amended judgment of conviction, was proper because the trial court was not imposing an amended sentence, rather it was correcting an earlier error. *State v. Moore*, 152 Idaho 203, 268 P.3d 471 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 46 (Idaho Feb. 16, 2012).

#### **Credit for Time Served.**

Defendant had been convicted of DUI, but his sentence had been withheld pending probation. After his third probation violation, his sentence was commuted to a nine month jail sentence, with no express mention of credit for pre-sentence incarceration. Defendant was therefore entitled to credit for all time served pursuant to probation violations, and trial court was without authority amend judgment to deny him any portion of that credit. *State v. Allen*, 144 Idaho 875, 172 P.3d 1150 (Ct. App. 2007).

#### **Incorrect Case Numbers.**

Although the preferred manner of proceeding would have been to file a new case altogether rather than filing an amended complaint, merely having different or incorrect case numbers on the complaint or pleadings as a result of either a clerical or typographical error, or use of a number from a previously dismissed case on the amended complaint, is not sufficient cause to invalidate the complaint; this is particularly true where there is only one event giving rise to the charges

contained in all pleadings. *State v. Bacon*, 117 Idaho 679, 791 P.2d 429 (1990).

#### **Insertion of “Guilty.”**

Where the verdict selected by the jury reflected a finding of guilt on the charge filed against the defendant, all jurors were polled and each asked if they agreed with the final verdict, to which each answered in the affirmative, and the jury foreman’s affidavit confirmed the defendant’s guilt, the trial court’s insertion of the word “guilty” in the jury verdict was merely a correction of what was obviously a clerical mistake in the verdict form. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

#### **Written Expression Consistent with Oral Sentence.**

If an order of commitment does not accurately represent the court’s oral sentence pronouncement that constitutes the judgment, it is manifestly proper to correct the error under this rule so the written expression is consistent with that judgment. *State v. Wallace*, 116 Idaho 930, 782 P.2d 53 (Ct. App. 1989).

**Cited in:** *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982); *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982); *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983); *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); *State v. Tanner*, 116 Idaho 561, 777 P.2d 1234 (Ct. App. 1989); *State v. Luna*, 118 Idaho 124, 795 P.2d 18 (Ct. App. 1990); *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010).

### **Rule 37. [Reserved.]**

### **Rule 38. Stay of execution — Relief pending review.**

(a) **Death.** A sentence of death shall be stayed pending any appeal or review.

(b) **Imprisonment.** The judgment of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. In the event a defendant is not admitted to bail following conviction and during pendency of the appeal, any sentence of imprisonment shall commence on the date of entry of judgment. If the defendant is incarcerated pending appeal the court in which the conviction was entered may order the defendant returned to the county in which the conviction was had for the purpose of assisting in the preparation of the defendant’s appeal. Such return shall not stay the running of the sentence.

(c) **Fine.** A judgment to pay a fine or a fine and costs, if appeal is taken, may be stayed by the court in which the judgment was entered upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs with the

clerk of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating the defendant's assets. (Adopted December 27, 1979, effective July 1, 1980.)

#### STATUTORY NOTES

**Cross References.** Execution, §§ 19-2701 — 19-2718. Suspension of death sentence, § 19-2708.

#### JUDICIAL DECISIONS

**Cited in:** State v. Wilson, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983); State v. Wilson, 105 Idaho 679, 672 P.2d 247 (Ct. App. 1983).

#### **Rule 39, 40.[Reserved.]**

#### **Rule 41. Search and seizure.**

(a) **Authority to issue warrant.** A search warrant authorized by this rule or by the Idaho Code may be issued by a district judge or magistrate within the judicial district wherein the county of proper venue is located upon request of a law enforcement officer or any attorney for the state of Idaho. Where it does not appear that the property or person sought is currently within the territorial boundaries of the state of Idaho, such warrant may still be issued; however, no such issuance will be deemed as granting authority to serve said warrant outside the territorial boundaries of the State.

(b) **Property or person which may be seized with a warrant.** A warrant may be issued under this rule to search for and seize (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, or (4) a person named in an arrest warrant issued pursuant to Rule 4 of these rules.

(c) **Issuance and content.** A warrant shall issue only on an affidavit or affidavits sworn to before a district judge or magistrate or by testimony under oath and recorded and establishing the grounds for issuing a warrant. If the district judge or magistrate is satisfied that there is probable cause to believe that the grounds for the application exist, the judge or magistrate shall issue a warrant identifying the property or person and naming or describing the person or place to be searched. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis, considering the totality of the circumstances, to believe probable cause exists. Before ruling on a request for a warrant the district judge or magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken



down by recording equipment and shall be considered a part of the affidavit. The warrant shall be directed to any peace officer authorized to enforce or assist in enforcing any law of the state of Idaho. It shall command the officer to search, within the specified period of time, not to exceed fourteen (14) days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(d) **Execution and return with inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for property taken or shall leave a copy and receipt at the place from which the property was taken. A verified return shall be promptly made to a district court judge or magistrate in the county where a warrant for the seizure of property or a person was issued. The inventory shall be made by one of the officers executing the warrant in the presence of the person from whose possession or premises the property was taken; provided, if such person is not present, the executing officer shall make the inventory in the presence of at least one (1) credible person of age. The district judge or magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. The district judge or magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the county in which the warrant was issued or served.

(e) **Motion for return of property.** A person aggrieved by a search and seizure may move the district court for the return of the property on the ground that the person is entitled to lawful possession of the property and that it was illegally seized. The motion for the return of the property shall be made only in the criminal action if one is pending, but if no action is pending a civil proceedings may be filed in the county where the property is seized or located. The court shall receive evidence on any issue of fact necessary to the decision on the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing after a complaint, indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) **Motion to suppress.** A motion to suppress evidence shall be made in the trial court as provided in Rules 5.1(b) and 12.

(g) **Telegraphic or facsimile copy of a search warrant.** After the issuance of a search warrant in the form set forth in subsection (c) above, a copy of the search warrant may be sent by telecommunication process or by facsimile process to any peace officer or other officer serving the search warrant. (Adopted December 27, 1979, effective July 1, 1980; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective

July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended March 18, 2011, effective July 1, 2011; amended February 9, 2012, effective July 1, 2012.)

## STATUTORY NOTES

**Cross References.** Search warrants,  
§ 19-4401 et seq.

## JUDICIAL DECISIONS

### ANALYSIS

Affidavit Contents.  
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Signature Requirements.  
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### Affidavit Contents.

The affidavit in support of the search warrant was valid where the stipulated facts established that the officer was sworn in before the magistrate, he stated that all the facts in his affidavit were true and correct and that the signature on the first page was his own, and the affidavit was signed in three places by the officer and acknowledged by the magistrate. *State v. Slater*, 133 Idaho 882, 994 P.2d 625 (Ct. App. 1999).

### Burden of Proof.

If a search is conducted pursuant to a warrant, the burden of proof is on the defendant to show that the search was invalid. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

Where an inventory was clearly deficient, but the claimant failed to introduce testimony

or evidence which sufficiently rebutted the state's initial assertion that all of the seized items had been returned, and where the claimant's own testimony and pleadings supported the state's claim that allegedly missing items were not seized, the district court's determination that the missing items had not been seized by the state was supported by competent and substantial evidence. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

In an Idaho Crim. R. 41(e) proceeding, the burden of proof shifts from the movant to the state when the property is no longer needed for evidentiary purposes. *State v. Meier*, 149 Idaho 229, 233 P.3d 160 (2010).

### Daytime.

For execution of search warrants, daytime extends from dawn to darkness where darkness is the point at which insufficient natural light exists with which to distinguish another's features. *State v. Burnside*, 113 Idaho 65, 741 P.2d 352 (Ct. App. 1987); *State v. Skurlock*, 150 Idaho 404, 247 P.3d 631 (2011).

Where the officers arrived at the defendant's home with the search warrant, prepared to make the search during daylight hours but the defendant was not at home and the officers waited until 8 PM for him to return, and the judge determined there was sufficient natural daylight with which to clearly identify individuals without the aid of artificial light when the search was actually commenced, the district judge's conclusion that the search occurred during the daytime was legally correct. *State v. Burnside*, 113 Idaho 65, 741 P.2d 352 (Ct. App. 1987).

### Defective Return.

Defects relating to the return of a search warrant are ministerial and do not compel invalidation of the warrant or suppression of its fruits, absent a showing of prejudice by the defendant. *State v. Curry*, 103 Idaho 332, 647 P.2d 788 (Ct. App. 1982).

Failure of the return to a search warrant to list a sledgehammer in the inventory of specific items seized from vehicle did not require

suppression of the evidence seized, where the search was made within the time limit imposed by the magistrate, the return was filed on the day after the warrant was issued, there was no allegation or showing that the warrant was not valid on its face, other than as regards the ministerial defect of failing to designate the district judge or magistrate to whom return was to be made (under provision deleted from this rule in 1980), and failure to specifically list the sledgehammer on the return did not prejudice defendant because he learned of the existence of the evidence as early as the preliminary hearing. *State v. Curry*, 103 Idaho 332, 647 P.2d 788 (Ct. App. 1982).

Defects in the return of a search warrant are not of a constitutional dimension. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

The police officer's failure to promptly verify the return of the search warrant did not require suppression of the evidence seized pursuant to the warrant. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Where the warrant and inventory were not returned promptly to a district judge or to a magistrate in the county of the warrant's origin as required by this rule and I.C. § 19-4415, but a copy of the inventory was made available to the defendants at their preliminary hearing, which was held shortly after the search and several months prior to trial, the defendants made no showing that failure to return the original warrant and inventory materially infringed upon any constitutionally protected interest, and, there was no need to activate the exclusionary rule. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

#### **Description.**

Where the inclusion of the incorrect road name, by itself, served only to describe a technically nonexistent location which could never be mistakenly searched, and where the presence of the additional description assured that the officers could, and did, with reasonable effort, "ascertain and identify the place intended," the warrant served its intended purpose; a constitutionally adequate description was provided, and thus the listing of a technically incorrect road name was inconsequential. *State v. Carlson*, 101 Idaho 598, 618 P.2d 776 (1980).

Where the description in the warrant is broader than that in the affidavit, the description in the affidavit circumscribes what may be seized under the warrant; on the other hand, where the description in the warrant is narrower its language controls to the exclusion of the affidavit. However, if an affidavit is

incorporated into the warrant, it may supplement the language of the warrant. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Where the description in the warrant was narrower than the affidavit, and no satisfactory connection of any kind between the affidavit and the warrant was established, the description in the warrant controlled. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Although the description of the land in the search warrant failed to give the meridian and the county where the land was located, the same officers obtained and executed the warrant; therefore, the possibility that neighboring properties would be mistakenly searched or the officers executing the warrant would not be able to locate the property was significantly reduced, and the warrant was valid. *State v. Sapp*, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986).

The purpose of the description of the premises in a search warrant is to allow the executing officers to ascertain and identify the property to be searched and distinguish the intended property from neighboring property; if the same officers are involved in obtaining and executing the warrant, these objectives are more likely to be met. *State v. Sapp*, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986).

The word "premises" in a search warrant does not have one fixed and definite meaning, but rather must be interpreted in light of the context and circumstances in which it is used. *State v. Sapp*, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986).

In determining the sufficiency of the description of the premises to be searched in the search warrant, the executing officer's knowledge of the place to be searched is relevant, although it would not substitute for a complete lack of accurate information in the warrant. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

The description on the search warrant was sufficient, where the residence was located in a remote rural area that did not have exact directions or house numbers, and the fact that the officers knew how to reach the residence combined with the description of the house and greenhouse made the prospect of a mistaken search remote. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

Motion to suppress was properly denied. Pursuant to a warrant, there was probable cause to seize all the currency found since the



officer did not have details about the type of currency taken during the theft, the amount of currency taken, or the currency that defendant already possessed lawfully. Despite defendant's assertions to the contrary, "currency" was a sufficiently particular description of the item to be seized. *State v. Teal*, 145 Idaho 985, 188 P.3d 927 (Ct. App. 2008).

#### **Finding of Probable Cause.**

Where affidavit, based on observations of police officers, indicated controlled substances were present in large quantities at certain address and further indicated that controlled substances were being sold at the address in question, the magistrate had a substantial basis for determining that probable cause existed for issuing a search warrant. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Court, in defendant's drug case, erred by suppressing evidence where there was probable cause for the search warrant because the judge, the witness and the prosecutor all treated a second warrant hearing as a continuance of the initial proceeding, the previously issued warrant was not executed, and therefore, it was unnecessary for the affiant to have an oath administered again. *State v. Nunez*, 138 Idaho 636, 67 P.3d 831 (2003).

#### **—Affidavit.**

The affidavit for probable cause must be evaluated as a whole to determine whether it was sufficient to establish probable cause for the issuance of a search warrant. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Although the two-pronged test requiring that an affidavit based at least partially on hearsay must demonstrate the reliability of the source of the information and present a sufficient factual basis for that information is no longer a "rigid requirement," the credibility and basis of knowledge of the informant should still be considered in an evaluation of probable cause. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

The affidavit in support of the request for a search warrant contained reliable, nonstate information that an informant had observed growing, harvested, drying and stored marijuana, thus supplying probable cause to the magistrate that a crime was being committed on the property to be searched. *State v. Carl-*

*son*, 134 Idaho 471, 4 P.3d 1122 (Ct. App. 2000).

#### **Hearsay.**

Evidence offered in support of an application for a search warrant may include hearsay, provided there is substantial basis for crediting the hearsay. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

#### **In General.**

The validity of a search warrant should not be tested in a hypertechnical manner. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Alleged procedural violation of I.C.R. 41(c) did not justify the suppression of evidence obtained through execution of the search warrant issued in the case since each time the exclusionary rule was applied it exacted a substantial social cost because relevant and reliable evidence was kept from the trier of fact, the search for truth at trial was deflected, and persons who would otherwise be incarcerated were allowed to escape the consequences of their actions, such that the exclusionary rule was not an appropriate sanction for the procedural error alleged here. *State v. Bicknell*, 140 Idaho 201, 91 P.3d 1105 (2004).

#### **Inventory.**

In considering a motion for return of property, the court will be assisted in its determination of what was actually seized by the state by a proper inventory of the seized items created at the time of the seizure. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

#### **Issue Not Raised at Trial.**

Where no assertion was made in the district court that search pursuant to the warrant was invalid because it was conducted at nighttime and the nighttime search issue was raised for the first time on appeal, the appellate court would not consider the alleged error on appeal. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984).

#### **Items Seized.**

Search warrants must describe the evidence to be seized, but the police are not limited to seizing only those items specifically described in the warrant; all that is required is that an item seized bear a reasonable relation to the purpose of the search. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

**Night Search.**

To justify nighttime execution of a warrant, the affidavit must both show reasonable cause for conducting the search at night, and must be positive that controlled substances were in the place to be searched. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Where the affidavit for the search warrant stated that time was of the essence and requested that nighttime search be authorized "to prevent the controlled substances from being consumed, destroyed or sold, or otherwise disposed of," and the affidavit made explicit statements indicating that controlled substances were in the place to be searched, it was reasonable to believe that a nighttime search was necessary because the controlled substances might not be present on the premises at daybreak; therefore the affidavit met the requirement of both § 19-4411 and subsection (c) of this rule, justifying the authorization of nighttime execution of the warrant. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

To justify nighttime execution of the warrant the affidavit must both show reasonable cause for conducting the search at night and must be positive that controlled substances are in the place to be searched. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984).

A magistrate's finding of reasonable cause for a nighttime search will not be disturbed on appeal, absent an abuse of discretion. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984).

While § 19-4411 requires "positive" facts showing that the property is in the place to be searched before a warrant for a night search may issue, subsection (c) of this rule provides that the authority issuing the warrant may, by appropriate provision in the warrant, and for reasonable cause shown, authorize its execution at times other than daytime. To the extent that these requirements for a night search conflict, the standard of reasonable cause in this rule controls over the provisions of § 19-4411; thus, where the magistrate's issuance of a warrant for a nighttime search was based upon reasonable cause to believe that contraband was in fact upon the premises to be searched and that a nighttime search was reasonable, "reasonable cause," within the meaning of this rule, existed for the issuance of a nighttime search warrant. *State v. Lewis*, 107 Idaho 616, 691 P.2d 1231 (1984).

Where the record simply shows that the

magistrate affirmatively authorized a nighttime search by circling the applicable language on the warrant and by writing his initials on it, the appellate court cannot say that he abused his discretion in doing so, applying the indulgent standard the Supreme Court has prescribed. *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

The "reasonable cause" standard applies in analyzing search warrants authorizing nighttime execution; when a magistrate reasonably feels a nighttime search would serve the ends of justice, his discretionary decision will not be disturbed on appeal. *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

The Supreme Court has chosen to give subsection (c) of this rule dominant effect over § 19-4411; therefore, when a magistrate reasonably feels a nighttime search would serve the ends of justice, his discretionary decision will not be disturbed on appeal. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

Where the magistrate was informed that the defendant was in Canadian custody and marijuana might be found in this state, and there was a risk that the marijuana or other evidence might be removed or destroyed by persons aware of the defendant's incarceration, reasonable cause for the nighttime searches of the defendant's house and minis-torage unit existed, and the magistrate did not abuse his discretion by authorizing them. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

**Plain View.**

The plain view doctrine consists of three elements: (1) At the time of the officer's observation he must be in a place where he had a legal right to be; (2) the items seized must be in "plain view"; and (3) the incriminating nature of the items must be immediately apparent. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

**Postal Affidavit.**

Issuance of search warrant based solely on affidavit signed by postal inspector was sufficient to support a search warrant where affidavit stated that postal inspection personnel intercepted the package which appeared suspicious, described the characteristics of the parcel and its mailing label, and similar characteristics of previous mailing to defendant's address, stated that a check with postal sources at the post office where the mailing originated disclosed that the return address was fictitious and described the training and experience the police department's drug-sniff-

ing dog that was used in the investigation and said that the dog alerted to the suspect parcel. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

In application for search warrant a common sense reading of postal inspector's affidavit reasonably identified the sources of his information as other government officials carrying out investigatory or regulatory responsibilities, and since those sources are presumptively reliable, defendant's challenge to search warrant failed. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

In application for search warrant where given a common sense interpretation federal agent's testimony indicated that her information came from the observations of state and federal law enforcement personnel and postal employees involved in the same investigation and nothing in the evidence presented contradicted the presumption that these sources were reliable there was a substantial basis for determining that probable cause existed for issuing the search warrant. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

#### **Probable Cause.**

Subsection (c) of this rule codifies the two-pronged test enunciated by the United States Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), that multiple hearsay is a permissible foundation upon which probable cause may be established, as long as the supporting affidavit (1) demonstrates the basis for each declarant's knowledge, and (2) establishes each declarant's reliability or credibility. *State v. Pontier*, 103 Idaho 91, 645 P.2d 325 (1982).

A magistrate's evaluation of probable cause is based on facts set forth in an affidavit or any sworn, recorded testimony given in support of the search warrant. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

The affidavit for a search warrant of a law enforcement agent which does not specifically identify each source may, nonetheless, be sufficient to support probable cause if a reader could reasonably infer that the information came from other law enforcement personnel. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

#### **Reasonableness of Search.**

The reasonableness of a police search will not be judged in retrospect according to what evidence it turned up; rather, the court must determine whether probable cause existed from that which the officer was aware of at the time he made the decision to search. *State v. Lewis*, 107 Idaho 616, 691 P.2d 1231 (1984).

#### **Reliability.**

The factors to be considered by the magis-

trate in application for search warrant include the reliability of, and the basis of knowledge of, persons who have supplied information that is related by the affiant or witness. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

#### **Review.**

Affidavits for search warrants should not be reviewed and tested in a hypertechnical manner; rather such affidavits must be tested and interpreted by both the magistrate and reviewing appellate court in a common sense and realistic fashion. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

When probable cause to issue a search warrant is questioned on appeal, the reviewing court's function is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

#### **Scope of Warrant.**

Where the search warrant used the word "premises" and the transcript of the probable cause hearing for the warrant revealed that the magistrate who issued the warrant was made aware of the information about a "fool proof greenhouse," the search of the greenhouse was included in the warrant. *State v. Sapp*, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986).

#### **Search Prior to Warrant Arriving.**

Where two police officers and narcotics agent entered defendant's residence without warrant, which had been issued but had not yet been delivered, found defendant's wife and child and looked through house for other people, then waited ten to fifteen minutes until the officer who had arrested defendant three or four blocks away arrived with the search warrant, after which police searched the house and discovered heroin and marijuana, the initial act of "securing the premises" prior to the arrival of the search warrant did not violate § 19-4408 or this rule. *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980), cert. denied, 454 U.S. 963, 102 S. Ct. 503, 70 L. Ed. 2d 378 (1981).

#### **Securing Premises Before Warrant Arrives.**

An entry intended to secure the premises is not improper when undertaken after the issuance of a search warrant and with knowledge of its existence but prior to its arrival at the premises to be searched. *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980), cert. denied, 454 U.S. 963, 102 S. Ct. 503, 70 L. Ed. 2d 378 (1981).



**Signature Requirements.**

Constitution Article 1, § 17, this rule, and §§ 19-4401, 19-4406 and 19-4407 require a magistrate or district judge's signature in order for a search warrant to be validly issued. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Since Const., Art. 1, § 17, this rule, and §§ 19-4401, 19-4406 and 19-4407 require a search warrant to be signed by a magistrate or district judge in order to be valid, search warrant that was not signed even though judge testified that he intended to sign it but forgot to do so was not a valid search warrant and where officers conducted a search under such warrant by showing the owner of the premises the affidavit of officer that was signed by judge as a witness to the officer's signature when the unsigned warrant was questioned admittance was gained through deception and evidence obtained in such search was not admissible. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

**Supporting Information.**

Magistrate judge properly dismissed a complaint charging possession of cocaine where the evidence was seized pursuant to a warrant based on oral testimony, but the tape recording of the oral testimony failed, leaving no record of that testimony. *State v. Zielinski*, 119 Idaho 316, 805 P.2d 1240 (1991).

After defendant's probation officer and loss prevention specialists found several items of stolen merchandise in his apartment, defendant argued to plead guilty to possession of a sexually exploitative material and the State agreed not to file any theft charges; within the time defendant could have filed an application for post-conviction relief, he filed an Idaho Crim. R. 41(e) motion to have the

property seized by the State returned to him but provided only conclusory testimony that he was entitled to lawful possession; defendant failed to meet his burden of proving his entitlement to the seized items. *State v. Meier*, 149 Idaho 229, 233 P.3d 160 (2010).

**Time Limit.**

Where warrant failed to specify the period within which the warrant was to be executed and where the warrant was executed by the officers within 48 hours of its issuance — well within the 14-day period provided in subsection (c), failure to include the required time limit within the body of the warrant was not fatal to the search warrant or to the admissibility of the evidence seized since no prejudice was shown by the party whose person or property had been subjected to the search. *State v. Wright*, 115 Idaho 1043, 772 P.2d 250 (Ct. App. 1989).

**Totality of Circumstances.**

To determine whether probable cause exists in order to issue a search warrant, a magistrate must employ the totality of circumstances standard set forth in *Illinois v. Gates*, 402 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, including veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Wilson*, 130 Idaho 213, 938 P.2d 1251 (Ct. App. 1997).

**Cited in:** *State v. Lang*, 105 Idaho 683, 672 P.2d 561 (1983); *State v. Forshaw*, 112 Idaho 162, 730 P.2d 1082 (Ct. App. 1986); *State v. Cada*, 129 Idaho 224, 923 P.2d 469 (Ct. App. 1996); *Wolf v. State*, 152 Idaho 64, 266 P.3d 1169 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

- Conflicting Laws.
- Constitutionality.
- Contraband.
- Correction of Warrant.
- Execution at Night.
- Finding of Probable Cause.
- Incorrect House Number.
- Scope of Warrant.

**Conflicting Laws.**

Since under former rule governing search and seizure a search warrant could be issued on the basis of recorded testimony, the statutory provision (§ 19-4404, superseded) that a magistrate must examine the complainant

and take his deposition in writing was of no further force and effect. *State v. Yoder*, 96 Idaho 651, 534 P.2d 771 (1975).

**Constitutionality.**

Issuance of search warrant pursuant to electronically recorded testimony is not contradictory to the constitutional provision that no warrant shall issue without probable cause shown by an affidavit. *State v. Yoder*, 96 Idaho 651, 534 P.2d 771 (1975).

**Contraband.**

Since the statute making the unauthorized dispensing of Prednisolone a criminal offense is not unconstitutional, there was probable cause to support the search warrant which

resulted in the discovery of the capsules. *State v. Kellogg*, 100 Idaho 483, 600 P.2d 787 (1979).

#### **Correction of Warrant.**

An executing officer cannot correct or modify a warrant in the event of mistake, since only a judicial officer may alter, modify or correct a warrant. *State v. Yoder*, 96 Idaho 651, 534 P.2d 771 (1975).

#### **Execution at Night.**

In view of the nature of the contraband, its arrival at the premises during the night and the possibility it could have been removed before daybreak, the magistrate did not abuse his discretion in determining that satisfactory reasonable cause existed so as to justify nighttime execution pursuant to subsection (c) of this rule. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

While a daytime warrant could be issued on the basis of probable cause, a greater showing was necessary before a warrant may be executed at night. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

#### **Finding of Probable Cause.**

An affidavit or recorded testimony which uses hearsay upon hearsay to establish probable cause is not acceptable for use by a magistrate in determining whether or not to issue a search warrant unless the facts indicate the reliability of both the initial source and the affiant's source. *State v. Oropeza*, 97 Idaho 387, 545 P.2d 475 (1976).

#### **Incorrect House Number.**

A search warrant which contained the incorrect house number of defendants' premises did not support a search of such premises, so that the trial court erred in refusing to grant defendants' motion to suppress evidence seized during the search. *State v. Yoder*, 96 Idaho 651, 534 P.2d 771 (1975).

Where officers possessed a warrant that contained an erroneous house number but also described the place to be searched as a green house, a single-story wood frame house, resting on the southeast corner of two known streets, 31st and Bella and where no other house rested on that particular corner, the address was written on the door frame molding rather than standard manufactured numerals of plastic, metal or wood, the officer with the search warrant could, with reasonable effort, ascertain and identify the place intended to be searched and evidence recovered by the search should not have been suppressed. *State v. Hart*, 100 Idaho 137, 594 P.2d 647 (1979).

#### **Scope of Warrant.**

Court did not err in denying suppression of evidence obtained by search conducted under warrant issued on the basis of informant's electronically recorded testimony as the term "affidavit" is broad enough to include electronic recording. *State v. Badger*, 96 Idaho 168, 525 P.2d 363 (1974).

### **RESEARCH REFERENCES**

**A.L.R.** Validity of consent to search given by one in custody of officers, 9 A.L.R.3d 858.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure, 11 A.L.R.3d 1330.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 A.L.R.3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 A.L.R.3d 724.

"Furtive" movement or gesture as justifying police search, 45 A.L.R.3d 581.

Disputation of truth of matters stated in affidavit in support of search warrant — Modern cases, 24 A.L.R.4th 1266.

Propriety of state or local government health officer's warrantless search — *Post-Camara* cases, 53 A.L.R.4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

### **Rule 41.1. Reclaiming exhibits — Documents or property.**

At any time after the commencement of a criminal action, any interested party or person may apply to the trial court for an order permitting a reclamation by such party or person of exhibits offered or admitted in evidence, documents or property displayed or considered in connection with the action, or any property in the possession of any department, agency or

official who is holding such property in connection with the trial of the criminal action. The trial court in its discretion may grant such an order on such conditions and under such circumstances as it deems appropriate, including but not limited to the substitution of a copy, photograph, drawing, facsimile, or other reproduction of the original exhibit, document or property, or the posting of a bond that the exhibit, document or property will be returned to the court if the court later orders that such exhibit, document or property be returned to the court for any purpose in connection with the criminal action. (Adopted December 27, 1979, effective July 1, 1980.)

### STATUTORY NOTES

**Cross References.** Disposal of property illegally held by defendant, §§ 19-3801 — 19-3807.

### Rule 42. Contempt.

This rule shall govern all contempt proceedings brought in connection with a criminal proceeding. It shall not apply to the prosecution of misdemeanor contempt under section 18-1801, Idaho Code, or any other criminal statute. (Adopted December 27, 1979, effective July 1, 1980; amended effective July 1, 2005.)

### JUDICIAL DECISIONS

#### ANALYSIS

**Affidavit.**  
**Judge As Witness.**

#### **Affidavit.**

The function of the affidavit is to apprise the alleged contemnor of the particular facts of which he or she is accused, so that he or she may meet such accusations at the hearing. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

Where the affidavit fails to allege all essential material facts, the deficiency cannot be cured by proof supplied at the hearing. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

In an indirect contempt proceeding where the contempt occurs outside the presence of the court, the court's jurisdiction is based upon the sufficiency of the affidavit presented to the court, and the initiating affidavit must

allege that the contemnor was either served with, or had actual knowledge of, the judgment or order which he is charged with having violated and it must allege a willful violation; this affidavit constitutes a verified complaint and its function is to apprise the alleged contemnor of the particular conduct of which he is accused so that he may meet such accusation at a hearing. *State v. Tanner*, 116 Idaho 561, 777 P.2d 1234 (Ct. App. 1989).

#### **Judge As Witness.**

Both § 7-603 and this Rule allow, if not require, that the judge who witnessed the conduct punish such conduct, therefore, because the judge is to preside at the hearing and the judge cannot be called as a witness, there is no right to call the judge as a witness in summary contempt proceedings and this does not violate any constitutional rights. *State v. Delezene (In re Williams)*, 120 Idaho 473, 817 P.2d 139 (1991).

### RESEARCH REFERENCES

**A.L.R.** Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.

Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant as contempt, 33 A.L.R.3d 1116.



Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Attack on judiciary as a whole as indirect contempt, 40 A.L.R.3d 1204.

Defense of entrapment in contempt proceedings, 41 A.L.R.3d 418.

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002.

Refusal to answer questions before state

grand jury as direct contempt of court, 69 A.L.R.3d 501.

Attorney's failure to attend court, or tardiness, as contempt, 13 A.L.R.4th 122.

Construction of provision in Federal Criminal Procedure Rule 42 (b) that if contempt charges involve disrespect to or criticism of judge, he is disqualified from presiding at trial or hearing except with defendant's consent, 3 A.L.R. Fed. 420.

### Rule 42(a). Definitions.

The following definitions apply to this rule.

(1) **Petitioner.** A petitioner is the person or legal entity initiating a nonsummary contempt proceeding.

(2) **Respondent.** A respondent is the person or legal entity alleged to have committed an act of contempt.

(3) **Contemnor.** A contemnor is a person or legal entity adjudged to have committed an act of contempt.

(4) **Summary proceeding.** A summary proceeding is one in which the contemnor is not given prior notice of the charge of contempt and an opportunity for a hearing to determine whether the charge is true.

(5) **Nonsummary proceeding.** A nonsummary proceeding is one in which the contemnor is given prior notice of the contempt charge and an opportunity for a hearing.

(6) **Civil sanction.** A civil sanction is one that is conditional. The contemnor can avoid the sanction entirely or have it cease by doing what the contemnor had previously been ordered by the court to do. A civil sanction can only be imposed if the contempt consists of failing to do what the contemnor had previously been ordered by the court to do.

(7) **Criminal sanction.** A criminal sanction is one that is unconditional. The contemnor cannot avoid the sanction entirely or have it cease by doing what the contemnor had been previously ordered by the court to do. A suspended sanction with probationary conditions is a criminal sanction, as is a sanction that includes provisions that are both conditional (civil) and unconditional (criminal). A criminal sanction may be imposed for any contempt. (Adopted March 24, 2005, effective July 1, 2005.)

### Rule 42(b). Summary proceedings.

(1) A summary proceeding may be used only if the contempt was committed in the presence of the court. A contempt is committed in the presence of the court if:

a. The conduct occurs in open court in the immediate presence of the judge;

b. The judge has personal knowledge, based upon personally observing and/or hearing the conduct, of the facts establishing all elements of the contempt; and

c. The conduct disturbs the court's business.

(2) The court may summarily impose a sanction for contempt that is committed in its presence. Before doing so, the court must:

- a. Give the contemnor notice of the alleged contempt, which can be oral; and
- b. Give the contemnor a brief opportunity to be heard in order to present matters in mitigation or to otherwise attempt to make amends with the court.

(3) Promptly after announcing the sanction, the court must enter in the record a written order, signed by the judge, which:

- a. States that the judge saw and/or heard all of the conduct constituting the contempt and that it was committed in the actual presence of the court;
- b. Recites each of the specific facts upon which the contempt conviction rests;
- c. Adjudges that the contemnor is guilty of contempt; and
- d. Sets forth the sanction for that contempt.

Before imposing incarceration as a sanction for summary contempt, the court should consider whether a lesser sanction would be effective. If the sanction includes incarceration, the court may immediately remand the contemnor into custody to begin serving such incarceration and later file the written order. If the sanction includes a civil sanction, the written order must recite precisely what the contemnor must do in order to avoid the sanction or have it cease. (Adopted March 24, 2005, effective July 1, 2005.)

#### **Rule 42(c). Nonsummary proceedings — Commencement.**

Nonsummary contempt proceedings may be commenced only as provided herein.

(1) **Order to show cause.** If the alleged contempt consists of failing to appear in court, the contempt proceedings may be commenced by an order to show cause directed to the respondent. The order to show cause must be supported by an affidavit unless it is prepared by or at the direction of the judge and the facts recited in it are based upon the judge's personal knowledge and/or upon information from the court file contained in documents prepared by court personnel. The order to show cause must:

- a. Notify the respondent of the charge of contempt;
- b. Recite all facts constituting the alleged contempt, other than that the respondent's failure to appear in court was willful; and
- c. Set a time, date, and place for the respondent to appear to answer to the charge of contempt.

The order to show cause may be prepared by the court or by a party at the court's direction.

(2) **Motion and affidavit.** All contempt proceedings, except those initiated by an order to show cause for the failure to appear in court, must be commenced by a motion and affidavit. The affidavit must allege the specific facts constituting the alleged contempt. Each instance of alleged contempt, if there is more than one, must be set forth separately. If the

alleged contempt is the violation of a court order, the affidavit must allege that either the respondent or the respondent's attorney was served with a copy of the order or had actual knowledge of it. The affidavit need not allege facts showing that the respondent's failure to comply with the court order was willful. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(d). Nonsummary proceedings — Service.**

If the contempt proceedings are initiated in connection with a pending action to which the respondent is a party, the order to show cause or the motion, affidavit, and written notice of the time, date, and place to appear may be served upon the respondent as provided in Rule 5(b) of the Idaho Rules of Civil Procedure unless the court orders personal service. If the respondent is not a party to the pending action in which the contempt proceedings are brought, service shall be as provided in Rule 4 of the Idaho Rules of Civil Procedure. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(e). Nonsummary proceedings — Warrant of attachment and bail.**

(1) **Warrant of attachment.** The court shall not issue a warrant of attachment unless the court finds that there is probable cause to believe that the respondent committed the contempt and determines that there are reasonable grounds to believe that the respondent will disregard a written notice to appear. The form of the warrant may be the same as a warrant of arrest.

(2) **Bail.** When issuing a warrant of attachment, the court shall set a reasonable bail, to be endorsed upon the warrant at the time it is issued.

(3) **Execution and return.** The execution and return of the warrant shall be in the same manner as a warrant of arrest. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(f). Nonsummary proceedings — Initial appearance of respondent.**

(1) **Advice to respondent.** At the respondent's first appearance in court to answer to the charge of contempt in nonsummary proceedings, the court shall inform the respondent of:

- a. The charge(s) of contempt against the respondent;
- b. The possible sanctions for contempt;
- c. That the respondent is not required to make a statement and that any statement made may be used against the respondent;
- d. The respondent's right to a trial;
- e. The respondent's right to confront the witnesses against the respondent, including watching the witnesses testify in court and questioning them; and
- f. The respondent's right to bail, if the respondent has been arrested under a warrant of attachment.

(2) **Additional advice in order to impose incarceration as a sanction.** If the respondent appears without counsel and the court desires



to have the option of imposing incarceration as a sanction, the court must inform the respondent that the respondent has the right to be represented by an attorney and that if the respondent desires an attorney and cannot afford one, an attorney will be appointed at public expense. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(g). Nonsummary proceedings — Plea.**

After being informed of the applicable rights, the respondent shall admit or deny the charge of contempt.

(1) **Admission of contempt.** Before an admission of the charge can be accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:

- a. The respondent was informed of the nature of the charge(s) of contempt;
- b. The respondent was informed of the maximum sanctions, including the possibility, if applicable, that sanctions for multiple contempts could be consecutive;
- c. The voluntariness of the admission; and
- d. The respondent was advised that by admitting the contempt, the respondent would be waiving the applicable rights specified in subsection (f) above.

(2) **Denial of contempt.** If the respondent denies the charge of contempt, the matter shall be set for a trial. The respondent must be given at least fourteen (14) days to prepare for trial, unless otherwise ordered by the court. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(h). Nonsummary proceedings — Defenses to the contempt.**

Defenses to the charge of contempt must be raised as follows:

(1) **Written response.** In order to assert an affirmative defense to the contempt, the respondent must file and serve a written response stating such defense, including any of the following: the respondent was unable to comply with the court order at the time of the alleged violation (only a defense to a criminal sanction), the respondent lacks the present ability to comply with the court order (only a defense to a civil sanction), the respondent was unaware of the order allegedly violated, the court lacks personal jurisdiction over the respondent, or the court lacked jurisdiction to issue the order allegedly violated. The written response must be filed within seven (7) days after entering a plea denying the contempt charged, unless otherwise ordered by the court.

(2) **Burden of proof regarding affirmative defenses.** In order to prevent a civil sanction from being imposed, the respondent must prove the affirmative defense by a preponderance of the evidence. In order to prevent a criminal sanction from being imposed, the respondent need only create a reasonable doubt as to whether the respondent is guilty of the contempt. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(i). Nonsummary proceedings — Trial.**

(1) **Court trial or jury trial.** The trial shall be before the court without a jury, provided, that if the respondent is charged with multiple counts tried in one proceeding, the court cannot impose consecutive criminal sanctions totaling more than six months in jail unless the respondent was given, or voluntarily waived, the right to a jury trial.

(2) **Trial rights required to impose a criminal sanction.** The court cannot impose a criminal sanction following a trial unless the respondent was provided the following rights: a public trial, compulsory process, the presumption of innocence, the privilege against self-incrimination, the right to call and cross-examine witnesses, the right to testify in one's own behalf, the right to exclude evidence that was obtained in violation of the respondent's Fourth Amendment rights, the right to counsel, if applicable, and the right to a unanimous verdict if there was a jury trial. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(j). Nonsummary proceedings — Burden of proof.**

(1) **Civil sanction.** In order to impose a civil sanction, the court must find, by a preponderance of the evidence, that all of the elements of contempt have been proven and that the contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction.

(2) **Criminal sanction.** In order to impose a criminal sanction, the trier of fact must find that all of the elements of contempt were proven beyond a reasonable doubt. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(k). Nonsummary proceedings — Findings of fact.**

If the contempt allegation is tried to the court without a jury, the court shall make specific findings of fact. In order to impose either a civil sanction or a conditional (civil) provision as part of a criminal sanction, the findings must include the facts upon which the court bases its determination that the contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(l). Nonsummary proceedings — Imposition of sanctions.**

If the respondent admits the contempt or is found in contempt following a trial, the court may impose sanctions as permitted by law.

(1) **Right to counsel.** The court cannot impose incarceration as a sanction unless the contemnor was represented by counsel or had knowingly and voluntarily waived the right to counsel.

(2) **Right to call witnesses and speak regarding the sanction.** The court cannot impose a criminal sanction without first giving the contemnor the right to call witnesses in mitigation of the sanction and the right to be heard in order to present matters in mitigation or to otherwise attempt to make amends with the court.

(3) **Written order.** The court shall issue a written order reciting the conduct upon which the contempt conviction rests; adjudging that the

contemnor is guilty of contempt; and setting forth the sanction for that contempt. If the sanction is civil or includes a conditional provision, the order must specify precisely what the contemnor must do in order to avoid that sanction or have it cease. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(m). Nonsummary proceedings — Attorney fees.**

In any contempt proceeding, the court may award the prevailing party costs and reasonable attorney fees under Idaho Code § 7-610, regardless of whether the court imposes a civil sanction, a criminal sanction, or no sanction. The procedure for awarding such costs and fees shall be as provided in Rule 54(e) of the Idaho Rules of Civil Procedure, except that the determination of the prevailing party shall be based upon who prevailed in the contempt proceeding. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 42(n). Other rules of criminal procedure.**

Rules regarding discovery and other rules of criminal procedure, to the extent that they are not in conflict with this rule, shall apply to nonsummary contempt proceedings. (Adopted March 24, 2005, effective July 1, 2005.)

**Rule 43. Presence of the defendant.**

(a) **Presence required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) **Continued presence not required.** The further progress of the trial to and including the return of the verdict, or the progress of any other proceeding, shall not be prevented and the defendant shall be considered to have waived defendant's right to be present whenever a defendant, initially present:

(1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) Who has previously been warned by the court, acts in a manner so disorderly, disruptive and disrespectful as to substantially impede or makes impossible orderly conduct of the trial or other proceeding, and the court may:

A. Bind and gag the defendant.

B. Cite the defendant for contempt.

C. Remove defendant from the courtroom until the defendant agrees to act properly.

D. Take other appropriate action, and continue to proceed with the trial.

(c) **Presence not required.** A defendant need not be present in the following situations unless otherwise ordered by the court:



- (1) A corporation may appear by counsel for all purposes.
- (2) In prosecutions of misdemeanors the defendant may appear by counsel or the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence without the defendant being physically present.
- (3) At a conference or argument upon a question of law.
- (4) At a reduction of sentence under Rule 35. (Adopted December 27, 1979, effective July 1, 1980; amended February 9, 2012, effective July 1, 2012.)

## JUDICIAL DECISIONS

### ANALYSIS

Amendment of Sentence.  
Discretion of Court.  
Due Process Not Violated.  
Hearing to Correct Sentence.  
Presence of Defense Counsel.  
Voluntary Absence.  
Waiver.

#### **Amendment of Sentence.**

Where the district court initially imposed upon defendant consecutive sentences for robbery and for use of a firearm, and where the court later amended the judgment by indicating that the sentence for use of a firearm was imposed as an enhancement to the charge of robbery, defendant was not resentenced when his sentence was so amended, and his presence was not required pursuant to subsection (a) of this rule, at the time of such amendment. *Lopez v. State*, 116 Idaho 705, 779 P.2d 19 (Ct. App. 1989).

#### **Discretion of Court.**

The district court's determination that manslaughter sentences were not illegal was not a modification of defendant's sentences made without the defendant being present in violation of this rule and § 19-2503. *State v. Dallas*, 126 Idaho 273, 882 P.2d 440 (Ct. App. 1994).

#### **Due Process Not Violated.**

Defendant's due process rights were not violated where he was denied counsel at his institutional review hearings, nor were these rights violated when the court relinquished its jurisdiction, ordering execution of defendant's sentence without holding another hearing. *State v. Bell*, 119 Idaho 322, 119 Idaho 1015, 812 P.2d 322 (Ct. App. 1991).

#### **Hearing to Correct Sentence.**

A defendant's presence at the time of sentencing is mandatory, not discretionary; thus, where the original sentence was invalid, the

defendant should have been present at the second proceeding at which the sentence was corrected. *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).

Where the oral sentence imposed is ambiguous and the written judgment differs substantially from, and imposes a heavier penalty than, the ambiguous oral sentence, thus requiring a resentencing, the defendant will be entitled to be brought before the judge for resentencing, under subsection (a) of this rule, and failure to do so will not constitute harmless error under I.C.R. 52. *State v. Hoffman*, 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985).

Where defendant was not present at the hearing on his I.C.R. 35 motion and his counsel went forward with the hearing, not objecting to defendant's absence, defendant did not waive his right to be present at his sentencing, nor was there any acquiescence on his part in the ex parte procedure used to "correct" the illegal sentence. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

Where defendant's original sentence was invalid, sentence was not imposed until the trial court corrected the judgment; thus, defendant's presence at the time of resentencing was mandatory. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

A defendant is entitled to be present at sentencing; the defendant is also entitled to be present for resentencing when a prior invalid sentence is corrected. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

The original sentence imposed on defendant which contained two separate enhancements, was invalid since it violated § 19-2520E, and the trial court could not correct the sentence without the defendant being present. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

**Presence of Defense Counsel.**

Subsection (a) of this rule and I.C. § 19-2503 require the presence of defense counsel when sentence is pronounced; however, where the district judge imposed a valid sentence in the presence of counsel, his subsequent action in having the defendant brought back before him and clarifying that sentence was consecutive and not concurrent, and the fact that the defendant's counsel was not present did not change that valid sentence. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

**Voluntary Absence.**

Defendant's alleged fear of an unfair trial, prompted by the judge's words of admonition, did not justify his flight and make his absence from the trial involuntary. *State v. Elliott*, 126 Idaho 323, 882 P.2d 978 (Ct. App. 1994).

The district court properly found that defendant's absence was voluntary, where the court recessed the trial for over an hour while defense counsel and the sheriff attempted to locate the defendant, the court asked all present in the courtroom, including counsel, friends and family of the defendant, whether anyone knew his location or the reason for his nonappearance. In the absence of any information from those sources or from the sheriff's search, the court could properly infer that defendant's absence was voluntary; any other conclusion would be based purely on speculation. *State v. Elliott*, 126 Idaho 323, 882 P.2d 978 (Ct. App. 1994).

The reference in subsection (b)(1) of this

rule to a defendant's voluntary absence from trial does not establish a right to be absent, but reiterates that a defendant's voluntary absence after trial has commenced is a waiver of the right to be present and does not prevent the continuation of the trial. *State v. Wachholtz*, 131 Idaho 74, 952 P.2d 396 (Ct. App. 1998).

District court exceeded the bounds of its discretion when it refused to reschedule a hearing on defendant's motion to suppress since defendant failed to appear at an earlier hearing, because the district court's concern that other defendants would seek to delay their trial through similar tactics was unfounded, when the right to be present at a hearing on a motion to suppress could be waived by defendant's voluntary absence. *State v. Rupert*, 146 Idaho 742, 202 P.3d 1288 (2009).

**Waiver.**

While it is error to sentence a felony defendant in his absence, such an error is not jurisdictional and may be waived as an issue on appeal. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App. 1986), cert. denied, *Dillard v. Idaho*, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

**Cited in:** *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983); *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983); *State v. White*, 107 Idaho 941, 694 P.2d 890 (1985); *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986); *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987); *State v. Knight*, 114 Idaho 923, 762 P.2d 836 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

**Relinquishment of Jurisdiction.**

Where the trial court sentenced a defendant, retained jurisdiction over him for 120 days pursuant to § 19-2601(4) and then relinquished jurisdiction, the relinquishment was not an imposition of sentence but an execu-

tion of it and no hearing was necessary under former rule requiring the presence of defendant. *State v. Ditmars*, 98 Idaho 472, 567 P.2d 17 (1977), cert. denied, 434 U.S. 1088, 98 S. Ct. 1284, 55 L. Ed. 2d 793 (1978).

RESEARCH REFERENCES

**A.L.R.** Sufficiency of Showing Defendant's "Voluntary Absence" from Trial for Purposes of State Criminal Procedure Rules or Statutes

Authorizing Continuation of Trial Notwithstanding Such Absence. 19 A.L.R.6th 697.

**Rule 43.1. Proceedings by telephone conference or video teleconference.**

Whenever the law or these rules require that a defendant in a misdemeanor or felony case be taken before a district judge or magistrate for a first or subsequent appearance, bail hearing, arraignment and plea in a misdemeanor case, or arraignment and plea of not guilty in a felony case,

this requirement can be satisfied by the defendant's appearance before a district judge or magistrate either in person or by telephone or video teleconference in the discretion of the district judge or magistrate. Such device must operate so that both the defendant and a district judge or magistrate can see or hear each other simultaneously and converse with each other. Such additional hearings and proceedings may be conducted under this rule as deemed appropriate by the court. The audio of the telephone conference, or video teleconference shall be recorded by the court and the court shall cause minutes of the hearing to be prepared and filed in the action. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 2, 2001, effective April 1, 2001.)

#### JUDICIAL DECISIONS

**Cited in:** State v. Langley, 110 Idaho 895, 719 P.2d 1155 (1986).

#### **Rule 43.2. Proceedings by telephone conference calls. [Rescinded.]**

#### STATUTORY NOTES

**Compiler's Notes.** Former Rule 43.2 (adopted March 23, 1983, effective July 1, 1983) was rescinded by Supreme Court Order of March 2, 2001, effective April 1, 2001.

#### **Rule 43.3. Forensic testimony by video teleconference.**

Forensic testimony may be offered by video teleconference via simultaneous electronic transmission. For testimony via video teleconference to be admissible:

1) The forensic scientist must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.

a. The court and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

b. The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

c. A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.

2) The party intending to submit testimony via video teleconference shall give written notice to the court and opposing party twenty eight (28) days in advance of the proceeding date.

3) A party in opposition to testimony being given via video teleconference shall give the court and opposing party written notification of his or her objection or affirmative consent no later than fourteen (14) days prior to the proceeding date.

4) The party seeking to introduce testimony via video teleconference shall be responsible for coordinating the audiovisual feed into the courtroom.



Nothing in this rule shall be construed to require court personnel to assist in the preparation or presentation of the testimony provided by the provisions of this rule.

The testimony shall be recorded in the same manner as any other testimony in the proceeding. (Adopted March 18, 2011, effective July 1, 2011.)

**Rule 44. Right to assignment of counsel.**

(a) **Right to assigned counsel.** Every defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant, from initial appearance before the magistrate or district court, unless the defendant waives such appointment.

(b) **Assignment procedures.** The procedures for implementing the right set out in subsection (a) above shall be those provided by law. (Adopted December 27, 1979, effective July 1, 1980.)

**STATUTORY NOTES**

**Cross References.** Right to counsel,  
§§ 19-851 — 19-866.

**JUDICIAL DECISIONS**

**ANALYSIS**

Choosing Counsel.  
Notice of Waiver.  
Plea Bargaining.  
Preliminary Hearing.  
Prior to Post-Conviction Petition.  
Waiver.

**Choosing Counsel.**

An indigent's right to court-appointed counsel includes the right to effective assistance of counsel, but it does not necessarily include the right to counsel of one's own choosing. *State v. Browning*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992).

**Notice of Waiver.**

The right to counsel can be waived without notice to the defendant's counsel; accordingly, where the defendant was represented by court-appointed counsel at his preliminary hearing and all subsequent proceedings, but then requested and received a meeting with the prosecutor, without his attorney being present, after signing a statement that he had initiated the meeting and did not desire the presence of his attorney, he understood his right to counsel and voluntarily relinquished and waived that right, even though his court-appointed counsel was not informed of that fact. *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981).

**Plea Bargaining.**

This rule is not applied per se to forbid prosecutors from engaging in plea negotiations with an accused in the absence of notification to and the securing of permission from defense counsel. *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981).

Where a defendant entered into plea bargain agreement after meeting with the prosecutor without defense counsel present, as defendant had requested when he initiated the meeting, the trial court did not render the assistance of defendant's counsel ineffective by accepting the defendant's plea of guilty to a lesser offense over the objection of his counsel, since the ultimate determination of the plea, if voluntary and intelligent, must be made by the accused. *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981).

**Preliminary Hearing.**

The right to counsel embraces all critical stages of the criminal justice process after commencement of adversarial criminal proceedings against the accused; because the preliminary hearing is a critical stage, the absence of an attorney will be excused only where the accused knowingly and intelligently has waived his or her right to counsel. *State v. Wuthrich*, 112 Idaho 360, 732 P.2d 329 (Ct. App. 1986).

**Prior to Post-Conviction Petition.**

Where defendant's request for court ap-

pointed counsel should have been determined prior to disposing of defendant's post-conviction petition, an order of dismissal of the petition for post-conviction relief was vacated and remanded to the district court. *Ortiz v. State*, 124 Idaho 67, 856 P.2d 104 (Ct. App. 1993), modified on other grounds, *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

offense with a high likelihood of—and eventually resulting in—a sentence of incarceration, she could have sought appointment of counsel upon a showing of indigency, but she also had the right to refuse to be represented by a court-appointed lawyer and to represent herself. *State v. Harrold*, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

#### **Waiver.**

Because the defendant was charged with an

### **RESEARCH REFERENCES**

**A.L.R.** Claims of Ineffective Assistance of Counsel in Death Penalty Proceedings — United States Supreme Court Cases. 31 A.L.R. Fed. 2d 1.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense — Federal Cases. 42 A.L.R. Fed. 2d 145.

#### **Rule 44.1. Withdrawal of counsel.**

No attorney may withdraw as an attorney of record for any defendant in any criminal action without first obtaining leave and order of the court upon notice to the prosecuting attorney and the defendant except as provided in this rule. Leave to withdraw as the attorney of record for a defendant may be granted by the court for good cause. Provided, an attorney may withdraw at any time after the final determination and disposition of the criminal action by the dismissal of the complaint or information, the acquittal of the defendant, or the entry of a judgment of conviction and sentence; but in the event of conviction an attorney may not withdraw without leave of the court until the expiration of the time for appeal from the judgment of conviction. Notice of the return of service of an arrest warrant for a probation violation must be served by the court upon counsel of record if counsel has not withdrawn from representation pursuant to this rule. (Adopted December 27, 1979, effective July 1, 1980; amended March 17, 2006, effective July 1, 2006.)

### **JUDICIAL DECISIONS**

#### **Applicability.**

Shortly after defendant was released from prison, and while his appeal was still pending, he died; substitution under Idaho App. R. 7 was not necessary in the circumstances of

the case, where the attorney for the deceased had not been granted leave to withdraw and merely wished to conclude the criminal proceeding. *State v. Korsen*, 141 Idaho 445, 111 P.3d 130 (2005).

#### **Rule 44.2. Mandatory appointment of counsel for post-conviction review after imposition of death penalty.**

(1) Immediately following the imposition of the death penalty, the district judge who sentenced the defendant shall appoint at least one attorney to represent the defendant for the purpose of seeking any post-conviction remedy referred to in I.C. § 19-2719(4) that the defendant may choose to seek. This appointment shall be made in compliance with the standards set

forth in Idaho Criminal Rule 44.3, and the attorney appointed shall be someone other than counsel who represented the defendant prior to the imposition of the death penalty. This new counsel shall not be considered to be co-counsel with any other attorney who represents the defendant, but may also be appointed to pursue the direct appeal for the defendant.

- (2) **Compensation and Payment of Expenses.**
- (a) Unless counsel is employed by a publicly funded office, lead counsel appointed to represent a capital defendant in post-conviction proceedings shall be paid an hourly rate of one hundred dollars (\$100.00) per hour.
- (b) The trial court shall authorize additional payments for expenses incidental to representation (including, but not limited to, investigative, expert and other preparation expenses) necessary to adequately litigate those post-conviction claims that are allowed pursuant to I.C. § 19-2719, to the same extent as a person having retained his own counsel is entitled.
- (c) Compensation and payment of expenses shall be made pursuant to the provisions of I.C. § 19-860(b). Counsel shall submit timely claims for compensation and payment of expenses in the manner provided in I.C. § 31-1501 et seq. (Adopted effective August 8, 1995; amended January 7, 2003, effective February 1, 2003.)

JUDICIAL DECISIONS

ANALYSIS	
Death Penalty. Number of Attorneys.	finding that defendant had the capacity to waive his right to counsel was supported by substantial, competent, although conflicting evidence, and accordingly would not be disturbed. <i>State v. Lovelace</i> , 140 Idaho 73, 90 P.3d 298 (2004), cert. denied, 543 U.S. 936, 125 S. Ct. 323, 160 L. Ed. 2d 242 (2004).
<b>Death Penalty.</b> Right to counsel in post-conviction proceedings was not a constitutional right, but a matter left to the discretion of the trial judge; however, Idaho Crim. R. 44.2 provides for the mandatory appointment of counsel for post-conviction review after the imposition of the death penalty, and where the district court considered the evidence on defendant's competency and issued an order finding him competent to waive the assistance of counsel and to proceed pro se, the district court's decision	<b>Number of Attorneys.</b> Where the defendant provided no sound argument why his case for post-conviction relief required two attorneys, the district court's exercise of discretion in rejecting the request was not abuse. <i>State v. Hairston</i> , 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

**Rule 44.3. Standards for the Qualification of Appointed Counsel in Capital Cases.**

1. **Applicability.**
- The provisions for the appointment of counsel set forth in this Order apply only in cases where the defendant is needy, as defined in I.C. § 19-851 et seq., counsel is not privately retained by or for the defendant, and the death penalty may be or has been imposed upon the defendant.
2. **Number of Attorneys Per Case.**
- (a) In a case in which the death penalty may be imposed:
- (1) At the initial appearance in the magistrate division, two qualified trial attorneys shall be appointed to represent an indigent defendant,



unless the administrative district judge or his/her designee makes specific findings that two attorneys are not necessary.

(2) In the district court upon an indictment, two qualified trial attorneys shall be appointed to represent an indigent defendant, unless the administrative district judge or the assigned district judge makes specific findings that two attorneys are not necessary.

(3) In the event that more than one attorney is appointed, one appointed attorney shall be designated "lead counsel" and the second as "co-counsel."

(b) In a case in which the death penalty has been imposed:

(1) The district judge who sentenced the defendant shall comply with Idaho Criminal Rule 44.2.

(2) In the event that more than one attorney is appointed, one appointed attorney shall be designated "lead counsel" and the second as "co-counsel."

### **3. Attorney Qualifications.**

#### **(a) Trial.**

(1) Lead trial counsel assignments shall be made to attorneys who:

(A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and

(B) Are experienced and active trial practitioners with at least five (5) years litigation experience in criminal defense or prosecution; and

(C) Have served as lead counsel in no fewer than four (4) felony jury trials of cases which were tried to completion; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to completion, or served as lead counsel in the sentencing phase of a death penalty case.

(D) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and

(E) Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(F) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years; and

(G) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(2) Co-counsel assignments shall be assigned to attorneys who:

(A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and

(B) Qualify as lead counsel under paragraph 3(a) of this Order or meet the following requirements:

(i) Are experienced and active trial practitioners with at least three (3) years litigation experience in criminal defense or prosecution; and

(ii) Have prior experience as lead counsel in no fewer than three (3) felony jury trials of cases which were tried to completion; and

(iii) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and

(iv) Have attended and successfully completed at least six (6) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and

(v) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

**(3) Alternate Procedures.**

Applications for lead and co-counsel assignments may be made by persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the Idaho Supreme Court or the Court's designee that competent representation will be provided in a capital case. Lawyers appointed under this paragraph shall meet either of the following qualifications:

(A) Experience in some stage of death penalty litigation which does not meet the levels required in paragraphs (a)(1) or (a)(2) above, or

(B) Specialized post-graduate training in the defense or prosecution of persons accused of capital crimes.

**(b) Appeal/Post-Conviction.**

(1) Appellate or post convictions counsel must either qualify as "lead trial counsel" under Section 3(a) or meet the following requirements:

(A) Be a member in good standing of the Idaho State Bar, be admitted to practice in Idaho or admitted to practice pro hac vice.

(B) Be familiar with the rules, practice and procedure of the appellate courts of the State of Idaho.

(C) Be experienced and active post-conviction and appellate practitioners with at least three (3) years experience in criminal defense or prosecution.

(D) Have served as court appointed or retained counsel in the appeal or the post conviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court.

(E) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years.

(F) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

If the court in its discretion appoints co-counsel for appeal or post conviction, these requirements do not apply to co-counsel.

**(2) Alternate Procedures.**

Application for lead and co-counsel assignments may be made by persons with extensive criminal trial experience or extensive civil

litigation experience, if it is clearly demonstrated to the Idaho Supreme Court or the Court's designee that competent representation will be provided in a capital case. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

(A) Experience with the appeal and/or post-conviction litigation of death penalty cases which do not meet the levels detailed in paragraphs (a) or (b) above; and

(B) Specialized in post-graduate training in the defense or prosecution of persons accused of capital crimes;

(C) The availability of ongoing consultation support from experienced death penalty counsel.

#### **4. Workload.**

Appointments pursuant to this Order should provide each client with quality representation in accordance with constitutional and professional standards. The appointing authority shall not make an appointment without assessing the impact of the appointment on the attorney's workload.

#### **5. Compensation and Payment of Expenses.**

Compensation and payment of expenses shall be made pursuant to the provisions of I.C. 19-860(b). Counsel shall submit timely claims for compensation and payment of expenses in the manner provided in I.C. § 31-1501 et seq.

#### **6. Procedures for Maintaining Rosters of Qualified Counsel.**

(a) The Supreme Court of the State of Idaho or the Court's designee shall maintain rosters of attorneys who are competent and eligible to represent capital defendants. The first roster shall contain the names of attorneys eligible for appointment as lead counsel for trial and appeal/post conviction cases, pursuant to the qualification requirements specified in this Order. The second roster shall contain the names of attorneys eligible for appointment as co-counsel for trial and appeal/post conviction cases, pursuant to the qualification requirements specified in this Order.

##### **(1) Application.**

(A) Attorneys may obtain an application form from the Supreme Court of the State of Idaho or the Court's designee.

(B) Completed applications shall be submitted to the Supreme Court of the State of Idaho or the Court's designee. The Court or its designee shall review the application for completeness. If the application is incomplete, it shall be returned to the applicant, explaining what further information is required.

##### **(2) Review and Recommendation.**

(A) A standing Death Penalty Counsel Review and Recommendation Committee shall be established with membership appointed by the Supreme Court of the State of Idaho.

(B) The Supreme Court or its designee shall forward completed applications to the Death Penalty Counsel Review and Recommendation Committee. Upon receipt, a thorough investigation of the applicant's background, experience, training and an assessment of



whether the applicant is competent to provide adequate legal counsel to a capital defendant shall be completed.

(C) The application and recommendation will then be forwarded to the Supreme Court of the State of Idaho or its designee who will determine whether or not to include the applicant on a roster.

(3) **Term of eligibility.** Once included on a roster, the attorney's name shall remain on the roster for two (2) years from the notice of inclusion on the roster. It shall be the attorney's responsibility to forward to the Supreme Court of the State of Idaho or the Court's designee, one month prior to the expiration of their term of eligibility, proof of compliance with the qualification requirements of this Order to remain on a roster.

7. The Supreme Court of the State of Idaho or the Court's designee shall maintain the rosters of qualified capital defense counsel. The Court or the Court's designee shall distribute to all district court judges, at least annually, rosters of qualified capital defense counsel.

8. Notwithstanding the requirement of this rule that all appointments shall be from the court-maintained rosters, if an appointment of counsel from the rosters cannot practically and expeditiously be made, the appointing court may appoint one or more counsel who are not on the roster but who otherwise meet the qualifications set out in this rule. The order of appointment shall contain findings related to each attorney's qualifications under the applicable section of this rule, and shall also require each attorney to file an application under subsection (6)(a)(1) of this rule within thirty (30) days of his or her appointment. Any placement on the roster after such an appointment shall relate back to the date of appointment for all purposes. (Adopted March 31, 1998, effective January 1, 1999; amended February 12, 1999, effective January 1, 1999; amended and effective May 20, 1999; amended and effective February 14, 2000; amended and effective March 15, 2001; amended January 7, 2003, effective February 1, 2003.)

## **Rule 45. Time.**

(a) **Computation of time periods.** In computing the time period prescribed or allowed for the filing or service of any document in these rules, the day of the act or event after which such designated period of time begins to run is not to be included, but the last day of the period so computed is to be included unless it is a Saturday, Sunday or non-judicial day, as defined by section 1-1607, Idaho Code, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or non-judicial day as defined in section 1-1607, Idaho Code.

(b) **Enlargement.** When an act, other than the filing of a notice of appeal, is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order,

(2) Enlarge the time upon motion made after the expiration of the specified period and permit the act to be done if the failure to act was the result of excusable neglect, or

(3) Enlarge the time upon stipulation of the parties; but the court may not extend the time for taking any action under Rules 29, 34 and 35, or for the perfecting of an appeal, except to the extent and under the condition stated therein.

(c) **For motion, affidavits.** A written motion, other than one which may be heard ex parte, and notice of hearing thereof, shall be served not later than seven (7) days before the time specified for the hearing unless a different period of time is fixed by rule or by order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion and opposing affidavits must be served not less than one (1) day before the hearing unless the court permits them to be served at a later time.

(d) **Additional time after service by mail.** Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the party and a notice or other paper is served upon the party by mail, three (3) days shall be added to the prescribed period. (Adopted December 27, 1979, effective July 1, 1980.)

#### JUDICIAL DECISIONS

##### **Sentencing Credits.**

Defendant incarcerated for 104 days prior to entry of judgment was entitled to sentencing credit. *State v. Akin*, 139 Idaho 160, 75 P.3d 214 (Ct. App. 2003).

**Cited in:** *State v. Hoffman*, 114 Idaho 139, 754 P.2d 452 (Ct. App. 1988).

##### **Rule 46. Bail or release on own recognizance.**

(a) **Bail or release in non-capital cases.** A defendant who is charged with a crime that is not punishable by death shall be admitted to bail or released on the defendant's own recognizance at any time before a guilty plea or verdict of guilt. In the discretion of the court, bail or release on the defendant's own recognizance may be allowed in the following cases:

(1) After the defendant pleads guilty or is found guilty and before sentencing.

(2) While an appeal is pending from a judgment of conviction, an order withholding judgment, or an order imposing sentence, except that a court shall not allow bail when the defendant has been sentenced to death or life imprisonment.

(3) Upon a charge of a violation of the terms of probation.

(4) Upon a finding of a violation of the conditions of release, subject to the provisions of Idaho Code § 19-2919.

(b) **Bail where offense is punishable by death.** A person arrested for an offense punishable by death may be admitted to bail in the exercise of discretion by any magistrate or district court authorized by law to set bail in

accordance with the standard set forth in article I, section 6 of the Idaho Constitution.

(c) **Factors to be considered.** The determination of whether a defendant should be released upon the defendant's own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, can be made after considering any of the following factors:

(1) Defendant's employment status and history, and financial condition.

(2) The nature and extent of defendant's family relationships.

(3) Defendant's past and present residences.

(4) Defendant's character and reputation.

(5) The persons who agree to assist the defendant in attending court at the proper time.

(6) The nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty.

(7) Defendant's prior criminal record, if any, and, if defendant has previously been released pending a trial or hearing, whether defendant appeared as required.

(8) Any facts indicating the possibility of violations of law if defendant is released without restrictions.

(9) Any other facts tending to indicate that defendant has strong ties to the community and is not likely to flee the jurisdiction.

(10) What reasonable restrictions, conditions and prohibitions should be placed upon defendant's activities, movements, associations and residences.

Upon its own motion or upon a verified petition the court may from time to time re-evaluate the above factors and add to or modify the conditions of bail or revoke the defendant's admission to bail.

(d) **Right to bail or release pending appeal.** A defendant may be admitted to bail or released upon the defendant's own recognizance by the court in which the defendant was convicted pending an appeal upon consideration of the factors set forth in subsection (c) of this rule unless it appears that the appeal is frivolous or taken for delay. Application for admittance to bail or release upon the defendant's own recognizance may be made by the defendant to the appellate court upon a showing in the application that the court in which the defendant was convicted has refused to admit the defendant to bail or release the defendant on the defendant's own recognizance.

(e) **Terms and prohibitions of bail or release.**

(1) If a defendant is admitted to bail or released upon the defendant's own recognizance, the court making such determination may impose such reasonable terms, conditions and prohibitions as the court finds necessary in the exercise of its discretion.

(2) Whenever no contact is ordered pursuant to Idaho Code § 18-920, a no contact order shall be issued in accord with the standards set out in Criminal Rule 46.2.



(3) If one of the conditions of bail or release upon the defendant's own recognizance is an area of restriction monitored by electronic or global positioning system tracking, then the court shall notify the defendant in writing at the time of the setting of bail or release that intentionally leaving the area of restriction, except for the purpose of obtaining emergency medical care, may be prosecuted as the crime of escape and subject the defendant to the penalties set forth in I.C. § 18-2505 or I.C. § 18-2506.

(4) The court may, as a condition of release, require an agreement to comply with other terms and conditions of release.

**(f) Bail, form, conditions and place of deposit.**

(1) Bail may be posted in the form of cash deposit, property bond, or a bail bond issued by a surety insurance company qualified by law to do business in the state of Idaho. The surety shall clearly identify on the bond the name and mailing address of the person designated to receive all notices. The court shall not require that bail be posted only in cash, nor shall the court specify differing amounts for bail depending upon whether it is posted in the form of cash deposit, a property bond, or a bail bond. A cash deposit shall consist of payment in the form of United States currency, money order, certified check or cashier's check. Cash deposit may also be made by personal check payable to the clerk of the court where the acceptance of the personal check has been approved by a magistrate judge or district judge, or by credit card or debit card in those counties where procedures for the acceptance of such payment have been approved by the administrative district judge.

(2) When issuing a warrant of attachment for contempt regarding the nonpayment of any sum ordered by the court, the court may endorse upon the warrant that upon payment of a specified sum of money, not exceeding the amount owing, the contempt will be purged, the defendant shall be released, and the defendant need not appear in court in the contempt proceeding.

**(g) Property bonds.**

(1) The title owner(s) of the property shall execute and deliver a promissory note payable to the county in the amount of the bail. The promissory note shall require the promissor pay to the county the amount of bail, should the defendant fail to appear as required by the court and all attorney fees and costs over and above the amount of bail should the property be sold to satisfy the bail.

(2) The person pledging the property shall provide the tax assessed value and any other documentation required by the court and must disclose, under oath, all liens and encumbrances.

(3) The court, in its discretion, shall determine if the amount of equity in the property is adequate to cover the amount of bail and any other costs associated with liquidating the property to satisfy the obligation to the court.

(4) For real property to qualify as adequate security it must be located within the State of Idaho and must have an equity value, after deducting

the outstanding balance of any existing lien or encumbrance, in an amount not less than the principal amount of the bail set.

(5) If the court accepts the real property as security the property bond shall be promptly recorded in the county in which the property is situated prior to the release of the defendant. Evidence of such recording shall be provided to the court. All recording fees and costs shall be paid by the person posting the bond.

(6) The property bond and promissory note shall be on forms approved by the Supreme Court.

**(h) Forfeiture and enforcement of bail bond.**

(1) The court which has forfeited bail, upon a motion filed within one hundred eighty (180) days after an order of forfeiture, may direct that the forfeiture be set aside, in whole or in part, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. In ruling upon such a motion, the court shall consider all relevant factors, which may include but not be limited to the following:

(A) the willfulness of the defendant's violation of the obligation to appear;

(B) the participation of the person posting bail in locating and apprehending the defendant;

(C) the costs, inconvenience, and prejudice suffered by the state as a result of the defendant's violation of the obligation to appear;

(D) any intangible costs;

(E) the public's interest in insuring a defendant's appearance;

(F) any mitigating factors;

(G) whether the state exhibited any actual interest in regaining custody of the defendant through prompt efforts to extradite him;

(H) whether the bonding company has attempted to assist or persuade the defendant to expedite his return to Idaho by exercising his rights under the Interstate Agreement on Detainers, Idaho Code § 19-5001 *et seq.*; and

(I) the need to deter the defendant and others from future violations.

(2) If the court sets aside the forfeiture, in whole or in part, it may reinstate the bail, or the court may exonerate the bail, or the court may recommit the defendant to the custody of the sheriff and set new bail or may release the defendant on his or her own recognizance. The court shall, within five (5) business days, give written notice to the person posting the bail or, if the bail consists of a surety bond, to the surety or its designated agent of the action taken by the court.

(3) After the court enters the order forfeiting bail, the clerk must, within five (5) business days, mail a written notice of forfeiture to the last known address of the person posting the undertaking of bail or, if the bail consists of a surety bond, to the surety or its designated agent. If the defendant does not appear or is not brought before the court within one hundred eighty (180) days after the entry of the order forfeiting bail, the

clerk, upon receiving payment of the forfeited bail, shall remit such forfeiture to the county auditor for distribution and apportionment as provided by I. C. § 19-4705.

(i) **Revocation of bail.**

(1) Upon a verified application alleging that the defendant has willfully violated conditions of the defendant's release on bail, other than failure to appear, the court may issue a warrant directing that the defendant be arrested and brought before the court for hearing, or the court may order the defendant to appear before the court at a time certain.

(2) Upon a bail revocation hearing, at which the defendant shall appear if the defendant can be found, if the court finds that there has been a willful breach of conditions of bail, and if the defendant is present before the court, it may revoke the bail and remand the bailed person to the custody of the sheriff, and may at any time thereafter reconsider the issue of bail and may set new bail and impose other or additional conditions of release.

(j) **Re-admittance to bail.** After the order of recommitment of a defendant the court may again determine the amount of bail and order that the defendant be admitted to bail in the sum determined and released upon such conditions and prohibitions as the court determines in its discretion.

(k) **Exoneration of bail.**

(1) If the defendant appears before the court where the charge is pending, within one hundred eighty (180) days after the order forfeiting bail, upon motion of the person posting bond, if the court has not set aside the forfeiture, the court shall rescind the order of forfeiture and shall exonerate the bond; provided, that in those cases where the defendant was not returned by the person posting bail to the sheriff of the county where the action is pending, the court may condition the exoneration of bail and the setting aside of the forfeiture on payment by the person posting bail of the actual and reasonable costs incurred by state or local authorities arising from the transport of the defendant to the jail facility of the county where the charges are pending. Such costs shall be determined by the court following filing within fourteen (14) days of the defendant's return, by either the prosecuting attorney or a representative of the state or local law enforcement entity, of documentation of the costs actually incurred. The request for costs and supporting documentation shall also be served upon the person posting bail, who may file an objection to the request within fourteen (14) days of the filing of the request for costs. Any amounts ordered under this rule shall be paid directly to the appropriate law enforcement agency or agencies.

(2) A defendant appears before the court when the defendant physically appears in the court where the charge is pending, or, while in the custody of the sheriff of the county in which the charge is pending, appears in such court by video or audio, or by other appearance authorized by the court.

(3) Where a property bond has been posted the order exonerating the bond shall release the lien.



**(l) Increasing or reducing bail.**

(1) The court before which a case is pending may, after a defendant has been admitted to bail, increase or reduce the amount of bail. Upon its own motion, or upon a verified petition for an increase in bail, the court shall order the defendant to appear for a hearing on the application. The court shall also notify the person posting the undertaking of the date and time of the hearing. If the defendant fails to appear at the hearing after being properly notified of the date and the time of said hearing, the court shall, absent evidence of sufficient excuse for his absence, immediately forfeit the bail and shall issue a warrant for arrest of the defendant.

(2) Upon application of the defendant, and timely notice to the prosecuting attorney and the person posting bail of said application, the court may reduce the existing bail, in its discretion. If the court finds good cause to reduce the bail of the defendant, the court may enter such an order and may continue the defendant on the original bail, with the court record properly reflecting the reduced amount of the bail obligation. The court shall give notice of such reduction to the person posting bail within five (5) business days of the entry of the order reducing bail. (Adopted December 27, 1979, effective July 1, 1980; amended March 21, 1991, effective July 1, 1991; amended March 30, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended April 3, 1996, effective July 1, 1996; amended March 22, 2002, effective July 1, 2002; amended November 7, 2002, effective December 1, 2002; amended April 26, 2007, effective July 1, 2007; amended June 15, 2009, effective July 1, 2009.)

**STATUTORY NOTES**

**Compiler's Notes.** Former subdivision (e)(5) and subsection (h) were rescinded and the present subdivision (e)(5) and subsection (h) adopted by Supreme Court Order of March 20, 1991, effective July 1, 1991.

Former subsection (f) of this Rule was re-

scinded and former subsections (g) and (h) were amended as subsections (f) and (g) by Supreme Court Order of March 30, 1994, effective July 1, 1994.

**Cross References.** Bail, §§ 19-2901 — 19-2937.

**JUDICIAL DECISIONS****ANALYSIS**

Authority of Court.

Denial Proper.

Exoneration.

Forfeiture of Bond.

—Grounds to Set Aside.

—Incarceration in Another Jurisdiction.

Post-Conviction Bail.

Revocation of Bail.

Unnecessary Delay.

**Authority of Court.**

District court substantially complied with § 19-2927, even though the notice of forfeiture listed the incorrect date of forfeiture; the district court did not err in denying the bond

surety's motion to exonerate the bond, or abuse its discretion in denying the surety's second motion to extend the enforcement of the bond forfeiture because § 19-2927 and this rule do not grant the court authority to do so. *State v. Vargas*, 141 Idaho 485, 111 P.3d 621 (Ct. App. 2005).

**Denial Proper.**

Where the motion for a writ of habeas corpus sought the defendant's release on bail or on her own recognizance pursuant to this rule, and the defendant had been released on bail the day after her arrest—the same day the motion was filed—and she was no longer incarcerated when the motion was heard by the judge, the issue was moot and the motion

was properly denied. *State v. Harrold*, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

#### **Exoneration.**

Denial of motions to exonerate a bond was improper because it was unclear if all appropriate factors had been considered in a case where defendant failed to appear because he was being held on charges in another state. *State v. Beck*, 144 Idaho 651, 167 P.3d 788 (Ct. App. 2007).

Denial of motion to exonerate a bond was improper because a 90-day time limit did not apply where a bail bond company was seeking an immediate exoneration of the bond, even while defendant remained outside of Idaho. The motions were timely because they requested an exoneration before remittance of the forfeiture; no independent action was filed by the prosecution. *State v. Beck*, 144 Idaho 651, 167 P.3d 788 (Ct. App. 2007).

#### **Forfeiture of Bond.**

Despite a case number discrepancy, a surety was put on inquiry as to the correct case number by the notice of the forfeiture. Notice was sufficient for the surety to identify the person to whom the notice applied, as well as the probation violation involved. *State v. Castro*, 145 Idaho 993, 188 P.3d 935 (Ct. App. 2008).

Even if a bond surety had conclusively established that the defendant was deported, the impossibility doctrine would not have been a meritorious defense to forfeiture of the bond, as the defendant's deportation was due to his status as an illegal immigrant unlawfully present in the United States, a fact that the surety knew at the time the bond agreement was entered into. Thus, the act by the federal government in deporting the defendant was not an unforeseen supervening act that would excuse performance. *State v. Two Jinn, Inc.*, 151 Idaho 725, 264 P.3d 66 (2011).

#### **—Grounds to Set Aside.**

The trial court did not abuse its discretion in ruling that defendant's alleged fraud in obtaining an appellate bail bond was not a ground for setting aside the forfeiture of the bond and denying bondsman's motion to exonerate the bond under subdivision (e)(4) of this rule. *State v. Rupp*, 123 Idaho 1, 843 P.2d 151 (1992).

#### **—Incarceration in Another Jurisdiction.**

The incarceration of a defendant in another jurisdiction, which prevented him from appearing before the court, is only one factor to be considered by the district court in making its discretionary decision whether to forfeit the bond; the court should also consider whether the incarceration arises from a new

crime committed while the defendant was free on bond or from an offense that preceded his arrest. *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

In deciding how much, if any, of the bond to forfeit, when defendant fails to appear before the court, the court should also consider: (1) the willfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating and apprehending the defendant; (3) the costs, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public's interest in ensuring a defendant's appearance; and (6) any mitigating factors. *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

While it has long been held in Idaho that matters such as the fixing of bail and the release from custody are within the discretion of the courts, the forfeiture of a bond or the setting aside of such a forfeiture are also discretionary decisions within the realm of the district court. *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

#### **Post-Conviction Bail.**

As to the authority of a trial court to allow post-conviction bail to a convicted criminal made ineligible for bail by a statutory enactment, the issue is one of procedure rather than of substantive law, and where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail. Thus, a trial court may allow post-conviction bail under subsection (b) of this rule to a convicted criminal who is ineligible for bail under § 19-2905. *State v. Currington*, 108 Idaho 539, 700 P.2d 942 (1985).

Since defendant was sentenced to a ten-year indeterminate period and, under I.C. § 19-2905, would not be eligible for bail pending appeal and since it appeared that his appeal was frivolous, trial court did not abuse its discretion in denying bail pending appeal. *State v. Trefren*, 112 Idaho 812, 736 P.2d 864 (Ct. App. 1987), review denied, 113 Idaho 638, 747 P.2d 47, 116 Idaho 466, 776 P.2d 828 (1987).

#### **Revocation of Bail.**

In a lewd conduct and sexual abuse of a minor case, where the judge based his decision to revoke the bail on: the seriousness of the two charges; the fact that defendant first denied guilt and intent at his arraignment and then admitted the requisite intent, thereby indicating to the judge some degree of denial; and the judge's "gut feeling" that defendant might flee, based on his observations; the judge did not abuse his discretion by

disallowing bail when he accepted defendant's guilty plea. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

**Unnecessary Delay.**

In interpreting subdivision (a)(1) of this rule, the Court of Appeals adopted the interpretation of Federal Criminal Procedure Rule

48(b) that dismissal for unnecessary delay is limited to post-arrest situations. *State v. Burchard*, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

**Cited in:** *State v. Ybarra*, 102 Idaho 573, 634 P.2d 435 (1981); *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

**Admission to Bail.**

Factors to be considered in determining whether a convicted defendant should be admitted to bail pending appeal are whether his

appeal is taken in good faith, whether his release would menace society and whether he is likely to flee. *State v. Kerrigan*, 98 Idaho 701, 571 P.2d 762 (1977).

RESEARCH REFERENCES

**A.L.R.** Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 3 A.L.R.4th 1057.

When a person is in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — Modern cases, 26 A.L.R.4th 455.

Bail: Effect of surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663; 35 A.L.R.4th 1192.

**Rule 46.1. Bail for witnesses.**

If it appears by affidavit that the testimony of a person is material in any criminal proceedings and if it is shown that it may become impracticable to secure the person's presence by subpoena for a hearing or trial, the court may require such witness to give bail for the person's appearance as a witness in an amount fixed by the court. Such bail may be deposited in the same manner as bail of a person charged under Rule 46. If the person fails to give bail to appear as a witness, the court may commit the person to the custody of the sheriff pending final disposition of the proceedings in which the party's testimony is needed but the court may order the person released if the person has been detained for an unreasonable length of time and may at any time modify or eliminate the requirements as to bail. Bail of a witness may be forfeited as bail in other cases pursuant to section 19-3011, Idaho Code. (Adopted December 27, 1979, effective July 1, 1980.)

STATUTORY NOTES

**Cross References.** Undertaking of witnesses to appear, § 19-820.

Witnesses in criminal proceedings, §§ 19-3001 — 19-3025.

**Rule 46.2. No contact orders.**

(a) No contact orders issued pursuant to Idaho Code § 18-920 shall be in writing and served on or signed by the defendant. Each judicial district shall



adopt by administrative order a form for no contact orders for that district. No contact orders must contain, at a minimum, the following information:

- (1) The case number, defendant's name and victim's name;
- (2) A distance restriction;
- (3) That the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case;
- (4) An advisory that:
  - (a) A violation of the order may be prosecuted as a separate crime under I.C. § 18-920 for which no bail will be set until an appearance before a judge, and the possible penalties for this crime,
  - (b) The no contact order can only be modified by a judge,
  - (c) When more than one domestic violence protection order is in place, the most restrictive provision will control any conflicting terms of any other civil or criminal protection order.

Whenever a no contact order is issued, modified or terminated by the court, or the criminal case is dismissed, the clerk shall give written notification to the records department of the sheriff's office in the county in which the order was originally issued, immediately. No contact orders shall be entered into the Idaho Law Enforcement Telecommunications System (ILETS).

(b) A victim of a criminal offense for which a no contact order has issued may request modification or termination of that order by filing a written and signed request with the clerk of the court in which the criminal offense is filed. Forms for such a request shall be available from the clerk. The court shall provide for a hearing within fourteen days of the request and shall provide notification of the hearing to the victim and the parties. (Adopted March 22, 2002, effective July 1, 2002; amended April 22, 2004, effective July 1, 2004; amended June 30, 2004, effective July 1, 2004.)

#### **Rule 47. Motions.**

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which the motion is made and shall set forth the relief or order sought. It may be supported by affidavit. Any written order entered shall be on a separate document. (Adopted December 27, 1979, effective July 1, 1980; amended March 18, 1998, effective July 1, 1998.)

#### **JUDICIAL DECISIONS**

**Cited in:** State v. Ligon-Bruno, — Idaho —, 270 P.3d 1059 (2011).

#### **Rule 48. Dismissal by the court.**

(a) **Dismissal on motion and notice.** The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:

(1) For unnecessary delay in presenting the charge to the grand jury or if an information is not filed within the time period prescribed by Rule 7(f) of these rules, or for unnecessary delay in bringing the defendant to trial, or

(2) For any other reason, the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.

(b) **Order of dismissal.** When a court dismisses a criminal action upon its own motion or upon the motion of any party under this rule, it shall state in the order of dismissal its reasons for such dismissal.

(c) **Effect of dismissal.** An order for dismissal of a criminal action is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony. (Adopted December 27, 1979, effective July 1, 1980.)

### STATUTORY NOTES

**Cross References.** Dismissal of action,  
§§ 19-3501 — 19-3506.

### JUDICIAL DECISIONS

#### ANALYSIS

Bar to Further Prosecution.  
Dismissal As of Prior Date.  
Dismissal Findings Required.  
Dismissal Held Improper.  
Dismissal Not Required.  
Effective Administration of Court Business.  
Judicial Discretion.  
Jurisdiction.  
Minute Entry Not Sufficient.  
Plea Agreement.  
Proof of Prejudice.  
Refiling of Charge.  
Standard of Review.  
Unnecessary Delay.  
Waiver.

#### Bar to Further Prosecution.

After a misdemeanor charge has been dismissed, a defendant cannot be prosecuted under a subsequent, new complaint charging an identical offense based on the same acts as the earlier, dismissed charge; however, in order for such a dismissal to be a bar to further prosecution, the dismissal must be valid and final. *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985).

Where the state's timely appeal prevented dismissals of misdemeanor charge from becoming final, and the invalidity of the dismissals was established on appeal, the continued prosecution of the same charge initially filed against each defendant was not

barred by subsection (c) of this rule. *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985).

#### Dismissal As of Prior Date.

An order dismissing a criminal case nunc pro tunc was effective to dismiss the case as of a prior date, where the judge announced his intention to dismiss the case on the prior date and where through inadvertence an order carrying out this intent was not entered. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

#### Dismissal Findings Required.

This rule unambiguously requires a trial court to explain its reasoning in the order of dismissal, and where the magistrate did not comply with this requirement and failed to express his reasons for concluding that dismissal was warranted, it made it impossible for the court to evaluate the propriety of that decision. *State v. Keetch*, 134 Idaho 327, 1 P.3d 828 (Ct. App. 2000).

#### Dismissal Held Improper.

Where, on the face of the magistrate's orders of dismissal, it was unclear whether the magistrate dismissed the charges because defendants' motions were meritorious, or because the prosecutor had failed to appear at the hearing, and it appeared that the magistrate dismissed the charges solely because the prosecutor had failed to appear at the hearing, the magistrate erred as a matter of law

by dismissing the charges when no notice was given to the prosecutor that the cases would be dismissed by the court on its own volition for failure of the prosecutor to appear and resist the motions of the defendants. The prosecutor was entitled to such advance notice under this rule, affording him an opportunity to explain to the magistrate his reasons for not appearing. *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985).

The failure of the prosecution to reveal that two guns were found near a murder scene was not error that would be grounds for dismissal of the action, as neither gun was near either of the defendant's and the evidence established that the defendant shot one victim while he was working under a car and shot the other as she was attempting to flee so the guns had no significance to the case. *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998).

Because the evidence had already been reduced to the sole custody of the police at the time defendant flushed the suspected contraband down the toilet, defendant's actions were her own and were independent of any police coercion caused by the illegal arrest and search for evidence; therefore, the intervening circumstance factor strongly militates against suppression of the evidence of the destruction and the subsequent dismissal of the destruction of evidence charge. *State v. Schrecengost*, 134 Idaho 547, 6 P.3d 403 (Ct. App. 2000).

#### **Dismissal Not Required.**

Where prosecution exceeded the time limit for filing the information for burglary and theft charges by seven days, dismissal was not required because the defendant failed to show how he was prejudiced by the delay. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

When defendant was charged with driving under the influence of alcohol, he was not entitled to dismissal of the charge under this rule, although there was a 16-month delay in the judgment of conviction pending appeal, because he did not show prejudice. The court reporter was unable to timely complete the transcript because she was on medical leave and the defendant did not request that the stay be removed or at any time attempt to expedite the preparation of the transcript. *State v. Jacobson*, 150 Idaho 131, 244 P.3d 630 (2010).

#### **Effective Administration of Court Business.**

The defendant's motion to dismiss based upon his good behavior during the lengthy appellate process and the unforgiving immi-

gration consequences of his conviction was properly denied where the defendant did not address how the effective administration of the court's business would be served by dismissing the case. *State v. Avelar*, 132 Idaho 775, 979 P.2d 648 (1999), cert. denied, 528 U.S. 1022, 120 S. Ct. 533, 145 L. Ed. 2d 413 (1999).

#### **Judicial Discretion.**

Idaho Crim. R. 48(a) uses the permissive term "may dismiss" rather than a mandatory "shall dismiss"; therefore a dismissal motion under Rule 48(a) is subject to the court's discretion. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

#### **Jurisdiction.**

Where, in 1992, the court did not amend or modify any of the final orders related to withheld judgment, but only modified the period of probation, and where the court did not state reasons for dismissal or state that it was dismissing the case, it had continuing jurisdiction and the discretion to deny a 2010 motion to dismiss. *State v. Dieter*, — Idaho —, 291 P.3d 413 (2012).

#### **Minute Entry Not Sufficient.**

A minute entry signed by the judge was not sufficient to dismiss a criminal case. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

#### **Plea Agreement.**

Since issue of whether district court erred in denying defendant's motion to dismiss charge of driving under the influence felony was not reserved for review in plea argument that was filed, district court did not err in denying the motion. *State v. Kelchner*, 130 Idaho 37, 936 P.2d 680 (1997).

#### **Proof of Prejudice.**

Where the showing made to the trial court in support of the motion to dismiss did not rise to the level of definite proof of prejudice, it was error for the trial court to dismiss the information. *State v. Kruse*, 100 Idaho 877, 606 P.2d 981 (1980).

#### **Refiling of Charge.**

If a felony case is dismissed pursuant to subdivision (a)(2) of this rule, the six-month requirement of § 19-3501 is renewed upon the refiling of the charge. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

#### **Standard of Review.**

In reviewing a dismissal pursuant to this rule, standard of review is whether the trial court erred as a matter of law in dismissing the criminal action. *State v. Swenson*, 119 Idaho 706, 809 P.2d 1185 (Ct. App. 1991).



**Unnecessary Delay.**

In interpreting subdivision (a)(1) of this rule, the Court of Appeals adopted the interpretation of Federal Criminal Procedure Rule 48(b) that dismissal for unnecessary delay is limited to post-arrest situations. *State v. Burchard*, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

**Waiver.**

Defendant or his attorney could have requested that the district court enter an order of dismissal pursuant to the notice and I.C.R. 48(a)(2); however, he failed to make such a request, and upon his return, he never raised

personal jurisdiction as a bar to his sentencing, thus waiving the argument. *State v. Rogers*, 140 Idaho 223, 91 P.3d 1127 (2004).

**Cited in:** *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980); *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982); *State v. Hayes*, 108 Idaho 556, 700 P.2d 959 (Ct. App. 1985); *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986); *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986); *State v. Harbaugh*, 123 Idaho 835, 853 P.2d 580 (1993); *State v. Cheatham*, 134 Idaho 565, 6 P.3d 815 (2000); *Frost v. Robertson*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 24006 (Mar. 19, 2009).

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Dismissal and Refiling.**

Where the prosecutor, in order to circumvent a ruling reducing the charge against a defendant from second-degree murder to voluntary manslaughter, moved to dismiss the original action and then filed a second com-

plaint for second-degree murder, the dismissal and refile were not prohibited by former rule governing dismissal of actions. *Stockwell v. State*, 98 Idaho 797, 573 P.2d 116 (1977).

## RESEARCH REFERENCES

**A.L.R.** Construction and effect of statute authorizing dismissal of criminal action upon

settlement of civil liability growing out of act charged, 42 A.L.R.3d 315.

**Rule 49. Service and filing of papers.**

(a) **Service, when required.** Written motions, other than those which may be properly heard *ex parte*, written notices, and similar papers shall be served upon each party and filed within the time and in the manner provided by the civil rules. Service may be made upon an attorney for a party by transmittal of a copy of the document to the office of the attorney by a facsimile machine process. This rule shall not require a facsimile machine to be maintained in the office of an attorney.

(b) **Notice of orders.** Immediately upon the entry of an appealable order or judgment the clerk of the district court, or magistrate's division, shall serve a copy thereof, with the clerk's filing stamp thereon indicating the date of filing, by mail on the prosecuting attorney and on each defendant or the attorney for the defendant; or said appealable judgment or order may be delivered directly to said parties or their attorney. Service may be made upon an attorney for a party by transmittal of a copy of the document to the office of the attorney by a facsimile machine process. The clerk shall make a note in the court records of such mailing or delivery. Such mailing or delivery is sufficient notice for all purposes under these rules. Lack of notice of entry of an appealable order or judgment does not affect the time to appeal or to file a post-trial motion within the time allowed, except where there is no showing of mailing or delivery by the clerk in the court records and the party affected thereby had no actual notice. This rule shall not require a facsimile machine to be maintained in the office of an attorney.

(c) **Filing.** Documents required to be served shall be filed with the court. Documents shall be filed in the manner provided in civil actions. Any document, except an information or complaint, a search warrant, a warrant of arrest, or a return on a warrant or service of a search warrant, or any document filed as proof of incarceration of a party to the action, may be transmitted to the court for filing by a facsimile machine process. The clerk shall file stamp the facsimile copy as an original and the signatures on the facsimile copy shall constitute the required signature of a party or the attorney. Filings may be made only during the normal working hours of the clerk and only if there is a facsimile machine in the offices of the filing clerk of the court. Provided, documents over ten (10) pages in length cannot be filed by the facsimile machine process. Following the service of a subpoena, the person serving the subpoena may make return thereof to the person who requested the subpoena rather than making return with the court. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended November 15, 1989, effective January 1, 1990; amended March 18, 1998, effective July 1, 1998; amended April 22, 2004, effective July 1, 2004.)

#### STATUTORY NOTES

**Compiler's Notes.** Former subsection (b) opted by order of the Supreme Court of March 20, 1985, effective July 1, 1985. was rescinded and a new subsection (b) ad-

#### JUDICIAL DECISIONS

**Cited in:** State v. Nelson, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983); State v. Parrish, 110 Idaho 599, 716 P.2d 1371 (Ct. App. 1986); State v. Schaffer, 112 Idaho 1024, 739 P.2d 323 (1987); State v. Delezenne (In re Williams), 120 Idaho 473, 817 P.2d 139 (1991).

#### Rule 50. Terms abolished and calendars.

(a) **Terms of court abolished.** All district courts and magistrates divisions thereof shall be deemed in continuous session. Any hearings or proceedings may be continued at a time and place certain by order of the court upon motion of any party, upon stipulation of the parties, or upon motion of the court. For purposes of these rules governing procedure in criminal actions, the definitions of chambers of court, terms of court, vacations of court and adjournments of hearings are hereby abolished.

(b) **Calendars.** Courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable. (Adopted December 27, 1979, effective July 1, 1980.)

#### JUDICIAL DECISIONS

**Cited in:** State v. Fairchild, 108 Idaho 225, 697 P.2d 1239 (Ct. App. 1985).

**Rule 51. Exceptions unnecessary.**

Exceptions to the rulings of the court are unnecessary. (Adopted December 27, 1979, effective July 1, 1980.)

**Rule 52. Harmless error.**

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. (Adopted December 27, 1979, effective July 1, 1980.)

**STATUTORY NOTES**

**Cross References.** Errors and mistakes,  
§§ 19-3701, 19-3702.

**JUDICIAL DECISIONS****ANALYSIS**

Challenge.

Character Evidence.

Comments by Prosecutor.

Effect on Conviction.

—Erroneously Admitted Evidence.

—Factors Considered.

—Jury Instruction.

Error Held Harmless.

Error Held Not Harmless.

Hearsay.

Incorrect Highway Designation.

Issue Not Preserved.

Post-Conviction Relief Proceedings.

Variance.

Voir Dire.

**Challenge.**

Trial court did not err by failing to dismiss a juror for cause based on the juror's alleged bias because at no time did the juror indicate that she was biased against criminal defendants or in favor of the state. The juror merely disclosed that she resented the removal of jurors from the courtroom when attorneys' objections required discussion in the jury's absence, and that if it occurred at defendant's trial, she would not promise not to hold it against the defense attorney or the prosecutor. *State v. Adams*, 147 Idaho 857, 216 P.3d 146 (2009).

**Character Evidence.**

Any error in excluding pertinent character evidence regarding the victim was harmless where the defendant escalated a fight to one of potentially lethal proportions and where a reasonable jury still would have found that the defendant was not acting in self-defense or in lawful defense of another when he inflicted two final knife thrusts on the victim.

*State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

**Comments by Prosecutor.**

Closing argument comments by the prosecutor emphasizing the lack of credibility of defense accusations of a "frame-up" of defendant by the police and the prosecution were not so inherently prejudicial that a timely objection, accompanied by an instruction by the court to disregard the comments, would not have cured the defect. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Where in summation, prosecutor, with regard to defendant, incorporated phrases such as, "I think that is another embellishment" and "I didn't believe every word he said, I think he shaded his testimony to some degree", these portions of prosecutor's argument were improper statements of personal belief or opinion; however, the relevant and critical issue was whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, and upon careful review of the trial record the evidence presented at trial clearly demonstrated defendant's guilt, and the prosecutor's statements were thus harmless. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Although the issue of defendant's guilt was fairly debatable, the prosecutor's comment that defendant had "murdered" the victim's innocence related solely to an inconsequential fact and therefore was not influential upon the jury. *State v. Reynolds*, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991).

**Effect on Conviction.**

To hold an error as harmless, an appellate court must declare a belief, beyond a reason-



able doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Where the asserted error pertains to material admitted at trial, the test of harmless error is whether the court finds, beyond a reasonable doubt, that the jury would have reached the same result had the material not been admitted; where the error concerns material omitted at trial, the test is whether there is a reasonable possibility that the lack of the omitted material might have contributed to the conviction. *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

In prosecution for second-degree murder and aggravated battery, the admission of the testimony of a witness who was incompetent was harmless, where the judge's cautionary statement about corroboration restricted any use of the testimony to point on which there was independent evidence, the state presented extensive testimony from other witnesses about the shootings and surrounding circumstances, the defendant admitted the shootings, contending that he acted in self-defense, and the witness' testimony was not probative on the only genuinely contested issue at trial — whether the defendant's actions somehow were justified. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Denial of counsel at a preliminary hearing will be held harmless error only if the Court of Appeals is satisfied beyond a reasonable doubt that it did not affect the result of the trial. *State v. Wuthrich*, 112 Idaho 360, 732 P.2d 329 (Ct. App. 1986).

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the improper admission of officers' testimony about a radio report where the dispatcher stated that the defendant had said he "wanted to kill a cop" was not harmless error because it may have made a significant contribution to the jury's ultimate determination of the specific intent issue. *State v. Bohner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Where, in a prosecution for robbery, there was abundant evidence, in addition to eyewitness testimony, implicating the defendant in the robbery, and there was no showing of any unusually significant nexus between the eyewitness identifications and the general problems identified in the scientific magazine article on eyewitness testimony, proffered by the defendant and erroneously excluded as hearsay, such error was harmless for even if the article had been admitted, the verdict would have been the same. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Even if a prosecutor's conduct exceeds the permissible bounds of argument, such conduct will not require reversal of the conviction if it is deemed harmless error. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

#### **—Erroneously Admitted Evidence.**

Although, in a prosecution for robbery, there was a chance that the jury might infer from the erroneously admitted evidence of a chase and shoot-out that the defendant was an outlaw and therefore predisposed to commit a robbery, this risk was vastly outweighed by other compelling evidence establishing the defendant's involvement in the robbery; thus testimony regarding the chase did not contribute to the verdict, and its admission was harmless error. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Where, in prosecution for burglary and theft, the defendants testified that they did not participate in the charged burglaries and related thefts as asserted by the prosecuting witness, and they also offered an alibi witness who testified that they were not at the scenes of the charged burglaries on the day in question, while the state's evidence showed that each defendant had possession of fruits of the crimes charged, the admission of evidence of the uncharged crimes was not harmless error. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

#### **—Factors Considered.**

In determining whether an error has affected substantial rights or is harmless, the inquiry is whether it appears from the record that the error contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the error not occurred. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

#### **—Jury Instruction.**

An instruction which did not tell the jury that if they found the defendant's blood alcohol concentration to have been .10 percent or higher when he was driving they were required to find him guilty of driving under the influence, was defective, but it was harmless error. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

#### **Error Held Harmless.**

In prosecution for driving under the influence of alcohol, the failure to admit evidence that the police department recognized a .02 margin of error for the breathalyzer was harmless, where the arresting officer testified that when initially confronted by the police, the defendant found it difficult to rise, was unstable on his feet, suffered from slurred

speech, was belligerent, and smelled of alcohol, the defendant's condition prompted two officers to advise him not to ride his motorcycle, and the defendant was arrested approximately ten minutes later. *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988).

Although foundational evidence was minimal, any error, in admitting into trial notebook pages containing names and phone numbers found in defendant's residence as evidence that defendant possessed marijuana with intent to deliver, was harmless given the overwhelming evidence against defendant. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989).

Testimony by a social worker, upon cross-examination, that the defendant's wife told the social worker that she suspected her husband of having an affair with the babysitter was not prejudicial to the defendant who was on trial for lewd and lascivious conduct with his eight-year old stepdaughter, where the wife had already testified without objection that she suspected defendant of having an affair and the basis of defendant's objection to the social worker's testimony was that it was cumulative and irrelevant. *State v. Cliff*, 116 Idaho 921, 782 P.2d 44 (Ct. App. 1989).

Where, during defendant's trial for vehicular manslaughter, although a photograph of a victim's scalp lying in the snow on the side of the road should not have been admitted into evidence since this photograph had no probative value and carried with it some prejudicial impact not necessary to prove the manslaughter charges against defendant, when viewed against the totality of the evidence, the erroneous admission of this photograph was harmless. *State v. Phillips*, 117 Idaho 609, 790 P.2d 390 (Ct. App. 1990).

Trial court did not commit reversible error in refusing to give jury instruction on the lesser included offense of exhibiting a dangerous weapon at trial of defendant convicted of felony aggravated assault; court gave an instruction on the intermediate offense of exhibiting a deadly weapon and jury did not find defendant guilty of the intermediate crime and thus there was no indication that the result would have been different had the omitted instruction been given. *State v. Crossdale*, 120 Idaho 18, 813 P.2d 357 (Ct. App. 1991).

The trial court did not fully comply with § 19-2132; however, defendant did not argue that he was in any way prejudiced by the failure of the court to endorse its rejection of defendant's jury instruction and the Idaho Court of Appeals held the error to be harmless. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

The district court did not commit prejudicial error when it admitted testimony from a deputy sheriff that victim had identified defendant in a photographic lineup. Although defendant admitted to having sex with victim on the night in question, admission of a consistent statement by victim on the undisputed facts that defendant was the man who drove her from the bar and had intercourse with her in the backseat of his car did not contribute to the verdict of the jury, where the sole issue before it was consent. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Even if the district court incorrectly denied plaintiff's petition for post-conviction relief because the prosecution did not live up to its portion of the original plea agreement and improperly extended his probation, where plaintiff's probation violations and probation revocation occurred prior to the expiration of the initial three-year period of probation, plaintiff suffered no prejudice and any error was harmless. *Rodriguez v. State*, 123 Idaho 28, 843 P.2d 677 (Ct. App. 1992).

Although in a driving under the influence (DUI) case where the charge is enhanced to a felony under § 18-8005 due to the existence of prior convictions the jury should not be informed during the first phase of the trial that the defendant is charged with a felony, and although the district judge erred in using the terms "felony" and "feloniously" in the jury instructions, because the jury was admonished not to speculate as to punishment and the State presented overwhelming evidence that defendant committed the offense charge, there was no reasonable possibility that such error contributed to the conviction and conviction was upheld. *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995).

Although it is now settled that admission of DNA evidence in a rape case is governed by I.R.E. 702 and not by the Frye test, and although the district court may have erred in applying the Frye test instead of I.R.E. 702 in rejecting defendant's claim to prevent introduction of DNA evidence, such error was harmless because other overwhelming evidence, including several fingerprints, proved the defendant's guilt. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Where the evidence demonstrated beyond a reasonable doubt that the jury would have reached the same conclusion if prosecutorial misconduct had not occurred, the prosecutor's misconduct in closing argument, and the district court's failure to sustain the defendant's objection thereto, were harmless errors, and reversal was not required. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).



Where there was nothing in a challenged videotape to address the defendant's assertion that methamphetamine belonged to another person, even though the district court may not have performed the required balancing test in ruling on the defendant's request for a short continuance to acquire the tape from the prosecution and offer it into evidence, there was no reversible error because his substantial rights were not affected and thus there was no prejudice. *State v. Saxton*, 133 Idaho 546, 989 P.2d 288 (Ct. App. 1999).

Where the relevant portion of a witness' preliminary hearing testimony related only to events giving rise to a sexual battery charge, a nearly identical account of which was provided at trial by another witness, and where the defendant himself argued on appeal that the trial court should have excluded the preliminary hearing testimony as needlessly cumulative, the trial court's error in admitting that testimony was harmless. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

Where ample evidence of the animosity between the parties was presented during a trial, the court's error in determining the privilege of a witness's statement was harmless. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Although a number of errors occurred during the trial, these errors were, individually and cumulatively, harmless beyond a reasonable doubt and did not result in the denial of a fair trial. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

Although it was error to instruct the jury in a prosecution for public display of offensive sexual material in violation of I.C. § 18-4105, to wit, the public display of simulated masturbation, on the definition of "knowingly" from I.C. § 18-101(5) in addition to the applicable definition of "knowingly" from I.C. § 18-4101, the error was harmless; defendant's counsel could identify no specific components of the definitions that contradicted each other and could not identify how the two instructions were inconsistent or how the use of the instruction from I.C. § 18-101(5) prejudiced defendant. *State v. Paciorek*, 137 Idaho 629, 51 P.3d 443 (Ct. App. 2002).

Where defendant presented no defense witnesses or other evidence at trial to rebut the charge of sexual abuse, voluntarily confessed to officers that he engaged in improper sexual touching of the victim, the victim testified to the same, the court's failure to redact that portion of the videotaped confession where the officer stated he was an expert on deception, or offer a limiting instruction regarding the statement, was harmless error. *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002).

Under Idaho R. Evid. 803(8) and 803(6), the state police crime lab report should not have been admitted into evidence as either a business records exception or public records exception because it was an investigative report offered by the prosecution; however, all the information obtained in the report was testified to by the forensic lab technician and was a duplicate of testimony under oath; therefore, the error was harmless. *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003).

In a criminal prosecution for forgery, the trial court erred by admitting a reclamation document advising the bank that the payee's social security check had been forged since there was no testimony presented by any witness familiar with the system used to create the document; however, the error was harmless because the reclamation document did not present the jury with any information that had not already been introduced through the testimony of other witnesses. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

District court committed harmless procedural error by granting defendant's request for a Franks hearing and then denying the request after an ex parte in-camera hearing where defendant's substantial rights were not affected because he was not entitled to the hearing which was the source of his complaint. *State v. Fisher*, 140 Idaho 365, 93 P.3d 696 (2004).

#### **Error Held Not Harmless.**

The incriminating statements procured by the state's informant were not harmless, where prior to the witness' testimony and introduction of the recording at a continued preliminary hearing, the hearing judge was prepared to dismiss the charges, and the prosecuting attorney stated during closing arguments to the jury that the most devastating evidence against the defendant was the testimony of the witness. *State v. Currington*, 113 Idaho 538, 746 P.2d 997 (Ct. App. 1987).

Trial court committed reversible error by admitting rebuttal evidence concerning defendant's reputation since, under the circumstances of this case, defendant did not "open the door" with regard to evidence of good character, and where, because the case turned largely on the jury's assessment of witness' testimony and the amount of credibility the jury gave those witnesses including the rebuttal witness testimony regarding defendant's reputation, it could not be held beyond a reasonable doubt, that the jury would have found defendant guilty without the reputation testimony given by the rebuttal witness. *State v. Rupp*, 118 Idaho 17, 794 P.2d 287 (Ct. App. 1990).



It was not harmless error when a trial court erred in refusing to strike from a psychological report prejudicial language concerning the defendant's prior conviction for lewd and lascivious conduct and the fact that he had completed probation and treatment as a sex offender, where the only witnesses for the state were a police officer and the alleged victim, and where the trial court had determined that the credibility of the latter was "questionable." *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

Cumulative error required a new trial because the district court erred in allowing the introduction of highly prejudicial evidence of defendant previously supplying drugs to minors that had no relevancy to the charges he faced. In addition, the misjoinder of the three charges resulted in the jury hearing irrelevant and highly prejudicial evidence of defendant's guilt on unrelated charges. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

State's failure to provide notice of its intent to present other acts evidence was reversible error, as defendant suffered substantial prejudice due to its admission. Defendant's statements regarding past dealings in methamphetamine did not prove he knew of the methamphetamine in the vehicle the night of his arrest. *State v. Sheldon*, 145 Idaho 225, 178 P.3d 28 (2008).

Exclusion of the store manager's testimony on the security camera coverage was not harmless where there was a reasonable probability that the exclusion of this evidence and the alarm log contributed to defendant's conviction for burglary and petit theft. *State v. Karpach*, 146 Idaho 736, 202 P.3d 1282 (2009).

Error in admitting evidence that defendant had molested his eight-year-old sister when he was 15 or 16 years old was not harmless because defendant's daughter did not report the alleged abuse until a year after it occurred, and the State was unable to present any physical evidence or corroborating testimony. The error was reversible because the appellate court could not conclude beyond a reasonable doubt that the jury would have convicted defendant without the evidence of his previous misconduct. *State v. Johnson*, 148 Idaho 664, 227 P.3d 918 (2010).

Trial court erred in denying defendant's motion for a presentence psychological evaluation during the sentencing phase of trial because the record demonstrated that defendant's mental condition was a significant factor in determining the sentence; the trial court's failure to order a psychological evaluation was not harmless error. *State v. Hanson*, 152 Idaho 314, 271 P.3d 712 (2012).

### **Hearsay.**

The admission of inadmissible hearsay evidence was harmless error where there was incriminating forensic evidence as well as incriminating testimony offered by other witnesses. *State v. Trevino*, 132 Idaho 888, 980 P.2d 552 (1999).

Note written by defendant's co-conspirator to the co-conspirator's girlfriend, showing that the co-conspirator was attempting to cover up the crime by dissuading his girlfriend from divulging information to police, was not hearsay; although the note was offered in error under I.R.E. 801(d)(2)(E), such error was harmless because the note was admissible on other grounds. *State v. Harris*, 141 Idaho 721, 117 P.3d 135 (Ct. App. 2005).

### **Incorrect Highway Designation.**

Typographical error which resulted in incorrect designation of highway number on jury instruction in driving under the influence prosecution did not affect a substantial right and consequently, could be regarded as harmless error. *State v. Hanson*, 130 Idaho 842, 949 P.2d 590 (Ct. App. 1997).

### **Issue Not Preserved.**

The issue of suppression of out-of-court statements, which were relied upon by officer in stopping defendant and arresting defendant for driving under the influence and possession of a concealed weapon, was not preserved for appeal where the state made no offer of proof showing the substance of those statements or that such evidence would have shown the stop was reasonable. *State v. Schoonover*, 125 Idaho 953, 877 P.2d 924 (Ct. App. 1994).

### **Post-Conviction Relief Proceedings.**

Where there is competent and substantial evidence to support a decision made after an evidentiary hearing, the district court's decision will not be disturbed on appeal. Because post-conviction relief proceedings are civil in nature, findings of fact of the court will not be set aside on appeal unless clearly erroneous. *Nguyen v. State*, 121 Idaho 257, 824 P.2d 188 (Ct. App. 1992).

### **Variance.**

Defendant's conviction for three counts of lewd conduct with a minor child under 16 in violation of Idaho Code § 18-1508 was proper where the combination of the three acts of lewd conduct into a single element instruction did not mislead the jury or prejudice defendant; further, the court concluded that, based on the legal defense presented at trial, it could unequivocally determine that the jury would not have disagreed as to the commission of any of the acts; thus, the jury would

still have found defendant guilty of each count of lewd conduct and therefore, the variance error was harmless, Idaho. Crim. R. 52. State v. Montoya, 140 Idaho 160, 90 P.3d 910 (Ct. App. 2004).

### **Voir Dire.**

The defendant's substantial rights were not impaired where an improper question asked by the prosecutor during voir dire asked the juror for irrelevant information, did not ask the juror to commit to a position on the verdict before hearing all the evidence, and did not ask that the juror disregard the applicable law and vote to convict even if the state was unable to prove the elements of the offense. State v. Severance, 132 Idaho 637, 977 P.2d 899 (Ct. App. 1999).

**Cited in:** State v. McKinney, 107 Idaho 180, 687 P.2d 570 (1984); State v. Hoffman, 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985); State v. Garza, 109 Idaho 40, 704 P.2d 944 (Ct. App. 1985); State v. Burke, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986); State v. Major, 111

Idaho 410, 725 P.2d 115 (1986); State v. Roy, 113 Idaho 388, 744 P.2d 116 (Ct. App. 1987); State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987); State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988); State v. Browning, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992); State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992); Banuelos v. State, 127 Idaho 860, 908 P.2d 162 (Ct. App. 1995); State v. Seitter, 127 Idaho 356, 900 P.2d 1367 (1995); State v. Valdez-Molina, 127 Idaho 102, 897 P.2d 993 (1995); Stuart v. State, 127 Idaho 806, 907 P.2d 783 (1995); State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996); State v. Eytchison, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001); State v. Ransom, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002); Peterson v. State, 139 Idaho 95, 73 P.3d 108 (Ct. App. 2003); State v. Field, 144 Idaho 559, 165 P.3d 273 (2007); State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009); State v. Thorngren, 149 Idaho 729, 240 P.3d 575 (2010); State v. Watkins, 148 Idaho 418, 224 P.3d 485 (2009)

## DECISIONS UNDER PRIOR RULE OR STATUTE

### ANALYSIS

Foundation for Impeachment.  
Instructions.  
Misconduct of Prosecutor.  
Procedural Error.

### **Foundation for Impeachment.**

Where, the prosecution failed to lay a proper foundation with a witness it sought to later impeach by a prior inconsistent statement, but where the failure to lay a proper foundation was harmless error since the witness's prior statement was irrelevant and collateral to the material issues of the case, the trial court's admission of a police officer's rebuttal testimony did not affect any substantial rights of the defendant. State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979).

### **Instructions.**

In a prosecution for lewd conduct with a minor child under sixteen where the trial court, at the request of the prosecution, instructed the jury that statutory rape was a necessarily included offense, no prejudice resulted to defendant who was not convicted of

statutory rape but was convicted of lewd conduct with a minor child. State v. Herr, 97 Idaho 783, 554 P.2d 961 (1976), superseded by statute as stated in State v. Tribe, 123 Idaho 721, 852 P.2d 87 (1993).

### **Misconduct of Prosecutor.**

Where in his closing argument the prosecutor injected some personal comment and made several references to an irrelevant fact of the victim's knowledge of the defendant having a wife who was eight months pregnant at the time of the rape incident, the misconduct of the prosecutor in closing argument, if any, did not rise to the level of prejudicial error. State v. Smoot, 99 Idaho 855, 590 P.2d 1001 (1978).

### **Procedural Error.**

Where the state did not argue that it was prejudiced by defendant's alleged procedural errors, the state's motion to dismiss defendant's appeal from sentence imposed following conviction for possession and delivery of a controlled substance was denied. State v. Arambula, 97 Idaho 627, 550 P.2d 130 (1976).

**Rule 53. [Reserved.]****Rule 54. Appeals from a magistrate to district court. [Rescinded.]****STATUTORY NOTES**

**Compiler's Notes.** Former Rule 54 (adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983) was rescinded by Supreme Court Order of June 15, 1987, effective November 1, 1987.

**Rule 54.1. Appeals from a magistrate to a district court —  
Appealable judgments and orders.**

There shall be no direct appeal from an order or decision of a magistrate to the Supreme Court. Provided, however, that whenever an attorney magistrate is assigned by an order issued pursuant to Rule 2.2(e) or Rule 2.2(f) to hear any action which may otherwise be tried only by a district judge, any appeal taken from a judgment of such magistrate acting under such order shall be made to the Supreme Court unless otherwise provided by the original order of assignment. An appeal may be taken to the district judge's division of the district court from any of the following judgments, orders or decisions rendered by a magistrate:

- (a) A final judgment of conviction.
- (b) By a defendant only, from an order granting or denying a withheld judgment on a verdict or plea of guilty.
- (c) An order granting a motion to dismiss a complaint.
- (d) An order granting a motion to suppress evidence in a misdemeanor criminal action.
- (e) An order denying a motion for new trial.
- (f) An order made after judgment affecting the substantial rights of the defendant or the state.
- (g) Any order, judgment or decree in a special criminal proceeding in which an appeal is provided by statute.
- (h) Any order holding a person in contempt of court other than those contempts defined in Rule 42(a).
- (i) An interlocutory order when processed in the manner provided by Rule 12 of the Idaho Appellate Rules and accepted by the district court.
- (j) Any order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail. An appeal from such an order shall not deprive the magistrate court of jurisdiction over other proceedings involving the case or stay such proceedings. (Adopted June 15, 1987, effective November 1, 1987; amended April 27, 2011, effective July 1, 2011; amended May 9, 2011, effective July 1, 2011; amended February 9, 2012, effective July 1, 2012.)



## JUDICIAL DECISIONS

## ANALYSIS

Construction with Other Rules.  
Jurisdiction.  
Ruling on Motion to Dismiss.

**Construction with Other Rules.**

Although the defendant complied with the appellate rules by obtaining an order from the magistrate authorizing an appeal, his failure to file a further motion with the district court for acceptance of the appeal fell short of satisfying I.A.R. 12(c). *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999).

When appellant parents appealed a term of their daughter's probation pursuant to Idaho Crim. R. 54.1(f), the Supreme Court of Idaho held that the magistrate had the authority under Idaho Code Ann. § 20-520(1)(i) to require appellants to submit to random urine testing for drugs; however, requiring appellants to undergo urinalysis testing constituted a search that was presumptively invalid without a warrant under the Fourth Amendment. *State v. Doe*, 149 Idaho 353, 233 P.3d 1275 (2010).

**Jurisdiction.**

Defendant failed to timely file a notice of appeal from district court's appellate decision affirming magistrate's denial of his motion to

suppress, choosing instead to proceed on remand to the magistrate in defense of the underlying charge. Court of appeals therefore lacked subject matter jurisdiction over defendant's appeal of magistrate's order. Because defendant did not assert that he would raise any other issues if provided with the opportunity to appeal to the district court the magistrate's final judgment, remand was inappropriate, and his appeal was dismissed. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

**Ruling on Motion to Dismiss.**

Where, although a magistrate acting as a district judge did not conduct a trial and render a judgment, to the extent that the magistrate ruled on defendant's motion to dismiss or for re-transfer, the decision of the magistrate should be considered in the same manner. *State v. Smith*, 117 Idaho 891, 792 P.2d 916 (1990).

Dismissal of a criminal complaint at the preliminary hearing stage is not appealable under Idaho Crim. R. 54.1(c). *State v. Loomis*, 146 Idaho 700, 201 P.3d 1277 (2009).

**Cited in:** *State v. Jones*, 115 Idaho 1029, 772 P.2d 236 (Ct. App. 1989); *State v. Crisman*, 123 Idaho 277, 846 P.2d 928 (Ct. App. 1993); *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004).

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Appeal from Dismissal of Complaint.**

Where magistrate dismissed complaint on basis of lack of probable cause, but the State could have simply filed another complaint with another magistrate, in effect having its

assertion of error resolved in a new preliminary hearing, State was not entitled to appeal the dismissal. *State v. Ruiz*, 106 Idaho 336, 678 P.2d 1109 (1984).

**Rule 54.2. Magistrate appeals — Judicial review.**

All appeals from the magistrate's division shall be heard by the district court as an appellate proceeding unless the district court orders a trial de novo. (Adopted June 15, 1987, effective November 1, 1987.)

## JUDICIAL DECISIONS

**Cited in:** *State v. Palmer*, 114 Idaho 895, 761 P.2d 1247 (Ct. App. 1988); *State v. Kenner*, 121 Idaho 594, 826 P.2d 1306 (1992);

*State v. Tucker*, 124 Idaho 621, 862 P.2d 313 (Ct. App. 1993).

**Rule 54.3. Time for filing appeals.**

(a) All appeals permitted or authorized by these rules, may be made only by the physical filing of a notice of appeal with the clerk of the district court of the county wherein the magistrate trial was held, within forty-two (42)

days from the date evidenced by the filing stamp of the clerk of the court on the judgment, order or decree appealed. The time to appeal from any criminal judgment, order or decree in an action is terminated by the filing of a motion within fourteen (14) days of the entry of the judgment which, if granted, could affect the judgment or sentence in the action, in which case the appeal period commences to run upon the date of the clerk's filing stamp on the order deciding such motion.

(b) Time for filing cross-appeal. When a timely appeal is filed as matter of right, a cross-appeal may be filed by the opposing party within the time prescribed by these rules or within fourteen (14) days from the date the original notice of appeal is served, whichever is later. (Adopted June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

Subject-Matter Jurisdiction.

Since district court improperly allowed defendant to withdraw earlier guilty plea more than 42 days after final judgment, that holding and all subsequent proceedings in the matter were without subject matter jurisdiction and void. Thus, defendant's subsequent conviction and sentence on a different charge were vacated, his original conviction and sentence were reinstated, and case was remanded to effectuate this decision. *State v. Armstrong*, 146 Idaho 372, 195 P.3d 731 (Ct. App. 2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

Final Judgment.

The requirements of former similar rule regarding time for filing appeals must have been met for the entry of final judgment as applied to the doctrines of collateral estoppel and res judicata. *Aetna Cas. & Sur. Co. v. Fairchild*, 620 F. Supp. 1245 (D. Idaho 1985).

Rule 54.4. Notice of appeal.

A notice of appeal to the district court filed pursuant to these rules shall contain the following information and statements:

- (a) The title of the action or proceedings.
- (b) The title of the court which heard the trial or proceedings appealed from and the name of the presiding magistrate.
- (c) The number assigned to the action or proceedings by the trial court.
- (d) The title of the court to which the appeal is taken.
- (e) The date and heading of the judgment, decision or order from which the appeal is taken.
- (f) A statement as to whether the appeal is taken upon matters of law, or upon matters of fact, or both.
- (g) A statement as to whether the testimony and proceedings in the original trial or hearing were recorded or reported, together with an identification of the method of recording or reporting and the name of the party or person in whose possession such recording or reporting is located.
- (h) A certificate that the notice of appeal has been served personally or by mailing upon the opposing party or the party's attorney.

(i) A statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, such statement may be filed separately within fourteen (14) days after the filing of the notice of appeal and any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal thereafter discovered by the appellant. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.5. Stay on appeal — Powers of magistrate during appeal.**

(a) **Stay in Criminal Appeals.** Execution of the sentence, if any, imposed by the trial court, shall be stayed upon compliance with the provisions of section 19-3941, Idaho Code, or when ordered by the magistrate or by the district court as provided in Rule 46 and this rule.

(b) **Powers of Magistrate.** The magistrate shall have the following powers and authorities to rule upon the following motions and to take the following actions during the pendency of appeal unless otherwise prohibited by order of the district court:

- (1) Settle the transcript on appeal.
- (2) Rule upon any motion for new trial.
- (3) Rule upon any motion for arrest of judgment.
- (4) Conduct any hearing, and make any order, decision or judgment allowed or permitted by section 19-2601, Idaho Code.
- (5) Conduct any hearing and make any order, decision or judgment with regard to a withheld judgment entered upon a plea or verdict of guilty.
- (6) Place a defendant upon probation, modify or revoke such probation, or sentence a defendant upon revocation of probation.
- (7) In the event bail is not posted pursuant to section 19-3941, Idaho Code, the court may determine and order whether there shall be a stay of execution of the sentence upon a judgment of conviction during the pendency of an appeal to the district court; provided, however, any order of the district court with regard to such a stay shall take precedence over and supersede any order made by the magistrate.
- (8) Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law. Provided, however, in the event the district court shall enter an order affecting a stay of execution of a sentence, provisions concerning bail, or any of the other matters set forth above, such order of the district court shall take precedence over and supersede the order of the magistrate. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.6. Method of appeal — Transcript of proceedings —  
Listening to recording tapes — Trial de novo.**

(a) **Transcript Required.** Unless otherwise ordered by the district judge, a transcript shall be prepared as provided in Rule 54.7 and the appeal shall be heard as an appellate proceeding.



(b) **Alternate Methods of Hearing Appeal.** The district judge assigned the appeal may, on the judge's own motion or motion of a party, order an alternate method of hearing the appeal by ordering:

(1) That the appeal involves a question of law only so that no transcript is required and the appeal will be decided on the clerk's record, the briefs of the parties and oral argument; or

(2) That the appeal should be heard as an appellate proceeding by listening to the recording tapes without a transcript; or

(3) That the appeal should be heard as a trial de novo without a transcript.

(c) **Hearing on Question of Law.** If the district judge determines that the appeal can be heard as a question of law alone, without the necessity of a transcript or a trial de novo, the judge shall enter an order to that effect stating the issue of law to be determined on appeal and set a day certain for the filing of the appellant's opening brief based upon the clerk's file and the order of the court.

(d) **Listening to Tapes.** If the district judge determines that the appeal should be heard by listening to the tapes of the trial or proceedings of the trial court, the judge shall enter an order to that effect and direct a time within which the parties shall review or listen to the recording tapes and set a date certain for the filing of appellant's opening appellate brief.

(e) **Special Transcript.** If the district judge does not require the preparation of a transcript on appeal, the district judge shall nevertheless, upon motion of any party to the appeal, order the preparation of a transcript of the proceedings at the cost of the moving party which shall require the moving party to pay the estimated transcript fees within fourteen (14) days of entry of such order and the clerk of the court shall serve a copy of such order upon the transcriber of the trial or proceedings of the trial court. (Adopted June 15, 1987, effective November 1, 1987.)

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### **Oral Argument.**

Where a district court was acting in its appellate capacity, ruling on a magistrate's dismissal in the interest of justice, erroneously denied the defendant an opportunity to present oral argument, the defendant was not prejudiced since she was allowed to present

her oral argument to the Court of Appeals on each of the issues; it would have served no purpose to remand to the district court for oral argument where it had already been presented. *State v. Hayes*, 108 Idaho 556, 700 P.2d 959 (Ct. App. 1985).

#### **Rule 54.7. Payment of fees — Preparation of transcript.**

Unless otherwise ordered by the district judge, the transcript shall be prepared in the following manner:

(a) **Payment of Transcript Fee.** Unless otherwise ordered by the district judge, the appellant shall pay the estimated fee for preparation of the transcript as determined by the transcriber within 14 days after the filing of the notice of appeal, and the appellant shall pay the balance of the fee for the transcript upon its completion. The appellant shall pay a sum

per page for the original and two (2) copies of the transcript to be prepared by the transcriber equal to the dollar amount per page provided for the cost of a transcript prepared by a court reporter under Section 1-1105, Idaho Code. Such sum shall be paid to the clerk of the court of the magistrate's division and deposited in the district court fund, or such other fund which incurred the expense of the person who prepared the transcript. If the transcript is prepared by a transcriber or reporter privately retained by appellant, the cost therefor shall be paid by the appellant as agreed, but for purposes of taxing costs, the cost shall be deemed to be the same as provided in this rule. The district judge may order a transcript prepared at county expense if the appellant is exempt from paying such fee as provided by statute or law.

(b) **Preparation of Transcript.** Upon the payment of the estimated transcript fees, the transcriber shall give a receipt to the party paying such fees and shall thereafter prepare the transcript and lodge the same with the clerk of the trial court within thirty-five (35) days from the date of payment of the estimated fee. The transcriber may make application to the district judge for an extension of time in which to prepare the transcript, which shall be granted only for good cause shown.

(c) **Certificate.** The transcript must be examined and certified by the typist by a certificate in substantially the following form:

#### CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he or she correctly and accurately transcribed and typed the above transcript from the recording of the

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[Describe hearing: e.g. trial, hearing on motion for summary judgment, etc.]

which was recorded on \_\_\_\_\_ (date) \_\_\_\_\_ in the above entitled action or proceeding.

Dated and certified this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Transcriber

(d) **Form of Transcript.** All transcripts of the testimony and proceedings prepared for an appeal to the district court shall be in such form and arrangement as required for appeals to the Supreme Court under the Idaho Appellate Rules. (Adopted June 15, 1987, effective November 1, 1987.)

#### JUDICIAL DECISIONS

**Delay.**

Defendant was not entitled to dismissal of the charges against him, even though the

transcript was not completed for 16 months after defendant had paid the required fee, because the court reporter was on medical

leave and the defendant did not request that the stay, awaiting the reporter's return, be removed or at any time attempt to expedite the preparation of the transcript. *State v. Jacobson*, 150 Idaho 131, 244 P.3d 630 (2010).

**Rule 54.8. Clerk's record.**

The official court file of any criminal action appealed to the district court, including the minute entries or orders, together with the exhibits offered or admitted, shall constitute the clerk's record in such appeal. Provided, however, the trial court may file with the district court a certified copy of its official file and retain its original file if ordered by the magistrate. Upon determination of any appeal to the district court, the original clerk's record shall be returned to the trial court together with a certified copy of the order or other disposition rendered by the district court on appeal. No copies of the clerk's record need be prepared unless ordered by the magistrate or by the district court. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.9. Settlement of transcript.**

Upon receipt of the transcript of the testimony and proceedings, the clerk of the trial court shall mail or deliver a notice of lodging of the transcript to all attorneys of record, or parties appearing in person. The original of the transcript shall be retained by the clerk of the trial court, but the notice shall advise the plaintiff and defendant that they may pick up a copy of the transcript at the clerk's office and that the parties have twenty-one (21) days from the date of notice in which to file any objections to the content thereof. If there are multiple defendants appealing, and the court has not ordered separate transcripts for each defendant and the defendants have not ordered separate transcripts, they shall determine by agreement the manner and time of use of the transcript by each party, or failing such agreement, such determination shall be made by the trial court upon application of any party. Any party may file a written objection to the content of the transcript within twenty-one (21) days from the date of mailing of the notice to the parties that the transcript has been lodged with the trial court. Upon failure of the parties to file any objection with such time period, the transcript shall be deemed settled. Any objection made to a trial transcript shall be heard and determined by the trial court in the same manner as a motion. The determination by the trial court of any objection to the transcript shall be deemed a settlement of the transcript for all purposes. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.10. Filing of transcript and record.**

Within seven (7) days of the settlement of the transcript, or within seven (7) days of the receipt of an order of the district court that no transcript is needed or required, the clerk of the trial court shall file with the district court the transcript, if any, and the clerk's record, or a certified copy thereof, and all exhibits offered or admitted in the trial proceeding. The clerk of the trial court shall give notification of such filing to all parties or their attorneys. Any electronic recording, tape or belt used to record or transcribe the testimony and proceedings need not be forwarded to the clerk of the



district court unless ordered by the district court. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.11. Augmentation of the record.**

Any party desiring to augment the transcript or record may file a motion with the district court in the same manner and pursuant to the same procedure provided for augmentation of the record in appeals to the Supreme Court. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.12. Exhibits on appeal.**

All exhibits offered or admitted in a trial proceeding shall be lodged with the clerk of the district court by the clerk of the trial court together with a certificate that said exhibits include all exhibits offered or admitted in the trial or proceedings. All such exhibits shall be lodged with the clerk of the district court at the time that the transcript and clerk's record is lodged with the district court. If an exhibit is incapable of being transmitted to the district court, the magistrate may order the clerk of the trial court to photograph or otherwise describe or make a facsimile thereof and forward it to the district court and retain the original until determination of the appeal. Upon determination of the appeal, the district court shall return all exhibits to the trial court. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.13. Effect of failure to comply with time limits.**

The failure to physically file a notice of appeal or notice of cross-appeal with the district court within the time limits prescribed by these rules shall be jurisdictional and shall be grounds for automatic dismissal of such appeal upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the appellate process shall not be deemed jurisdictions, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the appeal. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.14. Motions on appeal.**

All motions on appeal shall be filed with the district court, except those expressly required to be filed with the trial court, and served upon all parties to the action. All motions must be accompanied by a brief. The opposing party shall have fourteen (14) days from service of a motion to file a response or brief and the motion shall be determined without oral argument unless ordered by the court. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 54.15. Appellate briefs.**

Briefs shall be in the form and arrangement, and filed and served within the times provided for appeals to the Supreme Court by the Idaho Appellate

Rules, unless otherwise ordered by the district court; provided, that such briefs may be typewritten and copies may be carbon copies or photocopies. Only one (1) original signed brief need be filed with the district court, and copies shall be served upon all other parties. (Adopted June 15, 1987, effective November 1, 1987.)

#### JUDICIAL DECISIONS

**Cited in:** State v. Langdon, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

#### **Rule 54.16. Appellate argument.**

Appellate argument may be heard by the district court after notice to the parties in the same manner as a notice of hearing of a motion before a trial court. (Adopted June 15, 1987, effective November 1, 1987.)

#### **Rule 54.17. Appellate review.**

All appeals from a magistrate shall be heard by the district court as an appellate proceeding unless the district court orders a trial de novo as provided in these rules. The scope of appellate review on appeal to the district court shall be as follows:

(a) Upon an appeal from a magistrate to the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the Idaho appellate rules.

(b) Upon an appeal from a magistrate to the district court in which a trial de novo is ordered, such appeal shall be by trial in the district court in the same manner as a trial upon information in the district court. (Adopted June 15, 1987, effective November 1, 1987.)

#### **Rule 54.18. Other appellate rules.**

Any appellate procedure not specified or covered by these rules shall be; in accordance with the appropriate appellate rule, (I.A.R.), or the appropriate rules of these criminal rules, (I.C.R.), to the extent that they are not contrary to this Rule 54. These rules shall be construed to provide a just, speedy and inexpensive determination of all appeals. (Adopted June 15, 1987, effective November 1, 1987.)

#### JUDICIAL DECISIONS

**Cited in:** State v. Peterson, 113 Idaho 554, 746 P.2d 1013 (Ct. App. 1987); State v. Langdon, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

#### **Rule 54.19. Listening to or copying recording tapes.**

Any party to an action in the magistrates division may listen to or copy an electronic tape or belt recording of the trial or hearing proceedings under such rules and for such fee as adopted by the majority of the district judges

of the judicial district. All fees received from a party for listening or copying recording tapes under this rule shall be transmitted to the county treasurer for deposit in the current expense fund of the county and credited back to the clerk's budget. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 55, 56.[Reserved.]**

## **Rule 57. Uniform Post-Conviction Procedure Act.**

(a) **Application for relief.** An application for relief from a judgment of conviction and/or sentence shall be in the form of a petition and shall be filed in the district court wherein the conviction was entered and be in substantially the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT,  
IN AND FOR \_\_\_\_\_ COUNTY, STATE OF IDAHO.

\_\_\_\_\_, )  
(Full Name) ) Case No. \_\_\_\_\_)  
Petitioner )  
v. ) PETITION FOR POST-  
STATE OF IDAHO, ) CONVICTION RELIEF  
Respondent )

The petitioner alleges:

1. Place of detention if in custody: \_\_\_\_\_
2. Name and location of court which imposed judgment/sentence: \_\_\_\_\_
3. The case number and the offense or offenses for which sentence was imposed:
  - (a) Case Number. \_\_\_\_\_
  - (b) Offense Convicted. \_\_\_\_\_
4. The date upon which sentence was imposed and the terms of sentence:
  - (a) Date of sentence. \_\_\_\_\_
  - (b) Terms of sentence. \_\_\_\_\_
5. Check whether a finding of guilty was made after a plea:
  - (a) Of guilty. \_\_\_\_\_
  - (b) Of not guilty. \_\_\_\_\_
6. Did you appeal from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
7. State concisely all the grounds on which you base your application for post-conviction relief:
  - (a) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  - (b) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

8. Prior to this motion have you filed with respect to this conviction:
- (a) Any petitions in state or federal courts for habeas corpus?
  - (b) Any other petitions, motions or application in this or any other court?
  - (c) If you answered “yes” to (a) or (b) state with respect to each petition, motion or application the nature of each motion or application and the name and location of the court in which each was filed.

9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

10. (a) Are you seeking leave to proceed in forma pauperis, that is, requesting the proceeding to be at county expense? \_\_\_\_\_
- (b) Are you requesting the appointment of counsel to represent you in this application? \_\_\_\_\_
- (c) If your answer to either of the above questions was “yes” fill out an affidavit of indigency in the form required by the trial court.

11. State specifically the relief you seek. \_\_\_\_\_

12. This petition may be accompanied by affidavits in support of the petition.

\_\_\_\_\_  
Signature of Petitioner

STATE OF \_\_\_\_\_  
ss.

COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

\_\_\_\_\_  
Signature of Petitioner

SUBSCRIBED and SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Notary Public For \_\_\_\_\_  
Residing at \_\_\_\_\_

My commission expires:

\_\_\_\_\_  
(month)(day)(year)

(b) **Filing and processing.** The petition for post-conviction relief shall be filed by the clerk of the court as a separate civil case and be processed under the Idaho Rules of Civil Procedure except as otherwise ordered by the trial court; provided the provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings unless and only to the extent ordered by the trial court.

(c) **Burden of proof.** The petitioner shall have the burden of proving the petitioner's grounds for relief by a preponderance of the evidence. (Adopted December 27, 1979, effective July 1, 1980.)

#### JUDICIAL DECISIONS

##### ANALYSIS

Constitutionality.  
Deficient Attorney Performance.  
Discovery.  
Dismissal of Application.  
—Improper.  
—Proper.  
Evidence.  
—Insufficient.  
Finding of Fact.  
Inquiry into Verdict.  
Procedure.

Timely Filing.  
Transcripts.  
—Sentencing Hearing.

##### Constitutionality.

Since the defendant, although incarcerated, was not a member of a suspect class, since the granting or denial of discovery did not involve a fundamental constitutional right, and since subsection (b) is not blatantly discriminatory on its face and did not lack a discernible relationship to a governmental purpose, a rational basis test was used to review the

plaintiff's equal protection claim. *Aeschliman v. State*, 132 Idaho 397, 758 P.2d 749, 973 P.2d 749 (Ct. App. 1999).

Because subsection (b) of this rule allows the district court to permit discovery when appropriate, it is rationally related to the interest of preventing unnecessary discovery in the post-conviction arena, does not deny an appellant discovery in toto, and is not violative of the equal protection clause of the state constitution. *Aeschliman v. State*, 132 Idaho 397, 758 P.2d 749, 973 P.2d 749 (Ct. App. 1999).

Although defendant's trial counsel admitted that his assistance did not fall within the range of competence regarding the wording of defendant's guilty plea to six counts of sexual exploitation by a medical care provider, defendant had not demonstrated that prejudice resulted from counsel's failure to pluralize the word "charge" in the conditional plea agreement because defendant did not show that the elimination of the first three counts on appeal would have had such a dramatic effect on his defense of the remaining three counts that that strategy realistically would have been the basis for his decision to have pleaded guilty on the last three counts. *McKeeth v. State*, 139 Idaho 639, 84 P.3d 575 (Ct. App. 2004).

#### **Deficient Attorney Performance.**

Where a detective received tips that appellant and his son were trafficking marijuana, probable cause supported the issuance of a search warrant; appellant's counsel was not deficient when he advised him to abandon a suppression motion and accept the plea agreement. Appellant failed to show that he was entitled to post-conviction relief. *Woodward v. State*, 142 Idaho 98, 123 P.3d 1254 (Ct. App. 2005).

#### **Discovery.**

Although the civil rules generally apply to proceedings on an application for post-conviction relief, the discovery provisions contained in those rules are not applicable unless specifically ordered by the court. Thus, unless necessary to protect an applicant's substantial rights, the district court is not required to order discovery. *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992).

Although the civil rules generally apply to proceedings on an application for post-conviction relief, the discovery provisions contained in those rules are not applicable unless specifically ordered by the court. *Aeschliman v. State*, 132 Idaho 397, 758 P.2d 749, 973 P.2d 749 (Ct. App. 1999).

Requiring the applicant to set forth specific areas wherein discovery is requested, and

why those areas were necessary, assured that the discretionary authority of this rule was properly utilized, and the district court did not abuse its discretion when it denied defendant's discovery motion. *Aeschliman v. State*, 132 Idaho 397, 758 P.2d 749, 973 P.2d 749 (Ct. App. 1999).

Discovery during post-conviction relief proceedings is a matter put to the sound discretion of the district court, and there is no requirement that the district court order discovery, unless discovery is necessary to protect an applicant's substantial rights. *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000).

Discovery in post-conviction proceedings is allowed only with authorization by the court pursuant to I. C. R. 57(b), is a matter left to the sound discretion of the district court, and unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery. *Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001).

#### **Dismissal of Application.**

##### **—Improper.**

Because the opportunity for an applicant to adequately and appropriately respond to a district court's notice of proposed dismissal is a substantial right, where that right was affected by a defective notice the error was not harmless, and the order summarily dismissing the application was vacated. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

##### **—Proper.**

Where the issues in defendant's application for post-conviction relief called for legal, rather than factual, determinations and would not have been affected by an evidentiary hearing or discovery, it was not error for the district court to summarily dismiss defendant's application after making the appropriate legal determinations. *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996).

#### **Evidence.**

Post-conviction relief proceedings are civil, rather than criminal, and an applicant has the burden of proving by a preponderance of the evidence the allegations which he contends entitle him to relief, and where there is competent and substantial evidence to support the lower court's decision following a post-conviction evidentiary hearing, that decision will not be disturbed on appeal. *Heck v. State*, 103 Idaho 648, 651 P.2d 582 (Ct. App. 1982).

The petitioner had the burden of proving, by a preponderance of the evidence, the allegations which he contended entitled him to



relief under the Post-Conviction Procedure Act. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988).

In a post-conviction proceeding brought under I.C. § 19-4901, the burden is on the applicant to establish his grounds for relief by a preponderance of the evidence. *Odom v. State*, 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992).

Post-conviction proceedings are special proceedings, civil in nature, and to prevail, the petitioner must prove by a preponderance of the evidence the allegations on which application for relief is made. *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000).

#### —Insufficient.

Where defendant was convicted of battery with intent to commit a serious felony under § 18-911 and argued that he did not receive effective assistance of counsel at his criminal trial, under subsection (c) of this rule, defendant bore the burden of proving, by a preponderance of the evidence, the allegations on which his claims were based and failed to prove that his counsel's conduct during voir dire examination, counsel's failure to object to the court's questioning of a witness, and counsel's allowance of evidence that the defendant committed a prior felony, represented deficient performance by counsel which prejudiced defendant's case. *Milton v. State*, 126 Idaho 638, 888 P.2d 812 (Ct. App. 1995).

#### Finding of Fact.

The Idaho Supreme Court will not set aside a district court's finding of fact unless it is clearly erroneous, i.e., unless it is not supported by substantial competent evidence. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

#### Inquiry into Verdict.

Under I.C.R. 57(b), defendant's postconviction motion for juror contact was properly denied because defendant failed to demonstrate good cause to believe that those contacts would lead to admissible evidence of

juror misconduct. *Hall v. State*, 151 Idaho 42, 253 P.3d 716 (2011).

#### Procedure.

An application for post-conviction relief is in the nature of a civil proceeding, entirely distinct from the underlying criminal action, and the Idaho Rules of Civil Procedure generally apply. *Ferrier v. State*, 135 Idaho 797, 25 P.3d 110 (2001).

The district court has jurisdiction over all post-conviction claims, regardless if the petitioner has been sentenced to death. *Dunlap v. State*, 146 Idaho 197, 192 P.3d 1021 (2008).

#### Timely Filing.

Although the notice of appeal from the district court's order dismissing the defendant's petition as untimely was filed beyond the 42 day time limit within which to file an appeal from a final order, the time for filing the appeal was extended by the timely filing of defendant's motion to reconsider the dismissal within 14 days of the order to be reconsidered. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992).

#### Transcripts.

This state's statutory scheme for post-conviction relief does not mandate production of transcripts prior to an application being filed. *State v. McRoberts*, 114 Idaho 459, 757 P.2d 722 (Ct. App. 1988).

#### —Sentencing Hearing.

Although a defendant could not obtain a transcript of her sentencing hearing, at public expense, in anticipation of filing for post-conviction relief, she was at liberty to file an application for such relief and would be able to obtain a transcript then if one was needed. *State v. McRoberts*, 114 Idaho 459, 757 P.2d 722 (Ct. App. 1988).

**Cited in:** *State v. Vetsch*, 101 Idaho 595, 618 P.2d 773 (1980); *Phillips v. State*, 108 Idaho 405, 700 P.2d 27 (1985); *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987); *Tolman v. State*, 128 Idaho 643, 917 P.2d 800 (Ct. App. 1996); *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

#### Post-Conviction Relief.

Title of application by convict for post-conviction relief was improper where it referred

to applicant as "movant" and included his prison number. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).

**Rule 58. [Reserved.]**

**Rule 59. Effective date.**

These rules shall take effect on the 1st day of July, 1980, and shall apply to all criminal actions thereafter filed. The trial courts shall apply these rules to actions pending on the effective date unless it finds that such application would prejudice the rights of any party. (Adopted December 27, 1979, effective July 1, 1980.)

**JUDICIAL DECISIONS**

**Cited in:** State v. Gissel, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

DECISIONS UNDER PRIOR RULE OR STATUTE

**Application of Rules.**

Since defendant in a murder prosecution had no unqualified right to have the former rules of procedure applied to his case before the rules went into effect, the trial court's determination that dismissing the informa-

tion, which was not filed until 97 days after the execution of the order committing defendant, would work an undue hardship on the prosecution would not be disturbed. State v. Powers, 96 Idaho 833, 537 P.2d 1369 (1975).

**Appendix A**  
**Guilty Plea Advisory**

Defendant's Name: _____	
Date: _____	Case Number: _____
Nature of Charges: _____	Minimum & Maximum Possible Penalty: _____
_____	_____
_____	_____

**STATEMENT OF RIGHTS & EXPLANATION OF WAIVERS  
BY PLEA OF GUILTY**

**(PLEASE INITIAL EACH RESPONSE)**

1. You have the right to remain silent. You do not have to say anything about the crime(s) you are accused of committing. If you elected to have a trial, the state could not call you as a witness or ask you any questions. However, anything you do say can be used as evidence against you in court.

I understand that by pleading guilty I am waiving my right to remain silent before and during trial. \_\_\_\_\_
2. The waiver of your right to remain silent only applies to your plea of guilty to the crime(s) in this case. Even after pleading guilty, you will still

have the right to refuse to answer any question or to provide any information that might tend to show you committed some other crime(s). You can also refuse to answer or provide any information that might tend to increase the punishment for the crime(s) to which you are pleading guilty.

I understand that by pleading guilty to the crime(s) in this case, I still have the right to remain silent with respect to any other crime(s) and with respect to answering questions or providing information that may increase my sentence. \_\_\_\_\_

3. You have the right to be represented by an attorney. If you want an attorney and cannot pay for one, you can ask the judge for an attorney who will be paid by the county.

4. You are presumed to be innocent. You would be found guilty if: 1) you plead guilty in front of the judge, or 2) you are found guilty at a jury trial.

I understand that by pleading guilty I am waiving my right to be presumed innocent.  
\_\_\_\_\_

5. You have the right to a speedy and public jury trial. A jury trial is a court hearing to determine whether you are guilty or not guilty of the charge(s) brought against you. In a jury trial, you have the right to present evidence in your defense and to testify in your own defense. The state must convince each and every one of the jurors of your guilt beyond a reasonable doubt.

I understand that by pleading guilty I am waiving my right to a speedy and public jury trial.  
\_\_\_\_\_

6. You have the right to confront the witnesses against you. This occurs during a jury trial where the state must prove its case by calling witnesses to testify under oath in front of you, the jury, and your attorney. Your attorney could then cross-examine (question) each witness. You could also call your own witnesses of your choosing to testify concerning your guilt or innocence. If you do not have the funds to bring those witnesses to court, the state will pay the cost of bringing your witnesses to court.

I understand that by pleading guilty I am waiving my right to confront the witnesses against me, and present witnesses and evidence in my defense.  
\_\_\_\_\_



QUESTIONS REGARDING PLEA

(Please answer every question. If you do not understand a question consult your attorney before answering.)

PLEASE CIRCLE ONE

1. Do you read and write the English language?	YES	NO
If not, have you been provided with an interpreter to help you fill out this form?	YES	NO
2. What is your age? _____		
3. What is your true legal name? _____		
4. What is the highest grade you completed? _____		
If you did not complete high school, have you received either a general education diploma or high school equivalency diploma?	YES	NO
5. Are you currently under the care of a mental health professional?	YES	NO
6. Have you ever been diagnosed with a mental health disorder?	YES	NO
If so, what was the diagnosis and when was it made? _____		
7. Are you currently prescribed any medication?	YES	NO
If so, have you taken your prescription medication during the past 24 hours?	YES	NO
8. In the last 24 hours, have you taken any medications or drugs, or drank any alcoholic beverages which you believe affect your ability to make a reasoned and informed decision in this case?	YES	NO
9. Is there any other reason that you would be unable to make a reasoned and informed decision in this case?	YES	NO
10. Is your guilty plea the result of a plea agreement?	YES	NO
If so, what are the terms of that plea agreement? (If available, a written plea agreement should be attached hereto as "Addendum 'A'") _____ _____ _____ _____		

11. There are two types of plea agreements.

Please initial the one paragraph below which describes the type of plea you are entering:

a. I understand that my plea agreement is a binding plea agreement. This means that if the district court does not impose the specific sentence as recommended by both parties, I will be allowed to withdraw my plea of guilty and proceed to a jury trial. \_\_\_\_\_

b. I understand that my plea agreement is a non-binding plea agreement. This means that the court is not bound by the agreement or any sentencing recommendations, and may impose any sentence authorized by law, including the maximum sentence stated above. Because the court is not bound by the agreement, if the district court chooses not to follow the agreement, I will not have the right to withdraw my guilty plea. \_\_\_\_\_

12. As a term of your plea agreement, are you pleading guilty to more than one crime?

YES

NO

If so, do you understand that your sentences for each crime could be ordered to be served either concurrently (at the same time) or consecutively (one after the other)?

YES

NO

13. Is this a conditional guilty plea in which you are reserving your right to appeal any pre-trial issues?

YES

NO

If so, what issue are you reserving the right to appeal?

\_\_\_\_\_

14. Have you waived your right to appeal your judgment of conviction and sentence as part of your plea agreement?

YES

NO

15. Have any other promises been made to you which have influenced your decision to plead guilty?

YES

NO

If so, what are those promises?

\_\_\_\_\_

16. Do you feel you have had sufficient time to discuss your case with your attorney?

YES

NO

17. Have you told your attorney everything you know about the crime?	YES	NO
--	-----	----

18. Is there anything you have requested your attorney to do that has not been done?	YES	NO
--	-----	----

If yes, please explain.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

19. Your attorney can get various items from the prosecutor relating to your case. This may include police reports, witness statements, tape recordings, photographs, reports of scientific testing, etc. This is called discovery. Have you reviewed the evidence provided to your attorney during discovery?	YES	NO
--	-----	----

20. Have you told your attorney about any witnesses who would show your innocence?	YES	NO
--	-----	----

21. Do you understand that by pleading guilty you will waive any defenses, both factual and legal, that you believe you may have in this case?	YES	NO
--	-----	----

22. Are there any motions or other requests for relief that you believe should still be filed in this case?	YES	NO
---	-----	----

If so, what motions or requests? \_\_\_\_\_

\_\_\_\_\_

23. Do you understand that if you enter an unconditional guilty plea in this case you will not be able to challenge any rulings that came before the guilty plea including: 1) any searches or seizures that occurred in your case, 2) any issues concerning the method or manner of your arrest, and 3) any issues about any statements you may have made to law enforcement?	YES	NO
--	-----	----

24. Do you understand that when you plead guilty, you are admitting the truth of each and every allegation contained in the charge(s) to which you plead guilty?	YES	NO
--	-----	----



25. Are you currently on probation or parole?

YES

NO

If so, do you understand that a plea of guilty in this case could be the basis of a violation of that probation or parole?

YES

NO

26. Are you aware that if you are not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal status in the United States, or denial of an application for United States citizenship?

YES

NO

27. Do you know whether the crime to which you will plead guilty would require you to register as a sex offender? (I.C. § 18-8304)

YES

NO

28. Are you aware that if you plead guilty you may be required to pay restitution to the victims in this case? (I.C. §19-5304)

YES

NO

29. Have you agreed to pay restitution to any other party as a condition of your plea agreement?

YES

NO

If so, to whom?

---

30. Is there a mandatory driver's license suspension as a result of a guilty plea in this case?

YES

NO

If so, for how long must your license be suspended?

---

31. Are you pleading guilty to a crime for which a mandatory domestic violence, substance abuse, or psychosexual evaluation is required? (I.C. §§ 18-918(7)(a),-8005(9),-8317)

YES

NO

32. Are you pleading guilty to a crime for which you may be required to pay the costs of prosecution and investigation? (I.C. § 37-2732A(K))

YES

NO

33. Are you pleading guilty to a crime for which you will be required to submit a DNA sample to the state? (I.C. § 19-5506)

YES

NO

Appx. A	IDAHO CRIMINAL RULES	Appx. A
34. Are you pleading guilty to a crime for which the court could impose a fine for a crime of violence of up to \$5,000, payable to the victim of the crime? (I.C. § 19-5307)	YES	NO
35. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to vote in Idaho? (ID. CONST. art. 6, § 3)	YES	NO
36. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to hold public office in Idaho? (ID. CONST. art. 6, § 3)	YES	NO
37. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to perform jury service in Idaho? (ID. CONST. art. 6, § 3)	YES	NO
38. Do you understand that if you plead guilty to a felony you will lose your right to purchase, possess, or carry firearms? (I.C. § 18-310)	YES	NO
39. Do you understand that no one, including your attorney, can force you to plead guilty in this case?	YES	NO
40. Are you entering your plea freely and voluntarily?	YES	NO
41. Are you pleading guilty because you did commit the acts alleged in the information or indictment?	YES	NO
42. If you were provided with an interpreter to help you fill out this form, have you had any trouble understanding your interpreter?	YES	NO
43. Have you had any trouble answering any of the questions in this form which you could not resolve by discussing the issue with your attorney?	YES	NO

I have answered the questions on pages 1-7 of this Guilty Plea Advisory form truthfully, understand all of the questions and answers herein, have discussed each question and answer with my attorney, and have completed this form freely and voluntarily. Furthermore, no one has threatened me to do so.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
DEFENDANT

I hereby acknowledge that I have discussed, in detail, the foregoing questions and answers with my client.

\_\_\_\_\_  
DEFENDANT'S ATTORNEY

(Adopted March 28, 2007, effective July 1, 2007.)

**APPENDIX B. FORMS PERTAINING TO BAIL BONDS.**

IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF \_\_\_\_\_

STATE OF IDAHO,	)	Case No.: _____
	)	Bond No.: _____
Plaintiff,	)	Bond Amount: \$_____
vs.	)	
_____	)	CERTIFICATE OF SURRENDER
Defendant.	)	
	)	

**Pre-Forfeiture of Bail:**

☐ For the purpose of surrender of the defendant pursuant to I.C. 19-2913(1), the undersigned certifies that he/she surrendered the defendant to the county sheriff where the action is pending, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the hour of \_\_\_\_\_

**Post-Forfeiture of Bail:**

☐ For the purpose of surrender of defendant after forfeiture of bail, the undersigned certifies that he/she surrendered the defendant to the \_\_\_\_\_ County Sheriff on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the hour of \_\_\_\_\_.

\_\_\_\_\_  
AUTHORIZED REPRESENTATIVE/  
PERSON POSTING BAIL

\_\_\_\_\_  
AUTHORIZED REPRESENTATIVE  
PERSON POSTING BAIL PRINTED NAME



\_\_\_\_\_  
DATE

**VERIFICATION OF OFFICER**

☐ As evidence of surrender by the Bail Agent/Authorized Representative, the undersigned officer of the \_\_\_\_\_ County Sheriff's Department has incarcerated the defendant this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the hour of \_\_\_\_\_.

☐ As evidence of the self-surrender by the Defendant pursuant to I.C. 19-2913(4), the undersigned officer of the \_\_\_\_\_ County Sheriff's Department has incarcerated the defendant in lieu of the bail originally set by the court.

\_\_\_\_\_  
Deputy Sheriff

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Date

IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF \_\_\_\_\_

STATE OF IDAHO,	)	Case No.: _____
	)	
Plaintiff,	)	AFFIDAVIT OF APPOINTMENT
vs.	)	TO ARREST
	)	
_____,	)	
Defendant.	)	
	)	

I, \_\_\_\_\_, being duly sworn, depose and state as follows:

1. I am a [licensed bail agent in the State of Idaho authorized by (name of surety insurance company) to execute or undersign undertakings of bail in connection with judicial criminal proceedings, which company has posted the bail bond in the above-entitled case] [the person who has posted bail in the above-entitled case].

2. I hereby extend my authority and empower \_\_\_\_\_, a person of suitable age and discretion, to arrest \_\_\_\_\_, the defendant in

the above-entitled case, at any place in the State of Idaho under the provisions of the Idaho Bail Act. Idaho Code 5 19-2901 *et seq.*

3. This authority to arrest the defendant shall continue until the bail bond posted in this case has been exonerated or until such authority is revoked.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

STATE OF IDAHO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this day of \_\_\_\_\_, 20\_\_\_\_\_, before me a Notary Public for the State of Idaho, personally appeared \_\_\_\_\_, known to me and/or identified to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_  
Commission Expires \_\_\_\_\_

IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF \_\_\_\_\_

STATE OF IDAHO, )  
 )  
Plaintiff, ) Case No. \_\_\_\_\_  
v. )  
 )  
\_\_\_\_\_, ) PROMISSORY NOTE  
Defendant. )

[I] [We] promise to pay \_\_\_\_\_ County the sum of \$ \_\_\_\_\_, which is the amount that the court has set as bail as in the above-entitled case. in the event that the defendant \_\_\_\_\_ fails to appear in court as ordered at all hearings and proceedings until the case is resolved. Such payment shall be made in the event that the court orders forfeiture of the bail following the defendant's failure to appear, as provided in the Idaho Bail Act, Idaho Code § 19-2901 *et seq.*, and within the time prescribed in Idaho Code § 19-2918. This promise is secured by the property bond that has been filed in the above-entitled case. Should such property be sold to

satisfy payment of the bail, [I] [we] further promise to pay all attorney fees and costs arising from the sale of the property.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_

STATE OF IDAHO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, before me a Notary Public for the State of Idaho, personally appeared \_\_\_\_\_, known to me and/or identified to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_  
Commission Expires \_\_\_\_\_

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- \_\_\_\_\_ Mailed
- \_\_\_\_\_ Hand-Delivered
- \_\_\_\_\_ Faxed to ( \_\_\_\_\_ )
- \_\_\_\_\_ Mailed and Faxed

\_\_\_\_\_



IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF \_\_\_\_\_

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. _____
v.	)	
_____	)	PROPERTY BOND -
Defendant.	)	REAL PROPERTY

[I] [We], \_\_\_\_\_, being duly sworn upon oath, depose and state as follows:

1. [I] [We] reside at \_\_\_\_\_.

2. [I am] [We are] the owner[s] of property located at the following address: \_\_\_\_\_, and described as follows:

3. There are no other owners of the above-described property.

4. [I] [We] acknowledge that the above-named defendant is charged in this case with the following offenses: \_\_\_\_\_.

5. [I] [We] acknowledge that bail has been set by the court in this case at \$ \_\_\_\_\_.

6. By this property bond, [I] [we] guarantee that the defendant will appear in court as ordered at all hearings and proceedings where the defendant's presence is required until the case is resolved.

7. [I] [We] have executed a promissory note pledging to pay to \_\_\_\_\_ County the full amount of the bail if the defendant fails to appear as required by the court. Such payment shall be made as provided in the Idaho Bail Act. Idaho Code § 19-2901 *et seq.* and within the time established by Idaho Code § 19-29 18.

8. [I] [We] pledge, under the provisions of Idaho Code § 19-2909, the above-described property as security for the guarantee that the defendant will appear in court as ordered in this case. [I] [We] agree and understand that in the event that the court orders forfeiture of the bail following the defendant's failure to appear in court as ordered, and if [I] [we] should fail to make remittance of the forfeiture as provided in Idaho Code § 19-2918, the above described property may be sold to satisfy payment of the bail. In such event, [I] [we] shall also be required to pay all attorney fees and costs arising from the sale of the property.

9. The tax-assessed value of the above-described property is \$ \_\_\_\_\_. The following documentation establishing such value is attached:

10. The above-described property is subject to the following liens and encumbrances: \_\_\_\_\_. The following documentation reflecting

such liens and encumbrances is attached: \_\_\_\_\_. There are no other liens or encumbrances on the property.

11. [I] [We] agree that [I] [we] shall not sell, lease, or encumber the property in any way without first informing the court. [I] [We] further agree that should [I] [we] become aware of any liens or encumbrances on the property in addition to those listed above [I] [we] shall immediately inform the court.

12. [I] [We] understand and agree that this property bond shall be recorded in the county in which the above-described property is located, that [I] [we] shall pay all recording fees and costs, and that this bond when so recorded shall constitute a lien on the above-described real property.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

STATE OF IDAHO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this day of \_\_\_\_\_, 20\_\_\_\_\_, before me a Notary Public for the State of Idaho, personally appeared \_\_\_\_\_, known to me and/or identified to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_  
Commission Expires \_\_\_\_\_

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ Mailed  
 \_\_\_\_\_ Hand-Delivered  
 \_\_\_\_\_ Faxed to (            )  
 \_\_\_\_\_ Mailed and Faxed

IN THE DISTRICT COURT OF THE \_\_\_\_\_  
JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF

STATE OF IDAHO,

Plaintiff,

v.

\_\_\_\_\_,

Defendant.

) Case No. \_\_\_\_\_

)

) **PROPERTY BOND - PERSONAL**

) **PROPERTY**

)

)

)

[I] [We], \_\_\_\_\_, being duly sworn upon oath, depose and state as follows:

1. [I] [We] reside at \_\_\_\_\_.
2. [I am] [We are] the owner[s] of property described as follows:

3. There are no other owners of the above-described property.

4. [I] [We] acknowledge that the above-named defendant is charged in this case with the following offenses: \_\_\_\_\_.

5. [I] [We] acknowledge that bail has been set by the court in this case at \$\_\_\_\_\_.

6. By this property bond, [I] [we] guarantee that the defendant will appear in court as ordered at all hearings and proceedings where the defendant's presence is required until the case is resolved.

7. [I] [We] have executed a promissory note pledging to pay to \_\_\_\_\_ County the full amount of the bail if the defendant fails to appear as required by the court. Such payment shall be made as provided in the Idaho Bail Act. Idaho Code § 19-2901 *et seq.* and within the time established by Idaho Code § 19-2918.

8. [I] [We] pledge, under the provisions of Idaho Code § 19-2909, the above-described property as security for the guarantee that the defendant will appear in court as ordered in this case. [I] [We] agree and understand that in the event that the court orders forfeiture of the bail following the defendant's failure to appear in court as ordered, and if [I] [we] should fail to make remittance of the forfeiture as provided in Idaho Code § 19-2918, the above described property may be sold to satisfy payment of the bail. In



such event, [I] [we] shall also be required to pay all attorney fees and costs arising from the sale of the property.

9. The value of the above-described property is \$ \_\_\_\_\_. The following documentation establishing such value is attached:

\_\_\_\_\_  
10. The above-described property is subject to the following liens and encumbrances: \_\_\_\_\_. The following documentation reflecting such liens and encumbrances is attached: \_\_\_\_\_. There are no other liens or encumbrances on the property.

11. [I] [We] agree that [I] [we] shall not sell, lease, or encumber the property in any way without first informing the court. [I] [We] further agree that should [I] [we] become aware of any liens or encumbrances on the property in addition to those listed above [I] [we] shall immediately inform the court.

12. [I] [We] understand and agree that this property bond shall be recorded with the Office of the Secretary of State pursuant to Idaho Code § 28-9-501, that [I] [we] shall pay all recording fees and costs, and that this bond when so recorded shall constitute a lien on the above-described real property.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

STATE OF IDAHO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this day of \_\_\_\_\_, 20\_\_\_\_\_, before me a Notary Public for the State of Idaho, personally appeared \_\_\_\_\_, known to me and/or identified to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_  
Commission Expires \_\_\_\_\_

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ Mailed  
\_\_\_\_\_ Hand-Delivered  
\_\_\_\_\_ Faxed to (            )  
\_\_\_\_\_ Mailed and Faxed

\_\_\_\_\_

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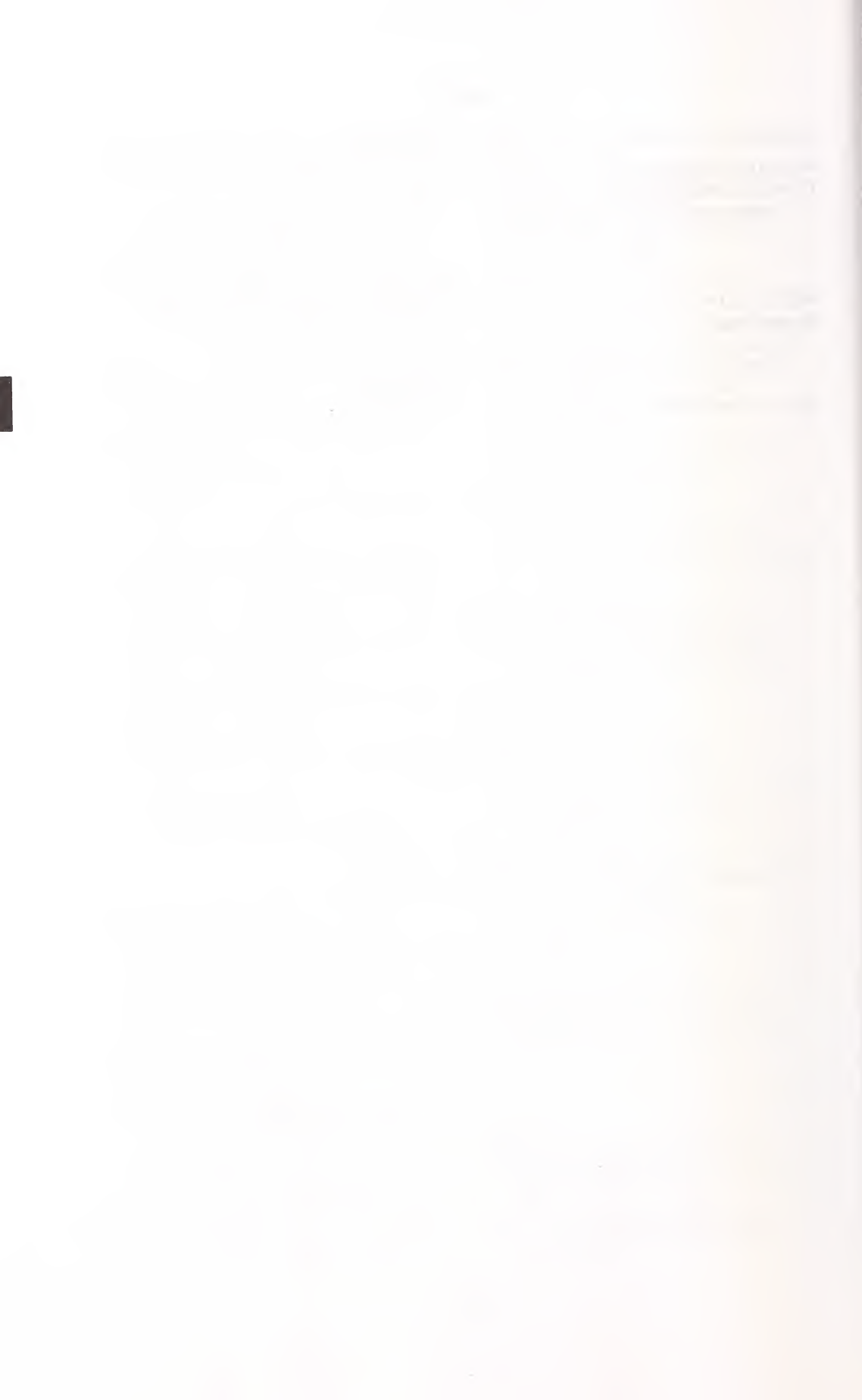
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# MISDEMEANOR CRIMINAL RULES

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16. Reporting of proceedings.
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## Rule 1. Application and designation of rules.

These rules shall govern the procedure in the magistrates division of the district courts of the state of Idaho in all misdemeanor criminal proceedings which are triable by the magistrates division whether brought before the court by an Idaho Uniform Citation or a sworn complaint. Provided, the general Idaho Criminal Rules shall apply to the processing of misdemeanor complaints and citations to the extent they are not in conflict with these specific rules regarding the processing of misdemeanor charges. These rules shall be denominated as the Misdemeanor Criminal Rules, (M.C.R.). (Adopted December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982; amended April 18, 1983, effective July 1, 1983; amended April 3, 1984, effective March 1, 1984; amended June 15, 1987, effective November 1, 1987.)

## JUDICIAL DECISIONS

### Discovery Rule.

The discovery rule in criminal cases applies

to infraction prosecutions. *State v. Phillips*, 117 Idaho 23, 784 P.2d 353 (Ct. App. 1989).

## Rule 2. Definitions.

As used in these rules, unless the context clearly requires otherwise:

(a) **“Citable offense”** shall mean any misdemeanor triable by a magistrate under the law, and rules of the Idaho Supreme Court.

(b) **“Uniform citation”** or **“citation”** means the Idaho Uniform Citation in the form prescribed by these rules used to bring a citable offense before



a court. The uniform citation shall be and constitute a summons and complaint against the person charged.

(c) **“Bail”** means money or its equivalent, a property bail bond executed by sureties as provided by law, or a surety bond issued by a surety or fidelity company authorized to issue bail bonds under the law of the state of Idaho, deposited with the court, court clerk, or other public officer by a defendant to secure the defendant’s appearance on a uniform citation or a sworn misdemeanor complaint.

(d) **“Clerk”** or **“clerk of the court”** means a deputy district court clerk or any person appointed under Rule 12.

(e) **“Court”** means any tribunal with jurisdiction to hear and determine uniform citations or sworn misdemeanor complaints and the magistrate or judge thereof.

(f) **“Magistrate”** or **“judge”** includes any officer authorized by law to sit as a court with jurisdiction to hear and determine citable offenses as defined by these rules.

(g) **“Police officer”** or **“peace officer”** includes a member of the Idaho State Police, a sheriff or deputy sheriff, a city policeman or marshal, a constable or any other officer duly authorized to enforce municipal, county, or state laws. (Adopted December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983.)

## JUDICIAL DECISIONS

### Police Officer.

Absent a definition of “law enforcement officer” in Idaho Code Title 19, the definition contained in paragraph (g) of this Rule applies because it defines the term “peace officer” which is used in M.C.R. 5(a). Misdemeanor Criminal Rule 5 governs the use of citations. The definition of “peace officer” in paragraph (g) of this Rule includes officials “authorized to enforce municipal, county, or state laws.” State v. Gage, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993).

### Rule 2.1 Social Security Numbers.

If an individual’s social security number is included in a document filed with the court, only the last four digits of that number should be used. (Adopted December 30, 2008, effective February 1, 2009.)

## Rule 3. Citable offenses — Methods of initiating prosecution — Trial — Consolidation.

(a) **Charging a citable offense.** A person may be charged and brought before a court for any citable offense upon the filing of an Idaho Uniform Citation as provided by these rules.

(b) **Use of citation.** The complaint in a uniform citation may be used as the complaint to prosecute a misdemeanor, whether or not there is an arrest without a warrant, an arrest pursuant to a warrant issued on a uniform citation, or a complaint and summons to appear by a uniform citation.

(c) **Determination of probable cause.** In the event a defendant is arrested without a warrant, or appears pursuant to a summons, or in the event application is made for the issuance of a warrant pursuant to a

uniform citation or sworn complaint, the determination of whether there is probable cause that an offense has been committed and probable cause that the defendant committed it shall be made at the time and in the manner prescribed by Rules 4 and 5 of the Idaho Criminal Rules.

(d) **Trial of uniform citation, demand for sworn complaint, amendments.** In the event of a plea of not guilty to a uniform citation, a trial may be held on the complaint contained in the citation without making a sworn complaint, unless a sworn complaint is demanded by any party within 28 days after the entry of a plea of not guilty or 7 days before trial, whichever is earlier. The court may amend or permit to be amended any process or pleading at any time before the prosecution rests including the alleging of a lesser included offense, but no greater or different offense may be charged if substantial rights of the defendant are prejudiced. If an amendment of a citation complaint is made, the court may, in its discretion, grant a continuance of the trial for good cause.

(e) **Offenses charged in each citation, consolidation of trials.** Only one person may be charged by a complaint of a single citation, but more than one misdemeanor may be charged in one citation. A misdemeanor may not be charged with an infraction in a citation. Provided, if the offenses charged by separate citation complaints or other complaints are of the same or similar character or are based on the same act or transaction or connected series of transactions, or are based on two or more acts or transactions connected together or constituting part of a common scheme or plan, the separate complaints may be consolidated by the court upon motion of any party or upon the court's own initiative. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1991, effective July 1, 1991; amended March 18, 1998, effective July 1, 1998; amended April 22, 2008, effective July 1, 2008.)

JUDICIAL DECISIONS

ANALYSIS

Probable Cause Hearings.  
Subsequent Felony Charge.

**Probable Cause Hearings.**

A magistrate erred when he conducted a second probable cause hearing and then dismissed the charges against the defendant, since a misdemeanor defendant is not permitted a second contested probable cause hearing after an initial finding of probable cause has already been made by a magistrate. *State v. Hogan*, 132 Idaho 412, 973 P.2d 764 (Ct. App. 1999).

**Subsequent Felony Charge.**

Since misdemeanors do not involve the filing of an indictment or information but are prosecuted based upon a complaint or citation, subsection 1 of § 19-3501 was not applicable to defendant's arrest until April, 1995 when he was charged with a felony, and thus information filed on July 14, 1995 was filed within the six months required by subsection 1 of § 19-3501. *State v. Kelchner*, 130 Idaho 37, 936 P.2d 680 (1997).

**Cited in:** *State v. Cheney*, 116 Idaho 917, 782 P.2d 40 (Ct. App. 1989); *State v. Halford*, 124 Idaho 411, 860 P.2d 27 (Ct. App. 1993).

**Rule 3.1. Stipulations not binding on court — Continuance of trial or hearing.**

The parties to any action may present to the court a stipulation as to any procedural matter involved in any proceeding, including a stipulation to

vacate or continue a hearing or trial, but such stipulation shall be considered as a joint motion by the parties to the court for its consideration, and shall not be binding upon the court. The court may approve or disapprove the stipulation in the same manner as the court rules upon a motion. The court may by oral or written notice to the parties limit the time within which a motion or stipulation to vacate or continue a hearing or trial must be made in order to be considered by the court. (Adopted April 3, 1984, effective March 1, 1984.)

**Rule 4. Jurisdiction — Venue — Distribution of fines.**

(a) **Jurisdiction.** Every magistrate in the state of Idaho is hereby assigned and granted the authority and jurisdiction to hear, process and determine, pursuant to judicial district rule of assignment, any citable offense alleged to have occurred within the state of Idaho, subject to the provisions of this rule.

(b) **Primary jurisdiction and venue.** All citable offenses shall be heard, processed and determined by a magistrate or judge in the county in which such violation is alleged to have occurred, except that citable offenses may be heard, processed and determined by the magistrates division of the district court of the county to which such alleged violation is assigned or transferred under this rule.

(c) **Transfer of misdemeanor citation or complaint to convenient county.**

(1) Transfer of citation by issuing officer. At the time of issuance of a citation or complaint, the person charged and the officer issuing the citation or complaint may mutually agree that the citation or complaint may be processed by a court in a more convenient county than the county in which the alleged violation occurred. In case of such agreement, the officer shall indicate upon the face of the citation or complaint the county and court before which the person charged must appear at a time certain, which date shall be not less than seven (7) nor more than twenty-one (21) days after the date of issuance of the citation or complaint. The signatures of the officer and the party charged upon the citation or complaint shall be deemed consent to such transfer of the citation or complaint. At the time of the issuance of a citation or complaint, the officer shall discuss with the party charged as to which county would be most convenient for processing the citation or complaint. It is the intent of these rules to allow transfers except in extraordinary circumstances.

(2) Transfer of citation or complaint by stipulation. At any time prior to the entry of a guilty plea, the parties may file a written stipulation to transfer the citation or complaint to a more convenient county. The stipulation must state the appearance date for the defendant in the more convenient county, which must be not less than fourteen (14) days after execution of the stipulation.

(d) **Transmittal of original citation or complaint.** In the event the processing of a citation or complaint is transferred to a more convenient



county by agreement or stipulation, the issuing officer or clerk of the transmitting court shall have the responsibility of delivering the citation or complaint with the stipulation to the court to which the transfer is made so as to be received no later than the date upon which the party charged is to appear before such court. In the event the party charged appears before such court at the time agreed upon and set forth on the citation or complaint or in the stipulation, and the citation or complaint has not been delivered to the court, no action shall be taken upon the citation or complaint; but if the citation or complaint is later filed in any court, it may be dismissed by the court without requiring another appearance of the party charged.

(e) **Appearance by person charged.** In the event a citation or complaint is transferred to a court other than in the county of violation, as authorized by this rule, upon appearance before the court the defendant may post bond, enter a plea of not guilty or enter a plea of guilty, all in accordance with the procedure of such court. The court shall thereupon process such citation or complaint in the same manner as citations or complaints for violations occurring within that county; except that if the defendant enters a plea of not guilty, the court shall indicate the plea of not guilty on the face of the citation or complaint, determine the amount of bail bond, if any, required of the person charged, and endorse on the citation or complaint the amount of the bond, and a time and place certain for the defendant to appear before a court in the county in which the violation is alleged to have occurred. The court accepting the plea of not guilty shall thereupon forward all copies of the citation or complaint, together with any bond money collected from the person charged, to the court in the county wherein the violation occurred. Thereafter, all further proceedings and jurisdiction for the proceeding and determination of the citation or complaint shall be in the court of the county wherein the violation is alleged to have occurred.

(f) **Failure to appear.** If a citation or complaint has been transferred under the provisions of this rule and thereafter the party charged fails to appear before such court at the time and place specified in the endorsement on the citation or complaint or in the stipulation, then and in such event the court to which such transfer was made shall have the primary authority and jurisdiction to issue a citation or complaint for failure to appear, or a bench warrant if the defendant has previously appeared, as may be necessary to bring the party charged before such court for any entry of plea to the citation or complaint.

(g) **Distribution of fines, costs and forfeitures.** The fines, forfeitures and costs imposed by the court to which a citation or complaint was transferred shall be remitted to the auditor of such county in which such judgment was rendered or the forfeiture was made, and shall be distributed by said auditor as follows: All costs are to be retained by the county in which the judgment was rendered or the forfeiture was made, to be apportioned as provided by law. All fines and forfeitures shall be remitted to the auditor of the county in which the violation occurred to be apportioned as provided in

section 19-4705, Idaho Code. When that portion of the fines and forfeitures is remitted to the county auditor of the county in which the violation occurred, it shall be accompanied by copies of the citation or complaint and judgment of conviction or forfeiture. Provided, any fines, forfeitures or costs assessed by the court of the county to which the citation or complaint was transferred for failure of the party charged to appear before the court at the time agreed, shall not be transmitted to the county in which the violation occurred, but shall be processed by the county enforcing the failure to appear in the same manner as an original citation or complaint.

(h) **Jurisdiction upon re-transfer.** In the event a citation or complaint is re-transferred to the county wherein the alleged violation occurred by reason of a plea of not guilty by the party charged, then such citation or complaint is hereby assigned to the magistrates division of the district court of the county wherein the violation is alleged to have occurred. This rule shall not, however, prevent a change of venue pursuant to law or rule, nor shall it prohibit a change of venue by stipulation of all parties with the approval of all courts involved. (Adopted December 27, 1979, effective July 1, 1980; amended March 27, 1989, effective July 1, 1989.)

#### JUDICIAL DECISIONS

**Traffic Offenses.**

Magistrates in this state have subject-matter jurisdiction to act upon traffic offenses.

State v. Ritchie, 114 Idaho 528, 757 P.2d 1247 (Ct. App. 1988).

#### **Rule 5. Uniform citation — Issuance — Service — Form — Number — Distribution.**

(a) **Peace Officer Citation.** A peace officer may issue a uniform citation for a citable offense in which the officer shall certify that the officer has reasonable grounds to believe, and does believe, that the person cited committed the offense contrary to law. The citation shall require the defendant to appear in court on the citation at the time certain which shall not be less than five (5) nor more than twenty-one (21) days after the date of the citation; provided, the administrative district judge may order that in specific counties that the appearance date shall be on or after one day and on or before a second date, and the Idaho Uniform Citation form may be amended accordingly. If a defendant appears on a citation within the time stated in the citation and the citation has not been delivered to the court, the court may dismiss the citation.

(b) **Exception — Second Offense or Enhanced DUI.** Notwithstanding subsection (a), a defendant arrested or cited and subsequently released for "Driving Under the Influence (Second Offense)," Idaho Code § 18-8005(4), or "Driving Under the Influence (Enhanced Penalty)," Idaho Code § 18-8004C, shall personally appear before a magistrate, for arraignment, within forty-eight (48) hours following the arrest or citation excluding Saturdays, Sundays, and holidays. Provided, the court may postpone the arraignment if the defendant is hospitalized or otherwise in a condition which prevents

the defendant being taken before the magistrate. At the arraignment, the court may order any appropriate conditions of release, pursuant to Idaho Criminal Rule 46. Failure to conduct the arraignment within forty-eight (48) hours shall not constitute grounds for dismissal. A person arrested or cited who remains in custody shall make an initial appearance before a magistrate as provided in Idaho Criminal Rule 5.

(c) **Citizen Citation.** The uniform citation may be signed by any person in whose presence an alleged offense occurred and be witnessed by a peace officer whose name shall be endorsed on the citation.

(d) **Service of Citation.** Service of a citation may be made by the defendant signing a written promise to appear on the citation at the time indicated, but if the defendant fails or refuses to sign the written promise to appear, or an electronic citation is issued, a peace officer may serve the citation on the defendant by personal delivery to the defendant and indicate such service on the face of the citation.

(e) **Citation After Arrest.** The peace officer may arrest a defendant when permitted by law and thereafter sign the complaint in a uniform citation which shall constitute the complaint for prosecution of the criminal action.

(f) **Warrant of Arrest.** The peace officer may sign the complaint in a uniform citation and present it to a magistrate for the issuance of a warrant of arrest upon the showing of probable cause as provided in Rules 4 and 5 of the Idaho Criminal Rules. In determining probable cause for the issuance of a warrant, the magistrate shall give preference to the issuance of a summons, which can be the summons in the citation.

(g) **Form.** With the exception of electronically issued citations, all citations in the courts of Idaho shall be processed on the Idaho Uniform Citation which shall be of the size of 5 ½ inches wide by 8 ½ inches long which shall be printed in black, and shall have black NCR copies, with at least four copies which shall be in the following form:



(AGENCY)

No. \_\_\_\_\_

IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF \_\_\_\_\_

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

STATE OF IDAHO

### 1) COMPLAINT AND SUMMONS

1

) [ ] Infraction Citation

vs.

) OR

☐ Misdemeanor Citation

)

☐ Accident Involved

1

☐ Commercial Vehicle

) Driven by this Driver

)

IPUC #

USDOT TK Census #

☐ Operator ☐ Class A ☐ Class B ☐ Class C ☐ Class D ☐ Other

☐ GVWR 26001+ ☐ 16+ Persons ☐ Placard Hazardous Materials DR#

Home Address \_\_\_\_\_

Business Address	Ph#
------------------	-----

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named Defendant.

DL or SS # \_\_\_\_\_ State \_\_\_\_\_ Sex ☐ M ☐ F

Height \_\_\_\_\_ Wt. \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ DOB \_\_\_\_\_

Veh. Lic. # \_\_\_\_\_ State \_\_\_\_\_ Yr. of vehicle \_\_\_\_\_ Make \_\_\_\_\_

Model \_\_\_\_\_ Color \_\_\_\_\_

Did commit the following act(s) on \_\_\_\_\_ 20 \_\_\_\_\_ at \_\_\_\_\_ o'clock \_M.

Vio. #1 \_\_\_\_\_

Code Section

\_\_\_\_\_

Vio. #2 \_\_\_\_\_

Code Section

\_\_\_\_\_

Location \_\_\_\_\_

Hwy \_\_\_\_\_ Mp. \_\_\_\_\_ County, Idaho.

\_\_\_\_\_

Date	Officer/Party	Serial #/Address	Dept.
------	---------------	------------------	-------

\_\_\_\_\_

Date	Witnessing Officer	Serial #/Address	Dept.
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THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the District Court of \_\_\_\_\_ County, \_\_\_\_\_, Idaho, located at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_, at \_\_\_\_\_ o'clock \_M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

\_\_\_\_\_  
Defendant's Signature

I hereby certify service upon the defendant personally on \_\_\_\_\_ 20 \_\_\_\_

\_\_\_\_\_  
Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

IDAHO UNIFORM CITATION

COURT DOCKET No. \_\_\_\_\_

DATE

\_\_\_\_\_ ☐ Fixed fine paid by mail

\_\_\_\_\_ ☐ Defendant appeared - First appearance

\_\_\_\_\_ ☐ Entered plea of admission or guilty

\_\_\_\_\_ ☐ Infraction: Plea of admission

\_\_\_\_\_ ☐ Misdemeanor: 1 plead guilty to the offense: \_\_\_\_\_

(Defendant's signature)

\_\_\_\_\_ ☐ Paid fixed penalty or fine

\_\_\_\_\_ ☐ Sentenced by Court

\_\_\_\_\_ ☐ Advised of rights, entered plea of denial or not guilty

\_\_\_\_\_ ☐ Trial set for \_\_\_\_ ☐ Jury ☐ Jury Waived ☐ Jury N/A

\_\_\_\_\_ ☐ Bail set in amount \$ \_\_\_\_\_ (misdemeanor only)

\_\_\_\_\_ ☐ Continued until \_\_\_\_\_

\_\_\_\_\_ ☐ Warrant issued - Reason \_\_\_\_\_

\_\_\_\_\_ ☐ Default - failed to appear on infraction



\_\_\_\_\_ [ ] Other action: \_\_\_\_\_

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT

OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

THE STATE OF IDAHO, Plaintiff

)

) JUDGMENT (VIOLATION #1)

VS.

)

) Case No.

\_\_\_\_\_, Defendant. )

The defendant having been fully advised of his constitutional and statutory rights, including his rights to be represented by counsel, and the defendant having:

☐ Been advised of right to court appointed counsel if indigent

☐ Been represented by counsel

(Name)

☐ Waived counsel

☐ Entered a plea of admission or guilty

☐ Entered a plea of denial or not guilty, and has been

☐ Found to have committed the offense

☐ Found not to have committed the offense

[ ] Failed to appear on an infraction - default entered

NOW THEREFORE, Judgment is hereby entered:

[ ] Against the defendant

[ ] Defendant's driving privileges are suspended for \_\_\_\_\_ (days) \_\_\_\_\_ (months)

[ ] For the defendant

[ ] Withheld judgment (misdemeanor only)

for the charge of the offense of \_\_\_\_\_ in violation of section \_\_\_\_\_ and;

THE DEFENDANT IS HEREBY ORDERED, to pay the following fixed penalty or fine:

Penalty or fine \$ \_\_\_\_\_ Costs \$ \_\_\_\_\_ Jail \_\_\_\_\_

Suspended \_\_\_\_\_ Probation period \_\_\_\_\_

Conditions and supplemental orders \_\_\_\_\_

\_\_\_\_\_  
Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Judge or Clerk

STATE OF IDAHO )

COUNTY OF \_\_\_\_\_ )

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct copy of the original judgment of the court record on file in this office.

Dated: \_\_\_\_\_ Clerk or Deputy \_\_\_\_\_

[Back of 1st Copy]

(AGENCY) No. \_\_\_\_\_

IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT

OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

STATE OF IDAHO

) COMPLAINT AND SUMMONS

)

) [ ] Infraction Citation

vs. ) OR

) [ ] Misdemeanor Citation

)

) [ ] Accident Involved

\_\_\_\_\_ )

Last Name )

)

)

\_\_\_\_\_ )

First Name Middle Initial )

IPUC # \_\_\_\_\_ USDOT TK Census # \_\_\_\_\_

[ ] Operator [ ] Class A [ ] Class B [ ] Class C [ ] Class D

[ ] Other \_\_\_\_\_

[ ] GVWR 26001+ [ ] 16+ Persons [ ] Placard Hazardous Materials DR# \_\_\_\_\_

Home Address \_\_\_\_\_

Business Address \_\_\_\_\_ Ph# \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named Defendant.

DL or SS # \_\_\_\_\_ State \_\_\_\_\_ Sex [ ] M [ ] F

Height \_\_\_\_\_ Wt. \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ DOB \_\_\_\_\_

Veh. Lic. # \_\_\_\_\_ State \_\_\_\_\_ Yr. of vehicle \_\_\_\_\_ Make \_\_\_\_\_

Model \_\_\_\_\_ Color \_\_\_\_\_



Did commit the following act(s) on \_\_\_\_\_ 19 \_\_\_\_ at \_\_\_\_\_ o'clock \_ M.

Vio. #1 \_\_\_\_\_

Code Section

\_\_\_\_\_

Vio. #2 \_\_\_\_\_

Code Section

\_\_\_\_\_

Location \_\_\_\_\_

Hwy \_\_\_\_\_ Mp. \_\_\_\_\_ County, Idaho.

\_\_\_\_\_

Date	Officer/Party	Serial#/Address	Dept.
------	---------------	-----------------	-------

\_\_\_\_\_

Date	Witnessing Officer	Serial #/Address	Dept.
------	--------------------	------------------	-------

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the District Court of \_\_\_\_\_ County, \_\_\_\_\_, Idaho, located at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, at \_\_\_\_ o'clock \_ M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

\_\_\_\_\_

Defendant's Signature

I hereby certify service upon the defendant personally on \_\_\_\_\_ 20 \_\_\_\_

\_\_\_\_\_

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #2

IDAHO UNIFORM CITATION COURT DOCKET

No. \_\_\_\_\_

DATE

\_\_\_\_\_ [ ] Fixed fine paid by mail

\_\_\_\_\_ [ ] Defendant appeared - First appearance

\_\_\_\_\_ [ ] Entered plea of admission or guilty

\_\_\_\_\_ [ ] Infraction: Plea of admission

\_\_\_\_\_ [ ] Misdemeanor: 1 plead guilty to the offense: \_\_\_\_\_

(Defendant's signature)

\_\_\_\_\_ [ ] Paid fixed penalty or fine

\_\_\_\_\_ [ ] Sentenced by Court

\_\_\_\_\_ [ ] Advised of rights, entered plea of denial or not guilty

\_\_\_\_\_ [ ] Trial set for \_\_\_\_\_ [ ] Jury [ ] Jury Waived [ ] Jury N/A

\_\_\_\_\_ [ ] Bail set in amount \$ \_\_\_\_\_ (misdemeanor only)

\_\_\_\_\_ [ ] Continued until \_\_\_\_\_

\_\_\_\_\_ [ ] Warrant issued - Reason \_\_\_\_\_

\_\_\_\_\_ [ ] Default - failed to appear on infraction

\_\_\_\_\_ [ ] Other action: \_\_\_\_\_

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT  
OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

THE STATE OF IDAHO, Plaintiff )  
 )  
 ) JUDGMENT (VIOLATION #2)  
 )  
 vs. )  
 )  
 ) Case No.  
 )  
 \_\_\_\_\_, Defendant. )

The defendant having been fully advised of his constitutional and statutory rights, including his rights to be represented by counsel, and the defendant having:

[ ] Been advised of right to court appointed counsel if indigent

[ ] Been represented by counsel \_\_\_\_\_

(Name)

- ☐ Waived counsel
- ☐ Entered a plea of admission or guilty
- ☐ Entered a plea of denial or not guilty, and has been
- ☐ Found to have committed the offense
- ☐ Found not to have committed the offense
- ☐ Failed to appear on an infraction - default entered

NOW THEREFORE, Judgment is hereby entered:

☐ Against the defendant

☐ Defendant's driving privileges are suspended for \_\_\_\_\_ (days) (months)



[ ] For the defendant

[ ] Withheld judgment (misdemeanor only)

for the charge of the offense of \_\_\_\_\_ in violation of section \_\_\_\_\_ and;

THE DEFENDANT IS HEREBY ORDERED, to pay the following fixed penalty or fine:

Penalty or fine \$ \_\_\_\_\_ Costs \$ \_\_\_\_\_ Jail \_\_\_\_\_

Suspended \_\_\_\_\_ Probation period \_\_\_\_\_

Conditions and supplemental orders \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Judge or Clerk

STATE OF IDAHO )

COUNTY OF \_\_\_\_\_ )

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct copy of the original judgment of the court record on file in this office.

Dated: \_\_\_\_\_ Clerk or Deputy \_\_\_\_\_

[Back of 2nd Copy]

(AGENCY)

No. \_\_\_\_\_

## IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT

OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

STATE OF IDAHO

) COMPLAINT AND SUMMONS

)

) [ ] Infraction Citation

VS.

) OR

☐ Misdemeanor Citation

)

) ☐ Accident Involved

)

)

)

)

Last Name

First Name   Middle Initial

IPUC # \_\_\_\_\_

USDOT TK Census # \_\_\_\_\_

[ ] Operator [ ] Class A [ ] Class B [ ] Class C [ ] Class D

☐ Other \_\_\_\_\_

☐ GVWR 26001+ ☐ 16+ Persons ☐ Placard Hazardous Materials DR# \_\_\_\_\_

Home Address \_\_\_\_\_

Business Address \_\_\_\_\_ Ph# \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named Defendant.

DL or SS # \_\_\_\_\_ State \_\_\_\_\_ Sex ☐ M ☐ F

Height	Wt.	Hair	Eyes	DOB
--------	-----	------	------	-----

Veh. Lic. # \_\_\_\_\_ State \_\_\_\_\_ Yr. of vehicle \_\_\_\_\_ Make \_\_\_\_\_

Model \_\_\_\_\_ Color \_\_\_\_\_

Did commit the following act(s) on \_\_\_\_\_ 19 \_\_\_\_ at \_\_\_\_\_ o'clock \_ M.

Vio. #1 \_\_\_\_\_

Code Section

Vio. #2 \_\_\_\_\_

Code Section

Location \_\_\_\_\_

Hwy \_\_\_\_\_ Mp. \_\_\_\_\_ County, Idaho.

Date            Officer/Party            Serial#/Address    Dept.

Date            Witnessing Officer            Serial#/Address    Dept.

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the District Court of \_\_\_\_\_ County, \_\_\_\_\_, Idaho, located at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_ M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

\_\_\_\_\_  
Defendant's Signature

I hereby certify service upon the defendant personally on \_\_\_\_\_ 20 \_\_\_\_

\_\_\_\_\_  
Officer



NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

DEFENDANT'S COPY

(AGENCY) No. \_\_\_\_\_

IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT

OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

STATE OF IDAHO ) COMPLAINT AND SUMMONS

)

) [ ] Infraction Citation

vs. ) OR

) [ ] Misdemeanor Citation

)

\_\_\_\_\_ ) [ ] Accident Involved

Last Name )

)

\_\_\_\_\_ )

First Name Middle Initial )

IPUC # \_\_\_\_\_ USDOT TK Census # \_\_\_\_\_

[ ] Operator [ ] Class A [ ] Class B [ ] Class C [ ] Class D

[ ] Other \_\_\_\_\_

[ ] GVWR 26001+ [ ] 16+ Persons [ ] Placard Hazardous Materials DR# \_\_\_\_\_

Home Address \_\_\_\_\_

Business Address \_\_\_\_\_ Ph# \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named Defendant.

DL or SS # \_\_\_\_\_ State \_\_\_\_\_ Sex ☐ M ☐ F

Height \_\_\_\_\_ Wt. \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ DOB \_\_\_\_\_

Veh. Lic. # \_\_\_\_\_ State \_\_\_\_\_ Yr. of vehicle \_\_\_\_\_ Make \_\_\_\_\_

Model \_\_\_\_\_ Color \_\_\_\_\_

Did commit the following act(s) on \_\_\_\_\_ 20 \_\_\_\_ at \_\_\_\_\_ o'clock \_ M.

Vio. #1 \_\_\_\_\_

Code Section

Vio. #2 \_\_\_\_\_

Code Section

Location \_\_\_\_\_

Hwy \_\_\_\_\_ Mp. \_\_\_\_\_ County, Idaho.

Date            Officer/Party            Serial#/Address    Dept.

Date            Witnessing Officer            Serial#/Address    Dept.

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the District Court of \_\_\_\_\_ County, \_\_\_\_\_, Idaho, located at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_ M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

\_\_\_\_\_  
Defendant's Signature

I hereby certify service upon the defendant personally on \_\_\_\_\_ 20\_\_

\_\_\_\_\_  
Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

DRIVER'S SERVICES COPY

READ CAREFULLY

☐ This is an INFRACTION charge in which:

NOTE: If you fail to appear within the time allowed for your appearance, judgment will be entered against you. Failure to pay the penalty could result in your license being suspended.

1. You may be represented by a lawyer at your expense.
2. You are entitled to a trial before a judge, but you do not have a right to trial by jury.
3. If you admit the offense or are found to have committed the offense, your fixed penalty and costs cannot be increased or decreased by the judge.

4. DENIAL OF CHARGE. If you do not feel you committed the offense(s) you may appear before the clerk of the court and DENY the charge, or you may indicate your denial below, within the time allowed for your appearance, and you will be given a trial date by the clerk.

☐ I DENY VIOLATION ☐ #1 ☐ #2. A court trial will be set and a notice sent to your home address.

5. ADMISSION OF CHARGE. You may admit the charge by mailing to the court (within the time allowed for your appearance) this copy of the citation together with your personal check or money order for the amount of the fixed penalty and costs. Payment of the fixed penalty and costs by mail will cause a judgment to be entered against you for the infraction for which driver violation points may be assessed against you by the Department of Transportation, OR You may go before the clerk of the court, within the time allowed for your appearance, to enter your admission at which time you must pay the same fixed penalty and costs.



FIXED PENALTY AND COSTS

VIOLATION #1 \$ \_\_\_\_\_

VIOLATION #2 \$ \_\_\_\_\_

Total Penalty and Costs \$ \_\_\_\_\_

☐ I ADMIT TO VIOLATION ☐ #1 ☐ #2 and enclose my check for the full penalty and costs.

MAIL TO: MAGISTRATE COURT, \_\_\_\_\_

\_\_\_\_\_ Idaho 83 \_\_\_\_\_

☐ This is an infraction for failure to have insurance. If you admit the charge or are found to have committed the charge, your driver's license will be suspended until you pay the fixed penalty, provide proof of insurance to the Driver's Services Bureau of the Department of Transportation and pay a reinstatement fee.

=====

☐ This is a MISDEMEANOR charge in which:

NOTE: If you fail to appear within the time allowed for your appearance, another charge of failure to appear may be filed and a warrant may be issued for your arrest.

- 1. You may be represented by a lawyer, which will be at your expense unless the judge finds you are indigent.
- 2. You are entitled to a trial by jury if requested by you.
- 3. PLEA OF NOT GUILTY. You may plead not guilty to the charge by appearing before the clerk of the court or the judge, within the time allowed for your appearance, at which time you will be given a trial date.
- 4. PLEA OF GUILTY. You may plead guilty to the charge by going before the clerk of the court, within the time allowed for your appearance, at which time you will be told if you can pay a fixed fine or whether it will be necessary for you to appear before the judge;

OR

You may have your fine determined by a judge at a time arranged with the clerk of the court, within the time allowed for your appearance.

5. If you plead guilty, you may still give an explanation to the judge.

6. You may call the clerk of the court to determine if you can sign a plea of guilty and pay the fine and costs by mail.

I plead guilty to all of the charges.

\_\_\_\_\_  
Defendant (If authorized by clerk of magistrate court)

[Back of Defendant's Copy]

#### IDAHO UNIFORM CITATION

#### ABSTRACT OF JUDGMENT

VIOLATION #1                      Case No. \_\_\_\_\_

OFFENSE \_\_\_\_\_

Code Section  
\_\_\_\_\_

\_\_\_\_\_ Complaint dismissed

Date

\_\_\_\_\_ DEFAULT ENTERED for failure to appear on infraction

Date

\_\_\_\_\_ JUDGMENT ENTERED AGAINST THE DEFENDANT

Date

Defendant's driving privileges are suspended \_\_\_\_\_  
\_\_\_\_\_  
(days) (months)  
Bond forfeited (Misdemeanor only) \_\_\_\_\_  
Withheld judgment (Misdemeanor only) \_\_\_\_\_  
Penalty or Fine \$ \_\_\_\_\_ Costs \$ \_\_\_\_\_ Suspended \$ \_\_\_\_\_  
Jail \_\_\_\_\_ Suspended \_\_\_\_\_ Probation Period \_\_\_\_\_  
Conditions and supplemental orders: \_\_\_\_\_  
\_\_\_\_\_

VIOLATION #2 Case No. \_\_\_\_\_

OFFENSE \_\_\_\_\_

Code Section \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_

Date Complaint dismissed  
\_\_\_\_\_ DEFAULT ENTERED for failure to appear on infraction

Date  
\_\_\_\_\_ JUDGMENT ENTERED AGAINST THE DEFENDANT

Date  
Defendant's driving privileges are suspended \_\_\_\_\_  
(days) (months)  
Bond forfeited (Misdemeanor only) \_\_\_\_\_



Withheld judgment (Misdemeanor only) \_\_\_\_\_

Penalty or Fine \$ \_\_\_\_\_ Costs \$ \_\_\_\_\_ Suspended \$ \_\_\_\_\_

Jail \_\_\_\_\_ Suspended \_\_\_\_\_ Probation Period \_\_\_\_\_

Conditions and supplemental orders: \_\_\_\_\_

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct abstract of the original judgment of the court record on file in this office.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Clerk

[Back of Driver's Services Copy]

(AGENCY)

No. \_\_\_\_\_

#### IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE \_\_\_\_\_ DISTRICT

OF THE STATE OF IDAHO, COUNTY OF \_\_\_\_\_

STATE OF IDAHO

) COMPLAINT AND SUMMONS

)

) [ ] Infraction Citation

vs.

) OR

) [ ] Misdemeanor Citation

)

) [ ] Accident Involved

\_\_\_\_\_  
Last Name

)

)

)

\_\_\_\_\_  
First Name Middle Initial

)

IPUC # \_\_\_\_\_ USDOT TK Census # \_\_\_\_\_

☐ Operator ☐ Class A ☐ Class B ☐ Class C ☐ Class D

☐ Other \_\_\_\_\_

☐ GVWR 26001+ ☐ 16+ Persons ☐ Placard Hazardous Materials DR# \_\_\_\_\_

Home Address \_\_\_\_\_

Business Address \_\_\_\_\_ Ph# \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named  
Defendant.

DL or SS # \_\_\_\_\_ State \_\_\_\_\_ Sex ☐ M ☐ F

Height \_\_\_\_\_ Wt. \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ DOB \_\_\_\_\_

Veh. Lic. # \_\_\_\_\_ State \_\_\_\_\_ Yr. of vehicle \_\_\_\_\_ Make \_\_\_\_\_

Model \_\_\_\_\_ Color \_\_\_\_\_

Did commit the following act(s) on \_\_\_\_\_ 19 \_\_\_\_ at \_\_\_\_\_ o'clock \_ M.

Vio. #1 \_\_\_\_\_

Code Section

\_\_\_\_\_

Vio. #2 \_\_\_\_\_

Code Section

\_\_\_\_\_

Location \_\_\_\_\_

Hwy \_\_\_\_\_ Mp. \_\_\_\_\_ County, Idaho.

\_\_\_\_\_

Date	Officer/Party	Serial#/Address	Dept.
<hr/>			
Date	Witnessing Officer	Serial#/Address	Dept.

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's  
Court of the District Court of \_\_\_\_\_ County, \_\_\_\_\_, Idaho, located  
at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, at \_\_\_\_ o'clock \_ M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

_____
Defendant's Signature
I hereby certify service upon the defendant personally on _____ 20____
_____
Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

OFFICER'S COPY

Each department issuing citations is authorized to design the format of this reverse side of the officer's copy inasmuch as the information contained herein will be used by the department for their own purposes and not filed with any court. In addition, the department may make additional copies of the Idaho Uniform Citation.

(Back of Additional Copies)

**(h) Color and Distribution.** With the exception of electronically issued citations, the first copy of the citation shall be white and deposited with and retained by the court; the second copy shall have pink borders at the top and bottom and be delivered to the defendant; the third copy shall have yellow borders at the top and bottom and be delivered by the police officer initially to the court and thereafter forwarded by the court to the appropriate department upon disposition of the citation. Additional copies of the citation



may be prepared with additional information required by the issuing governmental department, agency or unit for its internal use.

(i) **Electronic Citations.** Citations may be electronically issued. Electronic citations do not need to meet the formatting requirements set out in subsections (g) and (h) of this rule, but must otherwise provide the same information that is required by subsections (g) and (j) of this rule.

(j) **Failure to Appear.** The citation shall state and notify the defendant that in the event he fails to appear on the citation at the time indicated, a warrant may be issued for his arrest. In the event the defendant does not appear as required by the citation, action may be taken against him as provided in Rule 11. (Adopted April 18, 1983, effective July 1, 1983; amended March 20, 1991, effective July 1, 1991; amended March 26, 1992, effective July 1, 1992; amended March 9, 1999, effective July 1, 1999; amended March 21, 2007, effective July 1, 2007; amended March 18, 2011, effective July 1, 2011; amended April 2, 2010, effective April 15, 2010; amended March 18, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012.)

STATUTORY NOTES

**Compiler's Notes.** Former Rule 5 (Adopted December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982) was rescinded by order of the Supreme Court of April 18, 1983, effective July 1, 1983.

JUDICIAL DECISIONS

ANALYSIS

Eyewitness Account of Violation.  
Failure to Use Form.

**Eyewitness Account of Violation.**

Although the deputy had no authority to make a warrantless arrest for misdemeanor offenses committed outside his presence, he was authorized to issue a citation as provided in § 19-3901 where he had probable cause, based on a citizen's eyewitness account, that the defendant had violated one or more misdemeanor statutes regulating the operation of boats. *State v. Simpson*, 112 Idaho 644, 734 P.2d 669 (Ct. App. 1987).

**Failure to Use Form.**

Trial court correctly held that prosecution failed to present necessary proof that defendant had been validly convicted of two previous driving under the influence charges within the previous five years; defendant's prior judgment of conviction did not demon-

strate on its face that the defendant in that proceeding was informed of his rights as required under I.C.R. 11 and the form of the judgment entered failed to incorporate the information mandated by this rule. *State v. Mesenbrink*, 115 Idaho 850, 771 P.2d 514 (1989).

Although on their face the defendant's two previous judgments were not in the form required by subsection (f) of this rule, strict compliance is required only when the defendant enters an uncounseled guilty plea; therefore because defendant was represented by counsel, it could be said that the state had failed to meet its burden to show a voluntary waiver of sixth amendment rights. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

**Cited in:** *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985); *State v. Gage*, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993); *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

**Rule 6. First appearance of defendant — Plea of defendant — Trial date notice or continuance notice.**

(a) **First Appearance and Plea Before Clerk of the Court.** Except as provided in Rule 5(b), the defendant shall first appear before the clerk on or before the appearance date to enter a plea to a misdemeanor citation or complaint.

(1) **Continuance.** If, at the first appearance, the defendant desires additional time before entering a plea to the charge, the clerk shall continue the proceeding to a time certain and issue a continuance notice to the defendant in the form prescribed in this rule.

(2) **Plea of Not Guilty.** If the defendant enters a plea of not guilty, the clerk shall register the same and issue to the defendant a trial date notice in the form prescribed by this rule.

(3) **Plea of Guilty to Citation.** If the defendant desires to enter a plea of guilty to a misdemeanor citation, and if the clerk is authorized to accept such a plea and fine under Rule 14, the clerk shall accept the plea of guilty by having the defendant sign a written plea of guilty on the face of the court's copy of the citation and collect the fine and court costs as provided by Rule 14. The defendant must first acknowledge that he has read the advice on the backside of the defendant's copy of the citation. All other pleas of guilty may be filed with the clerk, but must be accepted by the court.

(b) **Plea Before the Court.** The defendant shall have the right to enter a plea to a misdemeanor citation or complaint before the court. If the defendant enters a plea of not guilty, a trial date notice shall be issued to the defendant in the form provided by this rule, and the bail bond, if any, shall be set by the court. If the defendant enters a plea of guilty, the court may thereupon impose the sentence or may appoint a later time for imposing sentence.

(c) **Duties of Court to Advise Defendant of Rights.** At the first appearance of the defendant before the court on a uniform citation or sworn complaint, the court shall inform the defendant of his constitutional rights and the rights provided in the Idaho Criminal Rules, and these rules. Such advice of rights may be announced to all defendants at each session of court at the commencement of the court hearing, rather than advising each of the defendants individually when they come before the court. If the offense has a permissible penalty of imprisonment which will be considered as possible punishment by the court, or if the conviction of the offense could cause a subsequent conviction to be enhanced from a misdemeanor to a felony, then or in either of such events the defendant shall be advised that he has the right to court appointed counsel at public expense if he is indigent. If the defendant is found by the court to be entitled to court appointed counsel, the court shall appoint such counsel unless the defendant voluntarily waives his right to counsel.

(d) **Appearance by Defendant Through Attorney.** Except as provided in Rule 5(b), a defendant may also appear, answer and have judgment

entered through an attorney, who shall either appear in person or shall file, at or before the time for appearance, a written appearance and answer on behalf of the defendant. The court may, in its discretion, require the presence of the defendant at any stage of the proceeding not otherwise required by these rules.

(e) **Trial Date Notice or Continuance Notice.** Whenever a defendant is given a trial date setting or a continuance at or after the defendant’s first appearance, such notice shall be given by a written notice delivered to the defendant in substantially the following form:

(1) **Trial Date Notice:**

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
	)	TRIAL DATE NOTICE
Defendant.	)	
	)	

NOTICE IS HEREBY GIVEN to the above Defendant that the trial before the court has been set for the charge against you at \_\_\_\_\_ o'clock \_\_\_\_M. on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation and the penalty in the sum of \$ \_\_\_\_\_. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE PENALTY, YOUR DRIVER’S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

- ☐ Personally delivered to the defendant this date.
- ☐ Mailed to the defendant this date.

Private Counsel: \_\_\_\_\_  
Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_  
Prosecutor: \_\_\_\_\_



Mailed \_\_\_\_\_

Hand Delivered \_\_\_\_\_

Dated \_\_\_\_\_

Clerk or Judge \_\_\_\_\_

**(2) Continuance Notice:**

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
_____	)	CONTINUANCE NOTICE
Defendant.	)	
	)	

NOTICE IS HEREBY GIVEN to the above Defendant that proceedings on the charge against you have been continued until \_\_\_\_\_ o'clock \_\_\_\_ .M. on the \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation and the penalty in the sum of \$ \_\_\_\_\_. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE PENALTY, YOUR DRIVER'S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

☐ Personally delivered to the defendant this date.

☐ Mailed to the defendant this date.

Private Counsel: \_\_\_\_\_

Mailed \_\_\_\_\_

Hand Delivered \_\_\_\_\_

Prosecutor: \_\_\_\_\_

Mailed \_\_\_\_\_

Hand Delivered \_\_\_\_\_

Dated \_\_\_\_\_

Clerk or Judge \_\_\_\_\_

(Adopted April 18, 1983, effective July 1, 1983; amended February 10, 1993, effective July 1, 1993; amended March 9, 1999, effective July 1, 1999;

amended March 5, 2002, effective July 1, 2002; amended April 2, 2010, effective April 15, 2010; amended March 18, 2011, effective July 1, 2011.)

STATUTORY NOTES

**Compiler's Notes.** Former Rule 6 (Adopted December 27, 1979, effective July 1, 1980) was rescinded by order of the Supreme Court of April 18, 1983, effective July 1, 1983.

JUDICIAL DECISIONS

**Misdemeanor Cases.**

In *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990), the Supreme Court discussed the constitutional requirements which must be met before a court may accept a plea of guilty in a felony case but the court specifically noted that these requirements apply only to felony cases and that the provisions of § 19-502 and this Rule continue to be applicable in accepting guilty pleas in misde-

meanor cases; therefore since both of defendant's first and second DUI violations were misdemeanors under § 18-8005 which prescribes the penalties for driving under the influence, Carrasco is not applicable in this case. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

**Cited in:** *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

**Rule 6.1. Voluntary appearance under warrant of arrest.**

If a person voluntarily appears before a magistrate while a warrant for the defendant's arrest is outstanding for a misdemeanor or contempt of court, the magistrate shall have the discretion either, (1) to require the person to appear before an arresting authority for arrest and booking before the person can appear before the magistrate or, (2) to enter an order quashing the warrant and cause a copy of the order to be sent to the agency holding the original warrant and deliver a copy of the order to the defendant. (Adopted March 28, 1986, effective July 1, 1986.)

STATUTORY NOTES

**Compiler's Notes.** A former Rule 6.1 (Adopted March 24, 1982, effective July 1, 1982) was amended and renumbered as Rule 7 by order of the Supreme Court of April 1, 1983, effective July 1, 1983.

**Rule 7. Proceedings by telephone conference calls in misdemeanor cases. [Rescinded.]**

STATUTORY NOTES

**Compiler's Notes.** Former Rule 7 (adopted March 24, 1982, effective July 1, 1982; amended April 18, 1983, effective July 1, 1983) was rescinded by Supreme Court Order of March 2, 2001, effective April 1, 2001.

**Rule 8. Deferred payment agreement — Form.**

(a) **Deferred Payment Agreement.** After the entry of a judgment for a misdemeanor, the court, or the clerk within the guidelines set by the court, may enter into an agreement with the defendant for the deferred payment of the fine and court costs. Such agreement shall be signed by the defendant and the court, or the clerk on behalf of the court, and shall state that failure

of the defendant to make the payments when agreed may result in the issuance of a warrant for the arrest of the defendant. Subsequent extensions of time to pay a fixed penalty may be granted by the execution of a new agreement by the defendant and the court or the clerk.

(b) **Form of Agreement.** A deferred payment agreement under this rule shall be in substantially the following form:

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
_____	)	DEFERRED PAYMENT
Defendant.	)	AGREEMENT
	)	
DOB: _____	)	
DL OR SSN: _____	)	
(State) _____	)	

JUDGMENT HAVING BEEN ENTERED for the charge against the above named defendant and for the penalty or fine and court costs of \$\_\_\_\_\_ and the defendant having shown good cause for a deferred payment;

IT IS HEREBY AGREED that the defendant is granted a Deferred Payment Agreement as follows: \_\_\_\_\_

You are further advised that an additional statutory \$2.00 handling fee will be assessed for EACH partial payment.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED THAT IF YOU DO NOT PAY SAID PENALTY WITHIN THE TIME AGREED, IN PERSON OR BY MAIL TO THE COURT, YOUR DRIVER'S LICENSE WILL BE SUSPENDED BY THE IDAHO DEPARTMENT OF TRANSPORTATION OR YOUR HOME STATE PURSUANT TO THE INTERSTATE NONRESIDENT VIOLATOR COMPACT IF THIS IS A TRAFFIC INFRACTION. IF YOU DO NOT MAKE THE PAYMENT WHEN AGREED YOU HAVE THE RIGHT TO APPEAR BEFORE THE COURT ON THE \_\_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_\_\_, AT \_\_\_\_ O'CLOCK \_\_\_\_ M. TO SHOW CAUSE WHY YOUR LICENSE SHOULD NOT BE SUSPENDED FOR FAILURE TO PAY THE PENALTY.

☐ THIS IS A MISDEMEANOR CHARGE — YOU ARE HEREBY NOTIFIED that if you do not pay the fine within the time agreed a warrant may issue for your arrest without further notice.

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk or Judge



## RECEIPT

I acknowledge receipt of this Agreement and state that I have read and agree to the terms of this Agreement and acknowledge that I REALIZE THAT MY DRIVER'S LICENSE WILL BE SUSPENDED OR A WARRANT MAY ISSUE FOR MY ARREST IF I FAIL TO MAKE THE PAYMENT AS AGREED.

---

Defendant

(Adopted April 18, 1983, effective July 1, 1983; amended February 10, 1993, effective July 1, 1993.)

## STATUTORY NOTES

**Compiler's Notes.** Former Rule 8 (Adopted December 27, 1979, effective July 1, 1980) was rescinded by order of the Supreme Court of April 18, 1983, effective July 1, 1983.

**Rule 9. Judgment of conviction and sentence — Judgment of acquittal.**

(a) **Judgment of Conviction and Sentence.** Upon appearance by the defendant and entry of a plea of guilty, or upon conviction following a plea of not guilty, the court may enter an appropriate judgment of conviction, impose sentence, direct that any fine, restitution, costs and fees be paid out of the bail deposited by the defendant or on defendant's behalf and remit to the party posting the bail any amount by which the bail exceeds these amounts. Provided the court may suspend the sentence and place the defendant on probation as provided by law, or may withhold judgment as provided in the following Rule 10.

(b) **Acquittal of defendant.** In the event the defendant is acquitted, the court shall enter a judgment of acquittal, exonerate any bail which has been posted, and return such bail to the person posting the same and shall discharge the defendant.

(c) **Discharge of Judgment.** If, after entry of a judgment for the payment of a penalty, court costs or payment of money to any person or entity, the court determines that the unpaid portion of the judgment is not reasonably collectible for any reason, the court may enter an order discharging the judgment and close the file. A discharge of a judgment on a citation may be entered by endorsing the word "discharged" on the face of the citation together with the date and the signature of the court. Such discharge may be signed and entered by the clerk at the direction of the court. The entry of a discharge of judgment shall not affect the judgment other than to satisfy the duty to pay the balance of the penalty, court costs and the payment of money to any person or entity; provided, such discharge does not satisfy the duty of the defendant to pay victim's restitution ordered pursuant to Chapter 53 of Title 19, Idaho Code, nor prevent the victim from enforcing the order by execution pursuant to section 19-5305, Idaho Code. (Adopted December 27, 1979, effective July 1, 1980; amended April 18, 1983,

effective July 1, 1983; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990.)

### JUDICIAL DECISIONS

**Cited in:** State v. Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

#### **Rule 9.1. Suspension of driver's license upon conviction of offense authorizing or requiring suspension of license — Suspension upon plea or finding of guilty of offense — Notice of increased penalty on subsequent violations — Temporary restricted license.**

(a) **Suspension of Driving Privileges.** The court shall include in a judgment of conviction and sentence the suspension of driving privileges and driver's license which is part of the sentence under a statute of the state. If the statute authorizes or requires the court to suspend driving privileges and driver's license by reason of a plea of guilty or finding of guilty of an offense, the court shall adjudicate the period of suspension in an order of suspension.

(b) **Order of Suspension.** Whenever the court suspends driving privileges and driver's license by reason of a plea of guilty or a finding of guilty to an offense, the court shall suspend the driving privileges by an order and cause copies to be filed with the Department of Transportation and served on the defendant by personal delivery or by mailing to the address indicated on the driver's license or other address furnished by the defendant. The suspension order shall be in substantially the following form:

	[Court Heading]
IN THE MATTER OF	)
SUSPENSION OF THE	) Citation Case No. ____
DRIVER'S LICENSE OF	)
_____	)
Defendant.	) ORDER SUSPENDING
	) DRIVER'S LICENSE FOR
	) A PLEA OF GUILTY OR
	) FINDING OF GUILTY OF
DOB: _____	) OFFENSE
DL OR SS#: _____	)
Address _____	)
_____	)

TO THE DEPARTMENT OF TRANSPORTATION, STATE OF IDAHO AND THE ABOVE NAMED DEFENDANT.

The defendant having ☐ entered a plea of guilty ☐ been found guilty of the offense of \_\_\_\_\_ in violation of Section \_\_\_\_\_, Idaho Code, which authorizes or requires the suspension of the driving privileges of the defendant by the court, and the court having considered the same.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the driving privileges and driver's license of the above named defendant are hereby suspended for a period of \_\_\_\_\_ days commencing on \_\_\_\_\_.

YOU ARE FURTHER NOTIFIED that the expiration of the period of this suspension does not reinstate your driver's license and that you must make application to the Department of Transportation of the state of Idaho for reinstatement of your license after the suspension period expires.

- ☐ Personally delivered to the respondent this date.
- ☐ Mailed to the respondent this date.

Date \_\_\_\_\_  
\_\_\_\_\_  
Judge

STATE OF IDAHO )  
COUNTY OF \_\_\_\_\_ )

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct copy of the original order of suspension of driver's license entered by the court and on file in this office.

Date \_\_\_\_\_  
\_\_\_\_\_  
Clerk or Deputy

(c) **Notice of Penalties for Subsequent Violations.** After plea or finding of guilty of an offense in violation of Section 18-8004, Idaho Code, the court shall at or before the time of sentencing or granting a withheld judgment deliver to the defendant a written notice advising the defendant as to the penalties that may be imposed for subsequent violations of that statute. The notice shall be signed by the defendant and retained by the court, a copy shall be mailed to the prosecuting attorney and a copy shall be delivered to the defendant which shall be in substantially the following form:

		[Court Heading]
STATE OF IDAHO	)	
	)	
Plaintiff,	)	NOTIFICATION OF PENALTIES
vs.	)	FOR SUBSEQUENT VIOLATION
_____	)	
Defendant.	)	
	)	

TO: ABOVE NAMED DEFENDANT.

YOU ARE HEREBY NOTIFIED that if you plead guilty to, or are found guilty of, another violation of driving with an alcohol concentration of at least 0.02, but less than 0.10, for an offense committed when you are under the age of twenty-one (21), the penalties will be as follows:



1. A SECOND DUI VIOLATION within five (5) years, including withheld judgments, is a misdemeanor and you:
  - (a) Shall be sentenced to jail for a mandatory minimum period of not less than ten (10) days the first forty-eight (48) hours of which must be consecutive, and may be sentenced to not more than one (1) year; and
  - (b) May be fined up to Two Thousand Dollars (\$2,000.00); and
  - (c) Shall have your driving privileges suspended for a minimum of one (1) year during which absolutely no driving privileges of any kind may be granted.
2. A THIRD DUI VIOLATION within five (5) years or a SUBSEQUENT DUI VIOLATION with a previous felony DUI or aggravated DUI within ten (10) years, including withheld judgments, is a FELONY and you:
  - (a) Shall be sentenced to the custody of State Board of Corrections for not more than five (5) years, but if the court imposes a jail sentence instead of the state penitentiary it shall be for a minimum period of not less than thirty (30) days; and
  - (b) May be fined up to Five Thousand Dollars (\$5,000.00); and
  - (c) Shall have your driving privileges suspended for at least one (1) year and not more than five (5) years after release from imprisonment.

I HAVE READ THIS ENTIRE DOCUMENT; I HAVE HAD IT EXPLAINED TO ME; AND I HAVE RECEIVED A COPY.

---

DATE

---

DEFENDANT

(d) **Temporary Restricted License.** The court may, in its discretion, and where provided by law, issue a temporary restricted license to a defendant whose driver's license has been suspended by the court. The period of time covered by the temporary license shall count and be credited against the suspension period. The original of the temporary restricted license shall be retained by the court, and certified copies of the temporary restricted license shall be filed with the Department of Transportation and delivered to the defendant. The certified copy delivered to the defendant shall be retained by the defendant as the authority to drive in accordance with the terms thereof during the period of the temporary license.

(e) **Form of Temporary Restricted License.** A temporary restricted license granted by the court during the suspension of a driver's license shall be in substantially the following form:

[Court Heading]

IN THE MATTER OF THE )  
SUSPENSION OF THE ) Citation Case No. \_\_\_\_  
DRIVER'S LICENSE OF )  
\_\_\_\_ )  
 ) TEMPORARY RESTRICTED  
Defendant. ) LICENSE DURING  
 ) SUSPENSION  
 )  
DOB: \_\_\_\_\_ )  
DL OR SS#: \_\_\_\_\_ )  
Address \_\_\_\_\_ )  
\_\_\_\_\_ )

TO: THE DEPARTMENT OF TRANSPORTATION, STATE OF IDAHO  
AND THE ABOVE NAMED DEFENDANT.

The driving privileges of the defendant having been suspended by the court by order or judgment dated \_\_\_\_\_ for a period of \_\_\_\_\_ days, and the defendant having applied to the court for a Temporary Restricted License, and the court having determined that a Temporary Restricted License is appropriate and should issue.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the defendant is hereby granted a Temporary Restricted License to drive a motor vehicle for the next \_\_\_\_ days commencing on date of this order under the following restrictions and conditions: \_\_\_\_\_

This Temporary Restricted License may be cancelled by order of the court for any violation of the above conditions and restrictions or by reason of a change of circumstances rendering the temporary license unnecessary or inappropriate.

Date \_\_\_\_\_

Judge \_\_\_\_\_

STATE OF IDAHO )  
COUNTY OF \_\_\_\_\_ )

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct copy of the original temporary restricted license issued by the court and on file in this office.

Date \_\_\_\_\_

Clerk or Deputy \_\_\_\_\_

(Adopted April 3, 1984, effective March 1, 1984; amended February 10, 1993, effective July 1, 1993; amended April 19, 1995, effective July 1, 1995; amended April 2, 2010, effective April 15, 2010.)

### STATUTORY NOTES

**Compiler's Notes.** Former M.C.R. 9.1 (Ad-opted April 18, 1983, effective July 1, 1983) was rescinded by order of the Supreme Court of April 3, 1984, effective March 1, 1984.

### JUDICIAL DECISIONS

**Cited in:** State v. Maxey, 125 Idaho 505, 873 P.2d 150 (1994).

### Rule 9.2. Suspension of driver's license for failure to take alcohol test.

(a) (1) **Sworn Statement of Officer.** The court shall not accept a license seized under Section 18-8002, Idaho Code, without an accompanying affidavit of the officer in substantially either of the following forms:

[Court Heading]

IN THE MATTER OF THE	)	
SUSPENSION OF THE	)	Citation Case No. ____
DRIVER'S LICENSE OF	)	
_____	)	
	)	
Defendant.	)	AFFIDAVIT OF REFUSAL
	)	TO TAKE ALCOHOL TEST
	)	
DOB: _____	)	
DL OR SS#: _____	)	
Address _____	)	
	)	

STATE OF IDAHO

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, being duly first sworn, states: I am an authorized peace officer, and on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.M., I had reasonable grounds to believe that \_\_\_\_\_, (hereinafter "defendant") had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substance.

I asked defendant to take an evidentiary test for alcohol concentration, informing him of the consequences of refusal as stated in Section 18-8002(3), Idaho Code. Defendant refused the test, as follows: \_\_\_\_\_

\_\_\_\_\_



Therefore, I advised the defendant that his driving privileges and license were seized and his driver's license,  
☐ Was seized and is attached.  
☐ Was not seized because it was not on his person.

Dated \_\_\_\_\_

\_\_\_\_\_  
Peace Officer

Subscribed and sworn to before me on \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Person authorized to  
Administer Oaths

**or in the alternative:**  
(2)

	[Court Heading]
THE STATE OF IDAHO	)
	) Court Case No. ____
Plaintiff,	)
vs.	)
_____	)
Defendant.	) PROBABLE CAUSE AFFIDAVIT
	) IN SUPPORT OF ARREST AND/
	) OR REFUSAL TO TAKE TEST
DOB: _____	)
SSN _____	)
DL # _____	)
(State) _____	)
State of Idaho	)
County of _____	)

I, \_\_\_\_\_, the undersigned, being first duly sworn on oath, depose  
(print)

and say that:

- 1. I am a peace officer employed by \_\_\_\_\_.
- 2. The defendant was arrested on \_\_\_\_ at \_\_\_\_ ☐ AM ☐ PM for the crime of driving under the influence of alcohol, drugs or any other intoxicating substances pursuant to Section 18-8004 Idaho Code.  
Second or more DUI offense in the last five years? ☐ YES ☐ NO  
☐ FELONY ☐ MISDEMEANOR

3. Location of Occurrence:

\_\_\_\_\_  
4. Identified the defendant as: (print name) \_\_\_\_\_  
by: (check box)

- ☐ Military ID ☐ State ID Card ☐ Student ID Card ☐ Drivers License
- ☐ Credit Cards ☐ Paperwork found ☐ Verbal ID by defendant

Witness \_\_\_\_\_ identified defendant

Other \_\_\_\_\_

5. Actual physical control established by: ☐ Observation by affiant

☐ Observation by Officer \_\_\_\_\_

☐ Admission of Defendant to \_\_\_\_\_,

☐ Statement of Witness: \_\_\_\_\_

☐ Other: \_\_\_\_\_

6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts:

(NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person):

PROBABLE CAUSE FOR STOP AND ARREST: \_\_\_\_\_

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D.U.I. NOTES Sobriety Tests — Meets Decision Points?

Odor of alcoholic beverage ☐ Yes ☐ No

Gaze Nystagmus ☐ Yes ☐ No

Admitted drinking alcoholic beverage

☐ Yes ☐ No

Walk & Turn ☐ Yes ☐ No

Slurred Speech

☐ Yes ☐ No

One Leg Stand

☐ Yes ☐ No

Impaired Memory

☐ Yes ☐ No

Glassy/bloodshot eyes

☐ Yes ☐ No

Crash Involved ☐ Yes ☐ No

Other \_\_\_\_\_

Injury ☐ Yes ☐ No

Drugs Suspected

☐ Yes ☐ No

Drug Recognition Evaluation Performed ☐ Yes ☐ No

Reason Drugs are Suspected

---

Prior to being offered the test, the defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code.

☐ Defendant was tested for alcohol concentration, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Sections 18-8003 & 18-8004(4), Idaho Code and the standards and methods adopted by the Department of Law Enforcement.

BAC: \_\_\_\_\_ by: \_\_\_\_\_

☐ Breath      Instrument Type:    ☐ Intoxilyzer 5000  
   ☐ Alco Sensor Serial #: \_\_\_\_\_

☐ Blood AND/OR ☐ Urine

Test Results Pending? ☐ Yes ☐ No (Attached)

Name of person administering breath test: \_\_\_\_\_

Date Certification Expires \_\_\_\_\_

☐ Defendant refused the test as follows: \_\_\_\_\_

By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and attached reports and documents that may be included herein is true and correct to the best of my information and belief.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_ (affiant)

Subscribed and sworn to before me on \_\_\_\_\_

(Date)

\_\_\_\_\_ (or) \_\_\_\_\_

PERSON AUTHORIZED

## TO ADMINISTER

## OATHS.

Title: \_\_\_\_\_

Residing at: \_\_\_\_\_ My Commission expires:\_\_\_\_\_

(b) **Suspension by Court.** After being presented with a sworn statement of an officer under this rule, if the person whose license was seized does not request a hearing within 7 days from the date of seizure of his license, as allowed by Section 18-8002, Idaho Code, the judge shall thereupon enter an order suspending the driver's license of the defendant for 180 days pursuant to Section 18-8002, Idaho Code, without further notice to the party. The order suspending driving privileges and driver's license shall be effective upon execution and shall apply to all driving privileges of the person, including those granted by any temporary license or permit issued by a police officer. The duty of the judge to enter such an order is a ministerial duty in which the judge has no discretion as to whether the order is to be entered.

(c) **Show Cause Hearing.** If a show cause hearing is timely requested by the defendant, the court shall notice it for hearing within the time provided by law. The hearing shall be limited to those issues provided by Section



18-8002(4)(b), Idaho Code. If the court enters an order of suspension, it shall cause copies of the suspension order to be filed with the Department of Transportation and served upon the defendant by personal delivery or mailing to the address indicated on the driver's license or other address furnished by the defendant. If the court makes the determination that there is not grounds for suspension of driving privileges and driver's license under this rule, it shall enter an order to that effect and return the license to the defendant.

(d) **Form of Suspension Order.** An order suspending driving privileges under Section 18-8002, Idaho Code shall be in substantially the following form:

	[Court Heading]
IN THE MATTER OF THE	)
SUSPENSION OF THE	) Citation Case No. ____
DRIVER'S LICENSE OF	)
_____	)
Defendant.	) ORDER SUSPENDING
	) DRIVING PRIVILEGES
	) UNDER SECTION 18-8002,
	) IDAHO CODE
DOB: _____	)
DL OR SS#: ____	)
(State) ____	)
CDL: _____	)

TO THE DEPARTMENT OF TRANSPORTATION, STATE OF IDAHO  
AND THE ABOVE NAMED DEFENDANT.

The license of the defendant having been seized by a police officer and a sworn statement of the police officer regarding the circumstances under which the defendant refused to submit to an evidentiary test for alcohol concentration after being requested to do so under Section 18-8002(3), Idaho Code, having been delivered to the court, and

☐ The defendant having failed to request a hearing within 7 days from the date of the seizure of his license, so that the court determined that the driving privileges of the defendant should be suspended under Section 18-8002(4)(c), Idaho Code.

☐ A hearing having been held at the request of the defendant and the court having determined that the driving privileges of the defendant should be suspended under Section 18-8002(4)(b), Idaho Code.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the driver's license and driving privileges of the above named defendant, including any driving privileges granted by a temporary license or permit, are hereby suspended for a period of \_\_\_\_ 180 days (first refusal) \_\_\_\_ 1 year (second refusal) commencing on \_\_\_\_\_.

THE DEFENDANT IS HEREBY NOTIFIED THAT ALL OF YOUR DRIVING PRIVILEGES, INCLUDING ANY DRIVING PRIVILEGES UNDER A TEMPORARY LICENSE OR PERMIT ISSUED BY THE POLICE

OFFICER, ARE SUSPENDED and that the expiration of the period of this suspension does not reinstate your driver's license and that you must make application to the Department of Transportation of the state of Idaho for reinstatement of your driver's license after the suspension period expires. You do not have the right to obtain any temporary or restricted license or permit of any kind.

- ☐ Personally delivered to the defendant this date.
- ☐ Mailed to the defendant this date.

Date \_\_\_\_\_  
\_\_\_\_\_  
Judge

STATE OF IDAHO )  
COUNTY OF \_\_\_\_\_ )

The undersigned Clerk of the above entitled court hereby certifies that the foregoing is a true and correct copy of the original order suspending driver's license entered by the court and on file in this office.

- ☐ Defendant's license was seized and is attached.
- ☐ Defendant's license could not be seized.

Dated \_\_\_\_\_  
\_\_\_\_\_  
Clerk or Deputy

(e) **Procedure and Evidence.** A hearing under Idaho Code Section 18-8002 described above is a civil hearing and will be governed by the Idaho Rules of Civil Procedure except that the discovery rules, Rules 26 through 37 I.R.C.P., will not apply and Rule 16 of the Idaho Criminal Rules will govern all discovery. Provided, there shall be no right to a jury trial in these hearings. (Adopted April 3, 1984, effective March 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended February 10, 1993, effective July 1, 1993; amended February 26, 1997, effective July 1, 1997; amended March 28, 2000, effective July 1, 2000.)

STATUTORY NOTES

**Compiler's Notes.** Former M.C.R. 9.2 (Ad-opted April 18, 1983, effective July 1, 1983) was rescinded by order of the Supreme Court of April 3, 1984, effective March 1, 1984.

JUDICIAL DECISIONS

ANALYSIS

Authority of Officer.  
Construction of Rule.  
Issue Preclusion.  
Jurisdiction of Court.  
Security Bond.  
Show Cause Hearing.

**Authority of Officer.**

The faithful performance blanket bond coverage found in the state's insurance policy covered the officer's duty to administer oaths under I.M.C.R. 12, where administering the oath for the affidavit required by this rule was reasonably necessary to accomplish the purpose of law enforcement, and administering

an oath was not outside the scope of those duties already enumerated in § 19-4804. *State v. Kappelman*, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

#### **Construction of Rule.**

The language in this rule that, "The court shall not accept a license seized under Section 18-8002, Idaho Code, without an accompanying affidavit by the officer..." was added to address an administrative, not an adjudicative, problem and cannot reasonably be construed as establishing a condition precedent to the court exercising the jurisdiction and duty conferred on it by § 18-8002(b). *Hanson v. State* (In re *Hanson*), 121 Idaho 507, 826 P.2d 468 (1992).

#### **Issue Preclusion.**

Issues decided at a license suspension (BAC) hearing were not entitled to preclusive effect in criminal prosecution based upon either the doctrine of *res judicata* or collateral estoppel. *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994).

#### **Jurisdiction of Court.**

The magistrate court erred in summarily terminating a driver's license suspension proceeding and returning the license to a driver on the ground that the court did not have jurisdiction to proceed on the basis of fact that the affidavit filed by the officer was invalid; with both jurisdiction over the subject matter and personal jurisdiction over the parties, the magistrate court erred when it concluded that "the court does not have jurisdiction to proceed." *Hanson v. State* (In re *Hanson*), 121 Idaho 507, 826 P.2d 468 (1992).

#### **Security Bond.**

If an officer's duty includes administering oaths then a faithful performance blanket bond will also cover this duty, and execution of a specific surety bond by each person appointed to administer oaths is not required. *State v. Kappelman*, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

#### **Show Cause Hearing.**

I.R.C.P. 60(b)(1) may not be applied to relieve a driver from the effects of an order suspending his driving privileges when, allegedly through mistake, inadvertence, or excusable neglect, the driver failed to request a show cause hearing with the seven-day time period. *Ausman v. State*, 124 Idaho 839, 864 P.2d 1126 (1993).

Intermediate appellate decision of the district court reversing an order of the magistrate granting the driver's motion to set aside the magistrate's previous order suspending his driver's license, was proper where, assuming the general applicability of the Idaho Rules of Civil Procedure to license suspension proceedings by virtue of I.M.C.R. 9.2(e), a conflict remained between I.M.C.R. 9.2(b) and I.R.C.P. 60(b)(1); because I.M.C.R. 9.2(b) was the more specific rule, it controlled over the more general I.R.C.P. 60(b)(1) and therefore, I.R.C.P. 60(b)(1) was not available to remedy the driver's untimely request for a show cause hearing. *Hansen v. State* (In re *Hansen*), 138 Idaho 865, 71 P.3d 464 (Ct. App. 2003).

**Cited in:** *State v. Ankney*, 109 Idaho 1, 704 P.2d 333 (1985); *Clayton v. State*, 118 Idaho 59, 794 P.2d 648 (Ct. App. 1990).

### **Rule 9.3. Seizure of driver's license upon suspension — Stay upon appeal.**

(a) **Seizure of Driver's License.** Upon the suspension of driving privileges and driver's license under these Misdemeanor Criminal Rules, the court shall seize the driver's license from the defendant, if possible, and upon entry of the order of suspension cause the driver's license to be delivered to the Department of Transportation with the order suspending the license. If the driver's license cannot be seized by the court for any reason, a notation to that effect shall be endorsed by the court or the clerk on the order of suspension. The driver's license shall not be automatically reinstated after the period of suspension, but upon the expiration of the period of suspension, the defendant may apply to the Department of Transportation for reinstatement of the license as provided by law.

(b) **Stay on Appeal.** In the event the defendant appeals the suspension of a driver's license or appeals a conviction which resulted in the suspension of a driver's license, the court imposing the suspension, or the appellate court, may stay the suspension of the driver's license pending the appeal



upon such conditions as the staying court may impose. (Adopted April 3, 1984, effective March 1, 1984.)

STATUTORY NOTES

**Compiler’s Notes.** Former M.C.R. 9.3 (Ad- opted April 18, 1983, effective July 1, 1983) was rescinded by order of the Supreme Court of April 3, 1984, effective March 1, 1984.

JUDICIAL DECISIONS

**Cited in:** Clayton v. State, 118 Idaho 59, 794 P.2d 648 (Ct. App. 1990).

**Rule 9.4. Alcohol-drug evaluation report.**

The alcohol-drug evaluation report received by the court pursuant to Section 18-8005(11), Idaho Code, shall remain confidential in the same manner and to the same extent as a presentence investigation report under the Idaho Criminal Rules; provided the defendant shall always be entitled to retain his copy of the report. The report of an individual alcohol-drug evaluation submitted to a sentencing court under Section 18-8005(11), Idaho Code, shall consist of the following components and be presented in a standardized format approved by the Idaho Supreme Court:

(a) **Face Sheet.** All alcohol-drug evaluation reports shall have a one (1) page typed summary face sheet attached to the report which shall be in the following form:

[Court and case title]

Case No.

Sentencing Date/Time:	Sentencing Judge:
Defendant:	SSN/DL#:
Aliases:	DOB:
	Sex: F M
	Marital Status:
Date of Evaluation:	Telephone:

List Prior Alcohol or Drug Related Arrests or charges:

List Results of Evidentiary Tests in this case:

Check Life Areas Affected:

Family \_\_\_\_\_

Social \_\_\_\_\_

Financial \_\_\_\_\_

Employment/Education\_\_\_\_\_

Health \_\_\_\_\_

Legal \_\_\_\_\_

---

**Evaluator's Concise Impressions and Recommendations for Treatment:**

---

DUI Evaluator's Name:

Address:

Phone:

(b) **Evaluation Report.** The report of the alcohol-drug evaluation shall be attached to the face sheet and shall contain the following information in the following order:

(1) Final disposition of any drug or alcohol related offenses or charges including any offenses or charges where drugs or alcohol were a factor.

(2) Any information of the defendant's blood alcohol content or refusals for any drug or alcohol related incidents.

(3) Any information of the defendant's driver license record.

(4) Previous alcohol or substance abuse education or treatment and whether the program was completed.

(5) Identification of primary substances of abuse or dependency to include listings of primary, secondary or other substances if appropriate and indications of defendant's history of I.V. drug use.

(6) Defendant's version of the current incident.

(7) Defendant's self assessment of substance use.

(8) Evaluator's description of the defendant's use of alcohol/drugs and the extent to which they have contributed to problems within the defendant's major life areas, including:

(I) Family

(II) Social

(III) Financial

(IV) Employment/Education

(V) Health

(VI) Legal

(9) A listing of the screening tools utilized in the evaluation together with the scores. The use of at least three (3) screening tools approved by the Department of Health and Welfare is mandatory and shall include:

A. A GAIN SS;

B. A criminogenic risk needs screening tool; and

C. Any other approved alcohol-drug screening tool.

The results and explanation of the screening tools administered by the evaluator must be included.

(10) Evaluator's impressions and recommendations for further assessment and/or appropriate ASAM level of care for treatment, including specific reasons for recommendations and the factors considered.

(11) Recommendations as to the most appropriate treatment program together with the estimated costs.

(12) Recommendations for suitable alternative treatment programs together with the estimated costs.

(13) Identification of any source used to verify any information provided in the evaluation.

(14) In the event an evaluator submits an evaluation that is not in compliance with this rule, the court may return the evaluation with instructions to prepare an evaluation in compliance with the rule at no additional cost to the defendant. If the evaluator fails to submit an evaluation in compliance with this rule after such an instruction, the court may decline any future evaluations from the evaluator. (Adopted March 20, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended January 25, 2013, effective July 1, 2013.)

### **Rule 10. Withheld judgments in the magistrates division — Conditions.**

(a) **Conditions considered in granting withheld judgments.** Before granting any withheld judgment pursuant to section 19-2601, Idaho Code, in the magistrates division, the court must consider:

- (1) All the facts and circumstances surrounding the offense with which the defendant is charged; and,
- (2) Whether the defendant is a first offender; and,
- (3) The previous actions and character of the defendant; and,
- (4) Whether the defendant might reasonably be expected to be rehabilitated; and,
- (5) Whether it reasonably appears that the defendant will abide by the terms of the probation; and,
- (6) The interests of society in being protected from possible future criminal conduct of the defendant; and,
- (7) The impact a record of a criminal conviction would have upon the defendant's future development and/or employment status.

(b) **Second and subsequent withheld judgments.** No second or any subsequent withheld judgment may be granted to the same defendant in the magistrates division unless the court in its discretion finds there to exist extraordinary circumstances, and the court in determining whether extraordinary circumstances exist, shall consider, in addition to the foregoing, the following factors:

- (1) Whether or not the defendant is before the court charged with the same or a related offense for which the defendant has received a prior withheld judgment; and,
- (2) Whether or not the defendant has received a prior withheld judgment in any court proceeding within five (5) years of the date on which the defendant appears before the court for sentencing; and,
- (3) Whether or not the defendant has ever been convicted of a felony offense.

(c) **Extraordinary circumstances for withheld judgments.** In making a determination that extraordinary circumstances exist, so as to allow the entry of a second or any subsequent withheld judgment for the same defendant in the magistrates division, the judge making this determination and awarding a second or subsequent withheld judgment shall make



specific findings as to what factors have been considered in reaching this decision.

(d) **Form of withheld judgment.** For any withheld judgment which is granted in the magistrates division, the court shall enter its order withholding judgment on the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF  
\_\_\_\_\_

MAGISTRATE DIVISION

State of Idaho,	)	Case (Docket) No. _____
	)	
Plaintiff,	)	ORDER WITHHOLDING
	)	JUDGMENT
vs.	)	
	)	
	)	_____
	)	For Traffic Offenses Only
	)	Ticket No. ____ Issued by
Defendant,	)	
	)	<input type="checkbox"/> State <input type="checkbox"/> County <input type="checkbox"/> City of
Social Security	)	_____
No. of Defendant	)	
	)	
Date of Birth of Defendant	)	

The defendant having been advised of his right to court appointed counsel, if indigent, and

☐ Defendant Waived:

- ☐ Right Against Self-Incrimination
- ☐ Right to Counsel
- ☐ Jury Trial
- ☐ Confront & Cross Examine Accuser
- ☐ All Defenses

☐ entered a plea of guilty to \_\_\_\_\_  
(Name of offense)

☐ been found guilty of \_\_\_\_\_  
(Name of offense)

- ☐ a violation of Idaho Code § \_\_\_\_\_
- ☐ a violation of Ordinance No. \_\_\_\_\_, of the  
City of \_\_\_\_\_,

IT IS HEREBY ORDERED that judgment be withheld for a period of \_\_\_\_\_ from the date hereof upon the following conditions (only the checked conditions are applicable).

☐ 1. Probation is granted to and accepted by the defendant subject to all its terms and conditions and with the understanding that the Court may at any time in a case of a violation of terms of the probation cause the probationer to be returned to the Court for entry of judgment and imposition of sentence as prescribed by law.

☐ 2. That the defendant shall notify the clerk of the court of any change of address during the period of probation.

☐ 3. That during said period of probation the defendant shall not violate any law or ordinance of the United States or any City, State, or County therein, wherein a fine or bond forfeiture of more than \$70.00 or a jail term could have been imposed as a penalty.

☐ 4. That during said period of probation the defendant will abstain from the consumption of alcoholic beverages and/or the use of narcotics or drugs in an unlawful manner.

☐ 5. That the defendant shall pay to the Clerk of this Court the following sums of money:

- a. Court costs, fees and charges in the sum of \_\_\_\_\_ dollars.
- b. \_\_\_\_\_ dollars for restitution to \_\_\_\_\_, the party injured by defendant's crime herein, for restitution to said party. Said sum shall be paid within \_\_\_\_\_ from this date.
- c. \_\_\_\_\_ dollars as reimbursement for public defender or appointed counsel services, pursuant to I.C. § 19-854(c).
- d. \_\_\_\_\_ dollars for expense incurred in this prosecution, to be distributed in the same manner as the payment of fines and forfeitures, pursuant to I.C. § 19-4705. Said sum shall be paid within \_\_\_\_\_ from this date.
- e. \_\_\_\_\_ dollars fine, to be distributed pursuant to I.C. § 39-i 6312.

☐ 6. That defendant shall attend and complete a

- ☐ driver education program
- ☐ alcohol education program
- ☐ alcohol treatment program

as follows:

\_\_\_\_\_

☐ 7. That defendant's driving privileges are suspended for \_\_\_\_\_ (days) (months).

☐ 8. That defendant shall not drive a motor vehicle except \_\_\_\_\_

☐ 9. That defendant agrees, as a condition of this withheld judgment, to be incarcerated as follows: \_\_\_\_\_

☐ 10. OTHER SPECIAL CONDITIONS: \_\_\_\_\_

IT IS FURTHER ORDERED that this probation will be terminated on \_\_\_\_\_, 20\_\_\_\_, unless otherwise ordered by the court.

IT IS FURTHER ORDERED that upon expiration of the probation period as hereinabove prescribed, the defendant shall be discharged from proba-

tion and the charges against him dismissed, upon a proper showing of compliance with this order, and in accordance with I.C. § 19-2604.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Judge

ACCEPTANCE

THIS IS TO CERTIFY THAT I have made the court aware of any prior withheld judgments or convictions which I have had in the past, and that I am aware that if I have not told the court about any prior withheld judgments or convictions, that this judgment can be vacated by the court and another judgment can be imposed.

THIS IS ALSO TO CERTIFY THAT I understand that I have the right to refuse the above conditions of probation and that I have the right to be sentenced by this court.

THIS IS ALSO TO CERTIFY THAT I have read and fully understand and accept all conditions, regulations and restrictions under which judgment is withheld and under which I am being granted probation, I will abide by and conform to them strictly, and fully understand that my failure to do so may result in the revocation of my probation and imposition of sentence upon me. I am also aware that I can appear before the court at the termination of my probationary period if I have lived up to all the conditions to ask to have the judge dismiss the charges against me.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Probationer

WITNESS:

\_\_\_\_\_

WHITE COPY — Retain in  
Court case file  
YELLOW COPY — Mail to:  
Information Systems  
Supreme Court Building  
451 W. State Street  
Boise, Idaho 83720  
(208)334-2850  
PINK COPY — May be given to  
defendant

(Adopted December 27, 1979, effective July 1, 1980; amended April 2, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983;



amended June 3, 1988, effective July 1, 1988; amended March 23, 1990, effective July 1, 1990; amended April 19, 1995, effective July 1, 1995.)

### JUDICIAL DECISIONS

#### ANALYSIS

##### Factors Considered.

No Equation to a Right.

No Mandate of Withheld Judgment.

No Recitation of Each Factor.

Timeliness.

##### Factors Considered.

Impact on employment is one factor to be considered by any court faced with reasonable options of outright probation, probation with some incarceration and imprisonment; it is not necessarily a "critical" factor, as its importance can vary from case to case depending upon other factors. *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986).

##### No Equation to a Right.

This rule expresses criteria for the sentencing court to consider before granting any withheld judgment pursuant to § 19-2601; the presence of these factors in any given case does not equate to a right to receive this sentencing alternative. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

##### No Mandate of Withheld Judgment.

This rule and § 19-2601 do not mandate, encourage or prioritize the granting of with-

held judgments. Rather, if a sentencing court in its discretion concludes a withheld judgment is appropriate, the court in the magistrate division must first consider the factors outlined in this rule. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

##### No Recitation of Each Factor.

A judge does not have to systematically recite each factor in this rule before deciding on a motion for withheld judgment; the record is sufficient if it shows the judge is aware of the factors he is required to consider. Indeed, he may simply refer to the factors or to the appropriate rule. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

##### Timeliness.

This rule does not provide a means by which a defendant may move for a withheld judgment almost six years after a judgment of conviction was entered, and the magistrate lacked authority to grant defendant's motion; although the district court incorrectly determined the magistrate possessed the authority to entertain defendant's motion to amend to a withheld judgment, the district court's ultimate order denying defendant's motion was affirmed. *State Ex Rel. City of Sandpoint v. Whitt*, 146 Idaho 292, 192 P.3d 1116 (2008).

### OPINIONS OF ATTORNEY GENERAL

Since this rule requires the use of the form and the form makes no provision for distribution of moneys on any basis other than those contained in the form, moneys paid by any defendant into court as part of a withheld judgment must be paid over to the county auditor for distribution as provided for in this rule. OAG 83-1.

Subsection (d) of I.C.R. 33 and subsection (d) of this rule require that any moneys paid as a condition of a withheld judgment be distributed in the manner provided for in § 19-4705. OAG 83-1.

### Rule 11. Failure to appear.

(a) **Failure to appear on citation.** In the event the defendant fails to appear at the time promised in the citation, the court may take one or more of the following actions:

(1) **Notice to appear or pay fine.** Mail a notice to the defendant at the address stated in the citation requesting the defendant to appear before the court as promised on the uniform traffic citation or to pay the fine to the court.

(2) **A warrant of arrest.** Issue a warrant of arrest on the basis of the citation if the defendant fails to appear or pay the fine within the time set

in the citation if probable cause has been shown as required by Rules 4 and 5 of the Idaho Criminal Rules.

(3) **Additional citation or complaint under oath.** Accept and file a citation or a complaint made under oath for the offense of failure to appear on a citation as provided by statute and these rules and issue a summons to appear or issue a warrant of arrest upon the showing of probable cause as required in subsection (a)(2) above.

(b) **Failure to appear after first appearance.** If a defendant fails to appear at the time fixed by the court, or at the time fixed by a continuance or trial date notice issued by the clerk, the court may order any bond forfeited and may issue a bench warrant for the arrest of the defendant. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983.)

**Rule 12. Appointment of persons to receive filings, fees, fines, forfeitures and bail moneys.**

(a) **Appointment.** The administrative district judge may appoint such person or persons to administer oaths, accept pleas to misdemeanor citations and complaints, receive bail, fines, forfeitures, and court costs, execute deferred payment agreements within guidelines set by the court, and perform all duties assigned to the clerk under these rules. All persons appointed under this rule to accept bail bonds shall be deemed acting as gratuitous bailees. Unless such persons are covered by a public employee bond, they shall be required to execute official surety bonds in the sum of not less than \$1,000 issued by a surety company authorized to do business in Idaho, or be executed by two (2) sufficient sureties approved by the administrative district judge, insuring that such person will faithfully perform the duties of the office and appointment and at all times account for and pay over all moneys in his hands as appointive clerk.

(b) **Appointment of law enforcement officer.** Duly appointed law enforcement officers may be appointed by the administrative district judge to receive fines within the limits of Rule 14 and cash deposits as bail in all cases provided for in Rule 13, provided they execute an official surety bond in the sum of \$1,000, or such officers are covered by an existing blanket fidelity bond and such bond coverage includes any moneys received pursuant to this rule. The cash deposit shall be made at the office of the law enforcement agency or at the appropriate court, or at such other place, which may be the place of issuance of a citation, as directed by the administrative district judge in an appropriate case occasioned by extreme circumstances or remoteness. An adequate record shall be kept of the deposit paid, which shall be transmitted in kind or check to the clerk's office within 24 hours after receipt. The record shall consist of the amount of deposits paid, whether paid in cash or otherwise, the offense involved, person charged, the person paying the said deposit and the date, hour and minute paid. A triplicate receipt shall be made; one (1) copy shall be given to the person paying the deposit, one (1) copy shall be transmitted to the clerk's

office, and one (1) copy shall remain in the issuing agency's office. (Adopted December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended January 24, 1989, effective January 24, 1989.)

JUDICIAL DECISIONS

ANALYSIS

Authority of Officer.  
Security Bond.

Authority of Officer.

The faithful performance blanket bond coverage found in the state's insurance policy covered the officer's duty to administer oaths under I.M.C.R. 12, where administering the oath for the affidavit required by I.M.C.R. 9.2 was reasonably necessary to accomplish the purpose of law enforcement, and administering an oath was not outside the scope of those duties already enumerated in § 19-4804. State v. Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

Security Bond.

A surety company can be held liable under a general bond, for a duty imposed upon an officer subsequent to the issuance of the bond, even though the duty was imposed by this rule rather than a statute. State v. Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

If an officer's duty includes administering oaths then a faithful performance blanket bond will also cover this duty, and execution of a specific surety bond by each person appointed to administer oaths is not required. State v. Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App.).

Rule 13. Bail schedules.

(a) **Amount of bail.** The amount of bail for misdemeanor traffic offenses and other criminal offenses shall be as set forth herein. Such bail schedules shall not govern when a person charged appears before a judge or magistrate, or the defendant's case is reviewed by a judge or magistrate, in which case such bail schedules are advisory only and bail may be raised, lowered or eliminated at the magistrate's discretion based upon the circumstances of that particular case. Any judge may also designate a bond schedule for offenses not listed below.

(b) **Bail bond schedule.** Except as provided above, the bail bond required for specific alleged offenses pending arraignment or trial shall be as follows:

Idaho Code	Offense	Bail Bond
(1) MOTOR VEHICLE OFFENSES:		
49-218	Operating motor vehicle as emergency vehicle	\$ 201.00
49-221	Failure to remove traffic sight obstruction	271.00
49-227	Driving without owner's consent	275.00
49-229	Injuring or destroying vehicle	275.00
49-230	Tampering with vehicle	271.00
49-235	Operating motor vehicle after notice of unsafe condition	275.00
49-1301(1)	Failure to remain at accident scene	300.00



<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
49-1302	Failure to give information and aid at accident	300.00
49-1303	Failure to notify owner of unattended vehicle at accident	300.00
49-1304	Failure to give notice to owner of property adjacent to highways at accident	259.00
49-1305	Failure to give immediate notice of \$1500 accident	300.00
49-1401(1)	Reckless driving	300.00
49-1401(3)	Inattentive driving	275.00
18-8004	Driving under the influence (First Offense)	
	Resident	500.00
	Nonresident	2,000.00
18-8004	Driving under the influence (Second Offense)	
	Resident (with condition Defendant must appear in court for arraignment within 48 hours, excluding weekends and holidays)	1,000.00
	Nonresident (with condition Defendant must appear in court for arraignment within 48 hours, excluding weekends and holidays)	3,000.00
18-8004C	Driving Under the Influence (Enhanced Penalty)	
	Resident (with condition Defendant must appear in court for arraignment within 48 hours, excluding weekends and holidays)	1,000.00

Idaho Code	Offense	Bail Bond
	Nonresident (with condition Defendant must appear in court for arraignment within 48 hours, excluding weekends and holidays)	3,000.00
49-1403	Knowingly permit operation of motor vehicle contrary to law	176.00
49-1404	Fleeing or attempting to elude police officer	300.00
49-1415	Illegal cancellation or soliciting cancellation of traffic citation	221.00
49-1419	Failure to obey traffic officer	176.00
49-1421	Driving on or across median of divided highway	166.00
49-1422	Passing stopped school bus	275.00
49-1424	Racing on public highways	271.00
18-3906	Littering highway from vehicle	186.00
(2) LICENSES, REGISTRATION AND INSURANCE OFFENSES:		
(A) License Offenses		
49-301	No license or invalid license	221.00
49-316	Failure to carry license (dismissed if license shown)	166.00
49-331(1)	Displaying mutilated or fictitious license	201.00
49-331(2)	Lending or permitting use of license by another	221.00
49-331(3)	Displaying a license of another as one's own	271.00
49-331(4)	Failure to surrender license when revoked or suspended	271.00
49-331(5)	Use of false or fictitious name in application for license, or concealing material facts	500.00
49-331(6)	Permitting any unlawful use of License	271.00
49-432	Operating a vehicle without a permit	
	Single Vehicle	275.00
	Combination of vehicles	377.00

<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
49-432(2)(a)	Operating vehicle without 120 hour permit to increase gross weight	327.00
49-432(2)(b)	Operating vehicle without 30 day permit to increase gross weight	577.00
49-432(3)	Exceeding the number of temporary permits allowed in a calendar year	300.00
49-1627(2)	Unlawful use of dealer plates	271.00
18-8001	Driving without privileges (First offense)	
	Idaho resident	500.00
	Nonresident	2,000.00
18-8001	Driving without privileges (Second offense)	
	Idaho resident	1,000.00
	Nonresident	3,000.00
18-8001	Driving without privileges (Third offense)	
	Idaho resident	2,000.00
	Nonresident	4,000.00
(B) Registration and Title Offenses		
49-519(1)	Operating vehicle without certificate of title	271.00
49-519(2)	Operating vehicle for which certificate of title is canceled	271.00
(C) Insurance Offenses		
49-1210	Registration of vehicle without insurance certificate	271.00
49-1229	Failure of owner of vehicle to maintain liability insurance (Second or subsequent offense within 5 year period only)	275.00
49-1232	Failure to carry proof of liability insurance in vehicle (Second or subsequent offense within 5 year period only)	275.00
49-1428	Operating a motor vehicle without liability insurance (Second or subsequent offense within 5 year period only)	275.00
49-1429	False or altered insurance certificate	500.00



Idaho Code	Offense	Bail Bond
49-1430	Forged insurance certificate	500.00
(3) SIZE, WEIGHT	AND D.L.E. OFFENSES:	
40-511(1)	Failure to stop at ports of entry or checking stations	271.00
49-1001(8)	Violation of travel authorization	271.00
49-1001, and	Exceeding highway load limit	152.50
49-1002, and	plus pounds overweight	
49-1004, and	(Effective July 1, 1995,	
49-1005 and	Violations of 49-1001, 49-	
49-438	1002, 49-1004 and 49-1005 and 49-438 with an overweight between 1 and 4000 pounds is an infraction) Penalties are increased for multiple misdemeanor violations, see I.C. 49-1-13(4)	

Pounds overweight:	Bail Bond
4,001 — 4,119	\$ 27.00
4,120 — 4,219	41.00
4,220 — 4,319	54.00
4,320 — 4,419	67.00
4,420 — 4,519	81.00
4,520 — 4,619	94.00
4,620 — 4,719	108.00
4,720 — 4,819	121.00
4,820 — 4,919	134.00
4,920 — 5,019	148.00
5,020 — 5,119	161.00
5,120 — 5,219	175.00
5,220 — 5,319	188.00
5,320 — 5,419	202.00
5,420 — 5,519	215.00
5,520 — 5,619	228.00
5,620 — 5,719	242.00
5,720 — 5,819	255.00
5,820 — 5,919	269.00
5,920 — 6,019	282.00
6,020 — 6,119	295.00
6,120 — 6,219	309.00
6,220 — 6,319	322.00
6,320 — 6,419	336.00
6,420 — 6,519	349.00

## Pounds overweight:

6,520 — 6,619
6,620 — 6,719
6,720 — 6,819
6,820 — 6,919
6,920 — 7,019
7,020 — 7,119
7,120 — 7,219
7,220 — 7,319
7,320 — 7,419
7,420 — 7,519
7,520 — 7,619
7,620 — 7,719
7,720 — 7,819
7,820 — 7,919
7,920 — 8,019
8,020 — 8,119
8,120 — 8,219
8,220 — 8,319
8,320 — 8,419
8,420 — 8,519
8,520 — 8,619
8,620 — 8,719
8,720 — 8,819
8,820 — 8,919
8,920 — 9,019
9,020 — 9,119
9,120 — 9,219
9,220 — 9,319
9,320 — 9,419
9,420 — 9,519
9,520 — 9,619
9,620 — 9,719
9,720 — 9,819
9,820 — 9,919
9,920 — 10,019
10,020 — 10,119
10,120 — 10,219
10,220 — 10,319
10,320 — 10,419
10,420 — 10,519
10,520 — 10,619
10,620 — 10,719
10,720 — 10,819
10,820 — 10,919
10,920 — 11,019

## Bail Bond

362.00
376.00
389.00
403.00
416.00
429.00
443.00
456.00
470.00
483.00
497.00
510.00
523.00
537.00
550.00
564.00
577.00
590.00
604.00
617.00
631.00
644.00
657.00
671.00
684.00
698.00
711.00
725.00
738.00
751.00
765.00
778.00
792.00
805.00
818.00
832.00
845.00
859.00
872.00
885.00
899.00
912.00
926.00
939.00
952.00

## Pounds overweight:

11,020 — 11,119
11,120 — 11,219
11,220 — 11,319
11,320 — 11,419
11,420 — 11,519
11,520 — 11,619
11,620 — 11,719
11,720 — 11,819
11,820 — 11,919
11,920 — 12,019
12,020 — 12,119
12,120 — 12,219
12,220 — 12,319
12,320 — 12,419
12,420 — 12,519
12,520 — 12,619
12,620 — 12,719
12,720 — 12,819
12,820 — 12,919
12,920 — 13,019
13,020 — 13,119
13,120 — 13,219
13,220 — 13,319
13,320 — 13,419
13,420 — 13,519
13,520 — 13,619
13,620 — 13,719
13,720 — 13,819
13,820 — 13,919
13,920 — 14,019
14,020 — 14,119
14,120 — 14,219
14,220 — 14,319
14,320 — 14,419
14,420 — 14,519
14,520 — 14,619
14,620 — 14,719
14,720 — 14,819
14,820 — 14,919
14,920 — 15,019
15,020 — 15,119
15,120 — 15,219
15,220 — 15,319
15,320 — 15,419
15,420 — 15,519

## Bail Bond

966.00
979.00
993.00
1,006.00
1,020.00
1,033.00
1,046.00
1,060.00
1,073.00
1,087.00
1,100.00
1,113.00
1,127.00
1,140.00
1,154.00
1,167.00
1,180.00
1,194.00
1,207.00
1,221.00
1,234.00
1,247.00
1,261.00
1,274.00
1,288.00
1,301.00
1,315.00
1,328.00
1,341.00
1,355.00
1,368.00
1,382.00
1,395.00
1,408.00
1,422.00
1,435.00
1,449.00
1,462.00
1,475.00
1,489.00
1,504.00
1,524.00
1,544.00
1,564.00
1,584.00



## Pounds overweight:

15,520 — 15,619	1,604.00
15,620 — 15,719	1,624.00
15,720 — 15,819	1,644.00
15,820 — 15,919	1,664.00
15,920 — 16,019	1,684.00
16,020 — 16,119	1,704.00
16,120 — 16,219	1,724.00
16,220 — 16,319	1,744.00
16,320 — 16,419	1,764.00
16,420 — 16,519	1,784.00
16,520 — 16,619	1,804.00
16,620 — 16,719	1,824.00
16,720 — 16,819	1,844.00
16,820 — 16,919	1,864.00
16,920 — 17,019	1,884.00
17,020 — 17,119	1,904.00
17,120 — 17,219	1,924.00
17,220 — 17,319	1,944.00
17,320 — 17,419	1,964.00
17,420 — 17,519	1,984.00
17,520 — 17,619	2,004.00
17,620 — 17,719	2,024.00
17,720 — 17,819	2,044.00
17,820 — 17,919	2,064.00
17,920 — 18,019	2,084.00
18,020 — 18,119	2,104.00
18,120 — 18,219	2,124.00
18,220 — 18,319	2,144.00
18,320 — 18,419	2,164.00
18,420 — 18,519	2,184.00
18,520 — 18,619	2,204.00
18,620 — 18,719	2,224.00
18,720 — 18,819	2,244.00
18,820 — 18,919	2,264.00
18,920 — 19,019	2,284.00
19,020 — 19,119	2,304.00
19,120 — 19,219	2,324.00
19,220 — 19,319	2,344.00
19,320 — 19,419	2,364.00
19,420 — 19,519	2,384.00
19,520 — 19,619	2,404.00
19,620 — 19,719	2,424.00
19,720 — 19,819	2,444.00
19,820 — 19,919	2,464.00
19,920 — 20,019	2,484.00

Pounds overweight:

20,020 — 20,119	Bail Bond 2,506.00
20,120 — 20,219	2,536.00
20,220 — 20,319	2,566.00
20,320 — 20,419	2,596.00
20,420 — 20,519	2,626.00
20,520 — 20,619	2,656.00
20,620 — 20,719	2,686.00
20,720 — 20,819	2,716.00
20,820 — 20,919	2,746.00
20,920 — 21,019	2,776.00
21,020 — 21,119	2,806.00
21,120 — 21,219	2,836.00
21,220 — 21,319	2,866.00
21,320 — 21,419	2,896.00
21,420 — 21,519	2,926.00
21,520 — 21,619	2,956.00
21,620 — 21,719	2,986.00
21,720 — 21,819	3,016.00
21,820 — 21,919	3,046.00
21,920 — 22,019	3,076.00
22,020 — 22,119	3,106.00
22,120 — 22,219	3,136.00
22,220 — 22,319	3,166.00
22,320 — 22,419	3,196.00
22,420 — 22,519	3,226.00
22,520 — 22,619	3,256.00
22,620 — 22,719	3,286.00
22,720 — 22,819	3,316.00
22,820 — 22,919	3,346.00
22,920 — 23,019	3,376.00
23,020 — 23,119	3,406.00
23,120 — 23,219	3,436.00
23,220 — 23,319	3,466.00
23,320 — 23,419	3,496.00
23,420 — 23,519	3,526.00
23,520 — 23,619	3,556.00
23,620 — 23,719	3,586.00
23,720 — 23,819	3,616.00
23,820 — 23,919	3,646.00
23,920 — 24,019	3,676.00
24,020 — 24,119	3,706.00
24,120 — 24,219	3,736.00
24,220 — 24,319	3,766.00
24,320 — 24,419	3,796.00
24,420 — 24,519	3,826.00

## Pounds overweight:

24,520 — 24,619

24,620 — 24,719

24,720 — 24,819

24,820 — 24,919

## Bail Bond

3,856.00

3,886.00

3,916.00

3,946.00

Overweight amounts beyond those listed shall be calculated at \$2,500 plus \$.30 per pound for each pound over 20,000 pounds overweight rounded down to the nearest dollar.

**Idaho Code****Offense****Bail Bond**

49-1004

Failure to obtain overweight or  
oversize permit

221.00

49-1010(1)

Over width violation

271.00

49-1010(2)

Over height violation

271.00

49-1010(3)

Over length violation

271.00

49-1012

Moving farm equipment after  
dark without lights or flagman  
requirements

271.00

49-1427

Transporting explosives without  
required notices and equipment

416.00

49-2203

Failure to obtain endorsement for  
transporting hazardous material

216.00

67-2901A

Specific violations of Dept. of Law  
Enforcement rules:Rule 18 — Any dangerous &  
hazardous material violation

416.00

Rule 19 — Safety violations

Serious or hazardous material  
safety violations as noted on the  
citation

416.00

Rule 19 — Disqualified driver of  
commercial vehicle

416.00

All other violations of Dept. of  
Law Enforcement rules:

196.00

63-2441

Special Fuel Permit Violation

377.00

## (4) WATER AND WATERCRAFT OFFENSES:

67-7016

Grossly negligent operation of  
watercraft

300.00

67-7017

Negligent operation of watercraft

271.00

67-7025

Interfering with other watercraft

211.00

67-7026

Operating watercraft in restricted  
area

271.00

67-7027

Failure to report collisions,  
accidents and casualties

300.00

67-7033(3)

Operating watercraft while  
suspended

Idaho resident

500.00



<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
	Nonresident	2,000.00
67-7034	Operating watercraft under the influence	
	Idaho resident	500.00
	Nonresident	2,000.00
(5) FISH AND GAME OFFENSES: The amount of bail for any alleged fish or game offense shall be the sum of \$186.00, except for certain specific violations which shall have bail in the following amounts:		
(A) Big Game Violations		
36-401	Hunting big game without a valid license	
	Idaho Resident	200.00
	Nonresident	500.00
36-405(c)(2)(B)	Transfer/Use of big game animal tag belonging to another person	
	Idaho resident	200.00
	Nonresident	500.00
36-409(c)	Hunt big game animal without appropriate tag, permit	
	Deer, bear, mountain lion, antelope	
	Idaho resident	200.00
	Nonresident	500.00
	Elk	
	Idaho resident	200.00
	Nonresident	500.00
	Moose, sheep, goat	
	Idaho resident	500.00
	Nonresident	1,500.00
36-409(d)	Failure to validate or attach own tag to big game animal:	
	Deer, antelope, bear and mountain lion	
	Idaho resident	200.00
	Nonresident	250.00
	Goat, elk, sheep, moose and caribou	
	Idaho resident	250.00
	Nonresident	500.00
36-502 and 36-1402(e) and 36-1404(a)	Possession of unlawfully taken big game (per animal)	
	Deer, antelope, bear and mountain lion	
	Idaho resident	400.00

<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
	Nonresident	1,000.00
	Trophy animals (when flagrant violation applies)	2,000.00
	Elk	
	Idaho resident	800.00
	Nonresident	1,500.00
	Trophy animals (when flagrant violation applies)	5,000.00
	Goat, sheep, moose and caribou	
	Idaho resident	1,500.00
	Nonresident	2,000.00
	Trophy animals (when flagrant violation applies)	10,000.00
36-502	Possess or transport big game animal improperly tagged	
	Deer, antelope, black bear and mountain lion	200.00
	Goat, elk, sheep, moose and caribou	400.00
36-1101	Hunt big game animals during closed season (per animal)	
	Deer, antelope, black bear and mountain lion	
	Idaho resident	200.00
	Nonresident	500.00
	Elk	
	Idaho resident	300.00
	Nonresident	1,000.00
	Goat, sheep, moose and caribou	
	Idaho resident	500.00
	Nonresident	1,500.00
36-1101, 36-1402(e) and 36-1404(a)	Kill big game animals during closed season (per animal)	
	Deer, antelope, black bear and mountain lion	
	Idaho resident	400.00
	Nonresident	1,000.00
	Trophy animals (when flagrant violation applies)	2,000.00
	Elk	
	Idaho resident	800.00
	Nonresident	1,500.00

Idaho Code	Offense	Bail Bond
	Trophy animals (when flagrant violation applies)	5,000.00
	Goat, sheep, moose and caribou	
	Idaho resident	1,500.00
	Nonresident	2,000.00
	Trophy animals (when flagrant violation applies)	10,000.00
36-1101 and 36-1404(a)	Exceed big game bag limit (by one (1) animal (per animal)	
	Deer, antelope, bear and mountain lion	
	Idaho resident	400.00
	Nonresident	1,000.00
	Elk	
	Idaho resident	800.00
	Nonresident	1,500.00
	Goat, sheep, moose and caribou	
	Idaho resident	1,500.00
	Nonresident	2,000.00
36-1101, 36-1402(e) and 36-1404(a)	Exceed big game bag limit by two (2) or more animals-	
	Flagrant violation (per animal)	1,500.00
	Trophy Animals	
	Deer, antelope, bear, and mountain lion	2,000.00
	Elk	5,000.00
	Goat, sheep, moose, caribou	10,000.00
36-1101, 36-1402(e) and 36-1404(a)	Take big game animal with modern firearm during archery/muzzle loader-only hunt - Flagrant violation (per animal(s))	1,500.00
	Trophy Animals	
	Deer, antelope	2,000.00
	Elk	5,000.00
	Goat, sheep, moose, caribou	10,000.00
36-1202	Waste of big game animal (per animal)	
	Idaho resident	500.00
	Nonresident	1,500.00



<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
36-1202, 36-1402(e) and 36-1404(a)	Waste of big game animal	
	Flagrant Violations - Trophy Animals	
	Deer, antelope	2,000.00
	Elk	5,000.00
	Goat, sheep, moose, caribou	10,000.00
36-1202	Waste of upland game animal	
	Idaho Resident	190.00
	Nonresident	250.00
(B) Upland and Migratory Game Bird Violations		
36-401	Hunting game birds without a valid license	
	Idaho resident	200.00
	Nonresident	300.00
36-502 and 36-1404(a)	Possess unlawfully taken game birds	
	Turkey, whistling swan and trumpeter swan	
	Idaho resident	200.00 + 25.00/bird
	Nonresident	250.00 + 25.00/bird
	All other species	165.00 + 25.00/bird
36-1101	Hunting game birds during closed season	
	Idaho resident	200.00
	Nonresident	500.00
36-1102(b)1 and 36-1902	Hunt, take or possess migratory birds contrary to Federal regulations	
	Eagles and swans	300.00/bird
	Hawks, owls and falcons	200.00/bird
	Geese and ducks	165.00 + 25.00/bird
36-1202	Waste of game bird	
	Idaho resident	165.00 + 25.00/bird
	Nonresident	250.00 + 25.00/bird
(C) Fishing Violations		
36-401	Fishing without a valid license	
	Salmon, steelhead and sturgeon	200.00
	All other species	186.00

Idaho Code	Offense	Bail Bond
36-502 and 36-1404	Possess unlawfully taken fish	
	Salmon, steelhead and bull trout	
	Idaho resident	200.00/fish
	Nonresident	300.00/fish
	Sturgeon	
	Idaho resident	500.00/fish
	Nonresident	1,000.00/fish
	All other species	165.00 + 25.00/fish
36-901 and 36-1202 and 36-1404(a)	Exceed bag or possession limit for fish and waste of game fish	
	Salmon, steelhead and bull trout	
	Idaho resident	200.00/fish
	Nonresident	300.00/fish
	Sturgeon	
	Idaho resident	500.00/fish
	Nonresident	1,000.00/fish
	All other species	165.00 + 25.00/fish
36-901	Fishing during closed season	
	Salmon, steelhead, sturgeon and bull trout	300.00
	All other species	200.00
36-902(a)	Allow or cause to pass into the waterway deleterious drugs, toxicants, chemicals, poisons, or electrical current to affect fish	500.00
36-902(c)	Use of explosives, poisons, nets, traps, spears or seines to take fish	500.00
(D) Miscellaneous Violations		
36-405(a)(3)(A)	Willfully make false statement on application for the purpose of obtaining wrong class license, tag or permit (per illegal document)	500.00
36-405(c)(1)	Purchase or possess wrong class license, tag or permit	500.00

<b>Idaho Code</b>	<b>Offense</b>	<b>Bail Bond</b>
36-501 and 36-1401(b)	Unlawful purchase or sale of wildlife/parts (per animal)	1,000.00
36-902(a)	Deposit destructive substances into waters	500.00
36-1101(b)(6)	Hunting with artificial light	500.00
36-1402(e)1 and 36-1404(a)	Take/kill big game animal with aid of artificial light (per animal)	
	Flagrant violation	1,500.00
	Trophy animals	
	Deer, antelope	2,000.00
	Elk	5,000.00
	Goat, sheep, moose, caribou	10,000.00
36-1402(d)(e)	Hunt, fish or trap or purchase a license while such privileges are revoked	
	Idaho resident	500.00
	Nonresident	1,000.00
36-1603	Hunting in violation of no trespass signs	200.00
18-3312	Injuring another by careless handling of and discharge of firearms	300.00
<b>(6) OUTFITTER AND GUIDE OFFENSES:</b>		
36-2104	Outfitting without a license	
	Idaho resident	200.00
	Nonresident	500.00
36-2104	Guiding without a license	
	Idaho resident	200.00
	Nonresident	500.00
36-2113(a)(8)	Willfully operating as an outfitter in any area or for any activity for which he is not licensed	
	Idaho resident	200.00
	Nonresident	500.00
36-2113(a)(9)	Employment of an unlicensed guide by an outfitter	
	Idaho resident	200.00
	Nonresident	500.00
<b>(7) OTHER MISDEMEANOR OFFENSES:</b>		
18-705	Resisting or obstructing an officer	300.00
18-6409	Disturbing the peace	221.00

Idaho Code	Offense	Bail Bond
18-6410	Assemble to disturb peace	221.00
23-615	Sale of liquor to underage person, etc.	275.00
23-603	Furnishing alcohol to a minor	275.00
25-221	Bringing in livestock without a health certificate	
	First animal in violation	239.00
	Each additional animal in violation	75.00
		(maximum of \$500.00)
25-214A	Failing to stop at port of entry or checking station while transporting livestock.	
	First animal in violation	239.00
	Each additional animal in violation	75.00
		(maximum of \$500.00)
18-3908	Flooding the highway	166.00
18-7906	Stalking	No bond until court appearance
18-918	Domestic assault or battery.	No bond until court appearance
39-6312	Violation of protection order in domestic violence	No bond until court appearance
18-920	Violation of a no contact order	No bond until court appearance
67-7114	Operating snowmobile or all- terrain vehicle while under the influence	
	Idaho Resident	500.00
	Nonresident	2,000.00

(c) **Method of posting bond.** The bail bond required above under subsection (b) of this rule, or any other bail bond set by a judge, may be posted, and a receipt given therefor indicating thereon the time and place for appearance by the defendant, in any of the following manners:

(1) **Cash bail bond.** By depositing an amount in cash equal to the bail bond.

(2) **Checks and money orders.** By depositing a cashier's check, money order, or a personal check payable to the clerk of the court under such procedures as shall be established by the administrative district judge or where acceptance of the personal check has been approved by a magistrate or district judge.



(3) **Surety bail bond.** By depositing, in lieu of cash, a bond or bond certificate which guarantees payment of the amount of the bail bond in the event the person charged fails to appear when required by the court. A fidelity, surety, guaranty, title or trust company authorized to do business in the state of Idaho and authorized to become and be accepted as sole surety on undertakings and bonds may execute the written undertakings provided for in these rules, which may be accepted by the person receiving the bond without prior approval by a judge unless otherwise ordered by the administrative judge of the judicial district.

(4) **Property bail bond.** By depositing a property bail bond of property owners for the amount of bail, as provided by law. (This method may be used only if a magistrate approves and accepts the bond.)

(d) **Bail for violation of municipal or county ordinances.** Bail for the above described offenses defined by municipal or county ordinances which are similar to those described in this rule shall be in the same amounts as provided above. (Adopted April 18, 1983, effective July 1, 1983; amended July 9, 1984, effective September 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 18, 1987, effective July 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 12, 1988, effective July 1, 1988; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1991; amended April 15, 1991, effective July 1, 1991; amended September 16, 1991, effective January 1, 1992; amended March 26, 1992, effective July 1, 1992; amended February 10, 1993, effective July 1, 1993; amended April 21, 1993, effective July 1, 1993; amended March 30, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended April 3, 1996, effective July 1, 1996; amended February 26, 1997, effective July 1, 1997; amended April 1, 1997, effective July 1, 1997; amended March 18, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended December 30, 1998, effective January 1, 1999; amended June 7, 1999, effective July 1, 1999; amended June 7, 2000, effective July 1, 2000; amended April 13, 2001, effective July 1, 2001; amended March 5, 2002, effective July 1, 2002; amended April 22, 2004, effective July 1, 2004; amended July 19, 2005, effective September 1, 2005; amended April 26, 2007, effective July 1, 2007; amended December 1, 2008, effective February 1, 2009; amended September 4, 2009, effective October 1, 2009; amended April 2, 2010, effective April 15, 2010; amended March 18, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012; amended June 19, 2012, effective July 1, 2012; amended and effective August 6, 2012.)

#### STATUTORY NOTES

**Compiler's Notes.** Former Rule 13 (Adopted December 27, 1979, effective July 1, 1980; amended June 2, 1980, effective July 1,

1980; amended October 1, 1980, effective November 1, 1980; amended April 2, 1981, effective July 1, 1981; amended March 24, 1982,

effective July 1, 1982) was rescinded by order of the Supreme Court of April 18, 1983, effective July 1, 1983.

### JUDICIAL DECISIONS

#### **Sufficiency of Uniform Citation.**

Where defendant was charged pursuant to § 18-705, the officer's inscription of the date, time, the words "resisting, obstructing and delaying an officer" and the number of the applicable code section on a preprinted Uniform Citation Form was sufficient to charge

an offense and defendant could have utilized subsection (d) of this rule to demand a sworn complaint had he been in doubt as to the nature of the offense charged. *State v. Cahoon*, 116 Idaho 399, 775 P.2d 1241 (1989).

**Cited in:** *Giles v. Ackerman*, 559 F. Supp. 226 (D. Idaho 1983).

#### **Rule 14. Disposition of citations by written plea of guilty — Limitations — Deferred payment agreements.**

(a) **Written Plea of Guilty.** Subject to the limitations of subsection (b) of this rule, any person charged with a misdemeanor by a uniform citation or complaint may sign a written plea of guilty on the citation and pay the fine and court costs. The amount of the fine and court costs to be assessed for an offense under a written plea of guilty shall be the bail bond amount provided in Rule 13. Upon the entry of a written plea of guilty under this rule, the clerk shall enter a judgment of conviction and shall collect the payment of the fine and court costs or enter into a deferred payment agreement with the defendant as provided in Rule 8. If a defendant appears before a judge or magistrate, or if a judge or magistrate reviews the file of a defendant and finds that summary disposition under this rule is not appropriate, in either event the summary disposition under this Rule 14(a) shall not apply and the Court shall make disposition of the case.

(b) **Limitation on offenses for written plea of guilty.** A written plea of guilty can be accepted under subsection (a) of this rule only if the required bail bond under Rule 13 does not exceed:

- (1) \$271.00 for a motor vehicle offense.
- (2) \$577.00 for offenses under I.C. Sections 49-432, 49-432(2)(a), 49-432(2)(b) and 63-2441.
- (3) \$4,098.50 for offenses under I.C. Sections 49-1001, 49-1002, 49-1004 and 49-1005, \$416.00 for violations of I.C. Sections 49-1427, and Rules under I.C. Section 67-2901A and \$271.00 for the other offenses listed under Rule 13(b)(3).
- (4) \$186.00 for any fish or game offense, except those where the citation indicates the offense requires suspension of a license or payment of a civil penalty.
- (5) \$271.00 for any other offense. (Adopted April 18, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 12, 1988, effective July 1, 1988; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective March 23, 1990; amended March 20, 1991, effective July 1, 1991; amended April 15, 1991, effective July 1, 1991; amended October 11, 1991, effective

January 1, 1992; amended March 26, 1992, effective July 1, 1992; amended February 10, 1993, effective July 1, 1993; amended April 21, 1993, effective July 1, 1993; amended March 30, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended April 3, 1996, effective July 1, 1996; amended February 26, 1997, effective July 1, 1997; amended March 18, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended June 7, 1999, effective July 1, 1999; amended July 19, 2005, effective September 1, 2005; amended April 26, 2007, effective July 1, 2007; amended and effective February 9, 2009; amended September 4, 2009, effective October 1, 2009; amended April 2, 2010, effective April 15, 2010; amended April 27, 2012, effective July 1, 2012.)

#### STATUTORY NOTES

**Compiler's Notes.** Former Rule 14 (Adopted December 27, 1979, effective July 1, 1980; amended June 2, 1980, effective July 1, 1980; amended October 1, 1980, effective November 1, 1980; amended April 2, 1981, effective July 1, 1981) was rescinded by order of the Supreme Court of April 1, 1983, effective July 1, 1983.

#### **Rule 15. Method of payment of fines and costs.**

Fines and costs may be paid by cash, money order, or cashier's check payable to the clerk of the court, or by major credit card or debit card where procedures for accepting such cards are available. In the discretion of the court, other fines and costs may also be paid by personal check payable to the clerk of the court under such procedures established by the administrative district judge for acceptance of such checks. Each administrative district judge, with the consultation of the district court clerks in the judicial district, shall develop guidelines and procedures for the acceptance of personal checks which should be in accordance with generally accepted business practices to reasonably assure that the check will be honored. Any administrative district judge may order that personal checks received for the payment of fines and costs be placed in a suspense fund and that the moneys from such checks not be delivered to the district court clerk until the checks have been honored. Any employee, deputy, official or agent of any court or any district court clerk accepting a personal check under the guidelines and procedures prescribed by the administrative district judge or by Supreme Court rule shall not in any case be liable for the payment or reimbursement of the funds represented by such personal check in the event it is dishonored. Provided, however, in the event that a check is dishonored and returned to the court for any reason, the defendant will be deemed not to have appeared nor to have posted bond under the citation and therefore may be prosecuted for failure to appear on the citation as well as for the violation of the citation; and in addition thereto, the maker of the check may be prosecuted for such other misdemeanor or felony for issuance of the check as may be provided by law. (Adopted December 27, 1979, effective July 1, 1980; amended June 2, 1980, effective July 1, 1980; amended April 2, 1981,



effective July 1, 1981; amended April 18, 1983, effective July 1, 1983; amended September 4, 2009, effective October 1, 2009.)

**Rule 16. Reporting of proceedings.**

All proceedings of the court with regard to the uniform citation, including all hearings, proceedings, and the trial, if any, shall be reported by a court reporter or recorded by a mechanical means as directed by the court. The citation and the reporter's notes or recording tape shall be preserved for the time prescribed by order or rule of the Supreme Court. (Adopted December 27, 1979, effective July 1, 1980.)

**Rule 17. Appeal to the district court.**

An appeal to the district court from a judgment of conviction or the suspension of a driver's license for a criminal offense may be taken within the time and processed in the manner prescribed for appeals from the magistrates division to the district court by the Idaho Criminal Rules; provided, an appeal from the suspension of a driver's license under I.C. § 18-8002 may be taken within the time and processed in the manner prescribed for appeals from the magistrates division to the district court by the Idaho Rules of Civil Procedure. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983; amended March 30, 1988, effective July 1, 1988.)

**JUDICIAL DECISIONS**

**Cited in:** State v. Peterson, 113 Idaho 554, 746 P.2d 1013 (Ct. App. 1987).

**Rule 18. Effective date.**

These rules shall take effect on the 1st day of July, 1980, and shall govern the processing of all citations and sworn misdemeanor complaints thereafter filed. The trial courts shall apply these rules to actions pending on the effective date unless it finds that such application would prejudice the rights of any party.





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# IDAHO INFRACTION RULES

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## Rule 1. Application and designation of rules.

These rules shall govern the procedure in the magistrates division of the district courts of the state of Idaho in all infraction proceedings which are triable by the magistrates division whether brought before the court by an Idaho Uniform Citation or a complaint. The administrative collection of parking violation penalties by local municipalities under local ordinance shall not be governed by these rules, but an infraction citation or complaint for a parking violation or failure to pay a parking penalty shall be governed by these rules. The Misdemeanor Criminal Rules shall apply to the processing of infraction citations and complaints to the extent they are not in conflict with these specific rules. These rules shall be denominated the Idaho Infraction Rules, (I.I.R.). (Adopted March 23, 1983, effective July 1, 1983; amended June 15, 1987, effective November 1, 1987.)

## JUDICIAL DECISIONS

### Discovery Rule.

The discovery rule in criminal cases applies

to infraction prosecutions. *State v. Phillips*, 117 Idaho 23, 784 P.2d 353 (Ct. App. 1989).

## Rule 2. Definitions.

As used in these rules, unless the context clearly requires otherwise:

(a) "Citable offense" means any infraction triable by a magistrate under the law and rules of the Supreme Court.

(b) "Uniform citation" or "citation" means the Idaho Uniform Citation in the form prescribed by these rules.

(c) “Court” means any tribunal with jurisdiction to hear and determine infraction citations or complaints and the magistrate or judge thereof.

(d) “Magistrate” or “judge” includes any officer authorized by law to sit as a court with jurisdiction to hear and determine citable offenses as defined by these rules.

(e) “Clerk” or “clerk of the court” includes any person appointed under Rule 12 to accept answers to infraction citations or complaints, receive payment of judgments for penalties, sign deferred payment agreements with defendants on behalf of the court, and perform other duties assigned to the clerk by these rules.

(f) “Infraction” means any public offense declared to be an infraction by state statute.

(g) “Police officer” or “peace officer” includes a member of the Idaho State Police, a sheriff or deputy sheriff, prosecuting attorney or deputy prosecuting attorney, a city policeman or marshal, or constable or any other officer duly authorized to enforce municipal, county, or state laws.

(h) “Moving traffic infraction” means any infraction offense involving a vehicle or motorized cycle for which driver violation points are assessed under Section 49-326, Idaho Code.

(i) “Non-moving traffic infraction” means any infraction offense involving a vehicle or motorized cycle for which there are no driver violation points assessed under Section 49-326, Idaho Code.

(j) “Penalty” means the fixed penalty exclusive of court costs assessed under these rules for an infraction violation. (Adopted March 23, 1983, effective July 1, 1983; amended March 21, 2007, effective July 1, 2007.)

### **Rule 2.1. Social Security Numbers.**

If an individual’s social security number is included in a document filed with the court, only the last four digits of that number shall be used. (Adopted December 19, 2008, effective February 1, 2009.)

### **Rule 3. Citable offenses — Methods of initiating — Trial — Consolidation.**

(a) **Use of Citation.** The complaint in a citation may be used as the complaint to prosecute an infraction offense.

(b) **Use of Complaint.** A written complaint signed or witnessed by a peace officer, which need not be a sworn complaint, may be used to prosecute an infraction offense.

(c) **Trial on Citation, Amendments.** If a defendant enters a denial to a citation, a trial may be held on the complaint contained in the citation without a separate written complaint. The court may amend, or permit to be amended, any process or pleading at any time before the state rests. If an amendment of a citation or complaint is made, the court may, in its discretion, grant a continuance of the trial for good cause.

(d) **Infraction Offenses Charged in Each Citation, Consolidation of Trials.** Only one person may be charged by the complaint of a single

citation, but more than one infraction may be charged in one citation. An infraction may not be charged with a misdemeanor in a citation. Provided, if the offenses charged by separate citation complaints or other complaints are of the same or similar character, or are based on the same act or transaction or connected series of acts or transactions, or are based on two or more acts or transactions constituting part of a common scheme or plan, the separate complaints may be consolidated by the court upon motion of any party or upon the court's own initiative. (Adopted March 23, 1983, effective July 1, 1983; amended March 20, 1991, effective July 1, 1991; amended April 22, 2008, effective July 1, 2008.)

#### **Rule 4. Assignment of jurisdiction.**

Every magistrate in the state of Idaho is hereby assigned and granted the authority and jurisdiction to hear, process and determine, subject to judicial district rule of assignment, any citable offense alleged to have occurred within the state of Idaho. (Adopted March 23, 1983, effective July 1, 1983.)

#### **Rule 5. Uniform citation — Issuance — Service — Form — Number — Distribution.**

(a) **Peace Officer Citation.** A peace officer may issue a uniform citation for a citable offense in which the officer shall certify that the officer has reasonable grounds to believe, and does believe, that the person cited committed the offense contrary to law. The citation shall require the defendant to appear in court on the citation at a time certain which shall be not less than five (5) nor more than twenty-one (21) days after the date of the citation.

(b) **Citizen Citation.** The uniform citation may be signed by any person in whose presence an alleged offense occurred and be witnessed by a peace officer whose name shall be endorsed on the citation.

(c) **Service of Citation.** Service of a citation may be made by the defendant signing a written promise to appear on the citation at the time indicated, but if the defendant fails or refuses to sign the written promise to appear, or an electronic citation is issued, a peace officer may serve the citation on the defendant by personal delivery to the defendant and indicate such service on the face of the citation.

(d) **Form.** With the exception of electronically issued citations, all citations in the courts of Idaho shall be processed on the Idaho Uniform Citation which shall be of the size of 5½ inches wide by 8½ inches long with at least three (3) copies which shall be in the form set forth in Rule 5 of the Misdemeanor Criminal Rules.

(e) **Color and Distribution.** With the exception of electronically issued citations, the first copy of the citation shall be white and deposited with and retained by the court; the second copy shall have pink borders at the top and bottom and be delivered to the defendant; the third copy shall have yellow borders at the top and bottom and be delivered by the police officer initially to the court and thereafter forwarded by the court to the appropriate



department upon disposition of the citation. Additional copies of the citation may be prepared with additional information required by the issuing governmental department, agency or unit for its internal use.

(f) **Electronic Citations.** Citations may be electronically issued in accord with Rule 5 of the Misdemeanor Criminal Rules.

(g) **Service of Citations for Parking Violation.** Where statutes provide for the issuance of a uniform citation to a vehicle's owner or lessee for a parking violation, the uniform citation may be served upon the registered owner or lessee by securing the uniform citation to the vehicle. (Adopted March 23, 1983, effective July 1, 1983; amended March 21, 2007, effective July 1, 2007; amended April 2, 2010, effective April 15, 2010; amended April 29, 2013, effective July 1, 2013.)

### JUDICIAL DECISIONS

#### **Admissibility in Subsequent Proceeding.**

The mere fact of receiving a traffic citation, by itself, is not admissible evidence in a subsequent civil proceeding arising out of the same incident. *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997).

Admission resulting from the payment of a traffic citation for an infraction, without appearing in court and entering a plea of guilty, is the functional equivalent of a plea of nolo contendere and although pursuant to statute and rule, the Department of Transportation

may assess points on a driver's record upon payment of an infraction, a plea of nolo contendere is inadmissible under I.R.E., Rule 410(a)(2) in subsequent proceeding to establish liability, therefore court did not err in prohibiting plaintiff from offering evidence that defendant had received and paid a fine for a traffic citation arising from the accident without entering a plea of guilty. *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997).

#### **Rule 6. Appearance of defendant — Admission of citation by mail — Answer of a defendant — Trial date notice or continuance notice.**

(a) **Admission of Citation By Mail.** Any person charged with an infraction by a citation may enter an admission by paying the total amount due, which includes fixed penalty and court costs, by mail. Payment of the total amount by mail shall constitute an admission of the charge. The total amount must be mailed by the defendant so as to be received by the court on or before the appearance date set forth in the citation. If a personal check is dishonored and returned to the court for any reason, the defendant will be deemed not to have appeared on the citation and default judgment may be entered against the defendant under Rule 8; and in addition thereto, the maker of the check may be prosecuted for such other misdemeanor or felony for issuance of the check as may be provided by law.

(b) **Appearance of Defendant.** Unless the defendant mails the total amount due to the court under subsection (a) of this rule, the defendant shall appear before the clerk to answer the charge set forth in a citation or complaint as provided in this rule. If the defendant denies the charge, no bail shall be required, and the defendant shall thereafter be present in court at the time of the trial set by the court or the clerk. If the defendant appears on a citation at the time stated in the citation and the citation has not been delivered to the court, the court may dismiss the citation.

(c) **First Appearance and Answer or Continuance Before Clerk of the Court.** The defendant shall appear before the clerk to enter an answer to an infraction citation or complaint on or before the appearance date. If the defendant admits the charge, judgment shall be entered against the defendant as provided by Rule 9. If the defendant denies the charge, the clerk shall set the trial date for the citation or complaint and serve a copy of the written trial date notice upon the defendant. If, at the first appearance, the defendant desires additional time before answering the charge, the clerk shall issue a continuance notice and serve a copy upon the defendant. The trial date notice and continuance notice shall be substantially in the form provided by these rules and may be served upon the defendant by personal delivery or by mailing to the address in the citation, or other address furnished by the defendant, and no further notice need be given to the defendant.

(d) **Appearance by Defendant Through Attorney.** A defendant may also appear, answer and have judgment entered through an attorney, who shall either appear in person or shall file, at or before the time for appearance, a written appearance and answer on behalf of the defendant. The court may, in its discretion, require the presence of the defendant at any stage of the proceeding not otherwise required by these rules.

(e) **Trial Date Notice or Continuance Notice.** Whenever a defendant is given a trial date setting or a continuance at or after the defendant's first appearance, such notice shall be given by a written notice delivered to the defendant in substantially the following form:

(1) **Trial Date Notice:**

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
_____	)	TRIAL DATE NOTICE
	)	
Defendant.	)	
	)	
DOB: _____	)	
DL OR SSN: _____ (State) _____	)	

NOTICE IS HEREBY GIVEN to the above Defendant that trial before the court has been set for the charge against you at \_\_\_\_\_ o'clock \_\_\_\_M. on the \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation in the sum of \$\_\_\_\_.

In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points

against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact.

IF YOU THEREAFTER FAIL TO PAY THE TOTAL AMOUNT DUE, YOUR DRIVER'S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

☐ Personally delivered to the defendant this date.

☐ Mailed to the defendant this date.

Private Counsel: \_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Prosecutor: \_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Dated \_\_\_\_\_

Clerk or Judge

**(2) Continuance Notice:**

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
_____	)	CONTINUANCE
	)	NOTICE
Defendant.	)	
	)	
DOB: _____	)	
DL OR SSN: _____ (State) ____	)	

NOTICE IS HEREBY GIVEN to the above Defendant that proceedings on the charge against you have been continued until \_\_\_\_\_ o'clock \_\_\_\_m. on the \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation in the sum of \$\_\_\_\_. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate

Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE TOTAL AMOUNT DUE, YOUR DRIVER'S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

- ☐ Personally delivered to the defendant this date.
- ☐ Mailed to the defendant this date.

Private Counsel: \_\_\_\_\_

Mailed\_\_\_\_\_ Hand Delivered \_\_\_\_\_

Prosecutor: \_\_\_\_\_

Mailed\_\_\_\_\_ Hand Delivered \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk or Judge

(Adopted March 23, 1983, effective July 1, 1983; amended February 10, 1993, effective July 1, 1993; amended April 19, 1995, effective July 1, 1995; amended March 21, 2007, effective July 1, 2007.)

JUDICIAL DECISIONS

**Admissibility in Subsequent Proceeding.**  
The mere fact of receiving a traffic citation, by itself, is not admissible evidence in a subsequent civil proceeding arising out of the same incident. *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997).  
Admission resulting from the payment of a traffic citation for an infraction, without appearing in court and entering a plea of guilty, is the functional equivalent of a plea of nolo contendere and although pursuant to statute and rule, the Department of Transportation

may assess points on a driver's record upon payment of an infraction, a plea of nolo contendere is inadmissible under I.R.E., Rule 410(a)(2) in subsequent proceeding to establish liability, therefore court did not err in prohibiting plaintiff from offering evidence that defendant had received and paid a fine for a traffic citation arising from the accident without entering a plea of guilty. *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997).

**Rule 7. Trial procedures — Venue — Arrest or bail prohibited — Court trials — Findings and judgment.**

- (a) **Evidence and Burden of Proof.** The burden of proof and the rules of evidence in a trial of an infraction citation or complaint shall be those provided for a trial of a criminal action.
- (b) **Venue.** All appearances by the defendant and the trial of an infraction, if any, shall be in the county where the alleged offense occurred. No infraction charge shall be transferred to the court of another county, except in cases where the infraction is committed in a city that is located in two counties the venue may be transferred in accord with I.C. 19-305.



(c) **Arrest or Bail Prohibited.** An infraction violation has been declared by statute to be a civil public offense, not constituting a crime, so that a defendant charged with an infraction violation shall never be arrested for the infraction and shall never be required to post bail on such charge. Bail is prohibited and cannot be posted and forfeited for an infraction.

(d) **Trial by Court.** There is no right to a trial by jury of a citation or complaint for an infraction and such trials shall be held before the court without a jury.

(e) **Findings and Judgment.** If the court does not find, beyond a reasonable doubt, that the defendant committed the infraction offense, it shall enter judgment for the defendant. If the court finds, beyond a reasonable doubt, that the defendant committed the infraction offense, it shall enter judgment against the defendant as provided in Rule 9. No written findings of fact by the court shall be required. (Adopted March 23, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990; amended effective November 6, 2002.)

#### JUDICIAL DECISIONS

**Reasonable Doubt.**

Evidence in a failure to yield the right-of-way prosecution consisting of testimony of investigating officer as to how the accident happened and statement of defendant that he

never saw the truck prior to the collision was sufficient to meet the reasonable doubt standard under this rule. *State v. Hines*, 117 Idaho 198, 786 P.2d 589 (Ct. App. 1990).

#### **Rule 7.1. Stipulations not binding on court — Continuance of trial or hearing.**

The parties to any action may present to the court a stipulation as to any procedural matter involved in any proceeding, including a stipulation to vacate or continue a hearing or trial, but such stipulation shall be considered as a joint motion by the parties to the court for its consideration, and shall not be binding upon the court. The court may approve or disapprove the stipulation in the same manner as the court rules upon a motion. The court may by oral or written notice to the parties limit the time within which a motion or stipulation to vacate or continue a hearing or trial must be made in order to be considered by the court. (Adopted March 30, 1984, effective July 1, 1984.)

#### **Rule 8. Failure to appear — Default judgment — Notice of judgment.**

(a) **Failure to Appear on Citation.** If the defendant fails to appear before the clerk at or before the time stated in an infraction citation, the court shall enter default judgment against the defendant for the infraction as provided by Rule 9 without giving further notice to the defendant.

(b) **Failure to Appear After First Appearance.** If a defendant fails to appear at the time fixed by a trial date notice or continuance notice served on the defendant pursuant to Rule 6(e), the court shall enter default

judgment against the defendant for the infraction without giving further notice to the defendant.

(c) **Notice of Default Judgment.** If a default judgment is entered against a defendant for an infraction under this rule, the clerk shall mail a notice of judgment to the defendant at the address stated in the citation advising the defendant that the defendant must pay the judgment by a date certain which shall be not less than 14 days after the date of the notice. The notice shall state that failure to pay the judgment will result in suspension of his driver's license.

(d) **Form of Notice of Default Judgment.** The form of the notice of default judgment shall be in substantially the following form:

STATE OF IDAHO	[Court Heading]	
	)	
	)	
Plaintiff,	)	
vs.	)	Citation No. ____
_____	)	DEFAULT JUDGMENT AND
	)	NOTICE OF NONCOMPLIANCE
Defendant.	)	(DUTY TO PAY
	)	OR SUSPENSION
DOB: _____ SEX: _____	)	OF DRIVER'S LICENSE)
DL OR SSN: _____ (State) _____	)	
CDL: _____	)	
VEH LIC: _____	)	
COMM VEH: _____	)	
HAZ MTL: _____	)	

JUDGMENT BY DEFAULT is entered against you on \_\_\_\_\_, \_\_\_\_, for the infraction of \_\_\_\_\_ issued on \_\_\_\_\_, \_\_\_\_, for the penalty of \$\_\_\_\_\_.

NOTICE IS GIVEN, that if you do not pay this penalty by mail or in person by \_\_\_\_\_, \_\_\_\_, your driver's license will be suspended by the Idaho Department of Transportation or your home state pursuant to the interstate Nonresident Violator Compact. Driving with a suspended license is a criminal misdemeanor which carries a JAIL PENALTY in the state of Idaho.

You may pay the penalty in person or by mail at the following address:

Magistrate Division

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You have the right to appear before the clerk **BEFORE** the payment date and request a court hearing to show cause why your license should not be suspended for failure to pay the penalty.

\_\_\_\_ Mailed to the defendant this date.

Dated \_\_\_\_\_

Clerk of the District Court

By \_\_\_\_\_

Deputy Clerk

(Adopted March 23, 1983, effective July 1, 1983; amended February 10, 1993, effective July 1, 1993; amended March 9, 1999, effective July 1, 1999.)

### **Rule 8.1. Relief from default judgments.**

After the entry of a default judgment under these rules, the court may set aside or otherwise grant relief from said judgment upon the grounds and as provided by Rules 60(a) and (b), I.R.C.P., as provided in civil cases. (Adopted March 30, 1984, effective July 1, 1984.)

### **Rule 9. Judgment — Fixed penalty plus court costs for infractions — Withheld judgment and suspended penalties prohibited — Deferred payment agreements.**

(a) **Entry of Judgment.** Upon, (1) the entry of an admission to an infraction citation or complaint in person or by mail under Rule 6(a), or, (2) the payment of the total amount, which includes fixed penalty and court costs, by the defendant, or, (3) a finding by the court upon trial that the defendant committed the infraction offense, or, (4) a failure of the defendant to appear in court or before the clerk as provided in Rule 8, the court shall enter judgment against the defendant for the infraction which shall order the defendant to pay the fixed penalty and court costs provided in this rule.

(b) **Fixed Penalty and Costs for Infraction.** The entry of a judgment for an infraction under this rule shall order the defendant to pay a dollar amount for a fixed penalty and court costs in the following amounts:

#### INFRACTION OFFENSE

#### TOTAL AMOUNT (Fixed Penalty Plus Court Costs)

- (1)(a) Failure to fasten safety restraint, operator/occupant age 18 or older, Section 49-673(3), Idaho Code. (Fixed penalty \$10.00, \$5.00 of which is to be sent to State's Catastrophic Health Care Fund).

\$10.00

INFRACTION OFFENSE

TOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(b)	Failure to fasten safety restraint, operator 18 years or older with occupant(s) under 18 years of age failing to wear safety restraint. Section 49-673(3), Idaho Code. (Fixed penalty \$10.00, \$5.00 of which is to be sent to State's Catastrophic Health Care Fund).	\$10.00
(c)	Failure to fasten safety restraint, operator under 18 years of age or operator under 18 who has occupant(s) under 18 years of age failing to wear safety restraint-single citation only, Section 49-673(4), Idaho Code. (Fixed penalty \$10.00, \$5.00 of which is to be sent to State's Catastrophic Health Care Fund, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$66.50
(2)	Failure to restrain child in car safety seat. Section 49-672, Idaho Code. (Fixed penalty \$27.50, court costs \$16.50, I.C., § 31-3201A(c), county justice fund fee \$5.00 I.C. § 31-3201(3), and, peace officers training fee \$15.00 I.C. § 31-3201B, ISTARs technology fund fee \$10.00 I.C. § 31-3201(5), and emergency surcharge fee \$10.00).	\$84.00



INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(3)	Pedestrian and bicycle infractions. (Fixed penalty \$5.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00)	\$61.50
(4)	Speeding traffic infractions.	
(a)	1 to 15 miles per hour above speed Limit. (Fixed penalty \$33.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$90.00
(b)	16 or more miles per hour above speed limit. (Fixed penalty \$98.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$155.00
(5)	Other moving traffic infractions. (Fixed penalty \$33.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$90.00

INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(6)	Speeding in a construction zone. I.C. § 49-657 (Fixed penalty \$50.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$106.50
(7)	Speeding in a school zone. I.C. § 49-658 (Fixed penalty \$100.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$156.50
(8)	Permitting unauthorized child under age 18 to operate vehicle. Section 49-333(1), Idaho Code. (Fixed penalty \$54.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$111.00
(9)	Permitting any unauthorized person to operate vehicle. Section 49-333(2), Idaho Code. (Fixed penalty \$54.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$111.00

INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

- |      |   |          |
|------|---|----------|
| (10) | Renting vehicle to unauthorized driver or failing to inspect license. Section 49-334, Idaho Code. (Fixed penalty \$54.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00). | \$111.00 |
| (11) | Expired license. Section 49-319, Idaho Code. (Fixed penalty \$44.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).  | \$101.00 |
| (12) | Violating restricted license. Section 49-317, Idaho Code. (Fixed penalty \$44.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).   | \$101.00 |
| (13) | Operating vehicle under out of state license while suspended. Section 49-329, Idaho Code. (Fixed penalty \$100.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).        | \$156.50 |

INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(14)	Failure to carry registration in vehicle (dismissed if registration is shown). Section 49-427, Idaho Code. (Fixed penalty \$10.50, court costs \$16.50, county justice fund \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$67.00
(15)	Failure to display license plate. Section 49-428, Idaho Code. (Fixed penalty \$10.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$67.00
(16)	Operating vehicle without registration. Section 49-456(1), Idaho Code. (Fixed penalty \$44.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$101.00
(17)	Fictitious display of license plates. Section 49-456(3), Idaho Code, (Fixed penalty \$58.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$115.00



INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

- |      |   |          |
|------|---|----------|
| (18) | Lending or permitting another to use registration or license plate. Section 49-456(4), Idaho Code. (Fixed penalty \$58.50, court costs \$16.50, county justice fund \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).                                | \$115.00 |
| (19) | Failing to surrender registration and license plate upon revocation or suspension. Section 49-456(5), Idaho Code. (Fixed penalty \$44.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00), and emergency surcharge fee \$10.00).            | \$101.00 |
| (20) | Use of false or fictitious name in application for registration or concealing material facts. Section 49-456(6), Idaho Code. (Fixed penalty \$100.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00). | \$156.50 |

<u>INFRACTION OFFENSE</u>		<u>TOTAL AMOUNT</u> <u>(Fixed Penalty Plus Court Costs)</u>
(21)	Failure to redeem an abandoned vehicle. Section 49-1802, Idaho Code. (Fixed penalty \$10.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, abandoned vehicle fee \$150.00, and emergency surcharge fee \$10.00).	\$217.00
(22)	Texting while driving. (Fixed penalty \$25.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$81.50
(23)	Non-moving traffic infractions. (Fixed penalty \$10.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$67.00
(24)	Special parking infractions. Recreational parking. Section 67-7115, Idaho Code, and illegal parking in state park, Section 67-4237 Idaho Code, (Fixed penalty \$25.00, court costs \$16.50, county justice fund fee \$5.00, ISTARs technology fund fee \$10.00, and emergency surcharge fee \$10.00 — No peace officers training fee).	\$66.50

INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

- |      |  |          |
|------|--|----------|
| (25) | Disability parking violations. Unauthorized disability parking, Section 49-213, Idaho Code, and unauthorized use of disability plate or placard, Section 49-410, Idaho Code. (Fixed penalty \$100.00, court costs \$16.50, county justice fund fee \$5.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00 — No peace officers training fee).  | \$141.50 |
| (26) | Other parking infractions and failure to pay parking infractions unless otherwise provided by statute or ordinance. (Fixed penalty \$5.00, court costs \$16.50, county justice fund fee \$5.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00 — No peace officers training fee).   | \$46.50  |
| (27) | Operating a motor vehicle without insurance. Sections 49-1229 and 49-1428, Idaho Code and failure to have certificate of insurance, Section 49-1232, Idaho Code, (First offense only, second or subsequent offense is a misdemeanor. (Fixed penalty \$75.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00). | \$131.50 |

INFRACTION OFFENSE

TOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(28)	Trucking overweight. Section 49-438, Idaho Code, and Sections 49-1001, 49-1002, 49-1004, 49-1005, Idaho Code. 1-1000 pounds overweight (Fixed penalty \$5.00, court costs \$16.50, county justice fund \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00.)	\$61.50
	1001-2000 pounds overweight (Fixed penalty \$15.00, court costs \$16.50, county justice fund \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00.)	\$71.50
	2001-4000 pounds overweight (Fixed penalty \$25.00, court costs \$16.50, county justice fund \$5.00, peace officer's training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00.)	\$81.50
	For multiple infractions see I.C. § 49-1013(4).	
(29)	Fish and game violations made infractions by Section 36-1401, Idaho Code. (Fixed penalty \$15.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$72.00



INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

- |      |   |          |
|------|---|----------|
| (30) | All-terrain vehicle and snowmobile infractions. Driving on highway. Section 67-7109, Idaho Code (Fixed penalty \$100.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).                          | \$156.50 |
| (31) | Parks and recreation violations made infractions by Section 67-4223, Idaho Code. (Fixed penalty \$15.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).  | \$72.00  |
| (32) | All other all-terrain vehicle and snowmobile infractions. Sections 67-7102 through 67-7112, 67-7122, 67-7125, Idaho Code. (Fixed penalty \$25.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00). | \$81.50  |
| (33) | Renting a watercraft without safety devices and safety decal. Section 67-7078 (Fixed penalty \$25.00, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).   | \$81.50  |

INFRACTION OFFENSETOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(34)	<p>Failure to carry required equipment in watercraft. (IDAPA 26.01.30 Parks and Recreation) Sections 67-7002 and 67-7015, Idaho Code. (Fixed penalty \$42.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).</p>	\$99.00
(35)	<p>Improper waterskiing. Section 67-7024, Idaho Code. (Fixed penalty \$42.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).</p>	\$99.00
(36)	<p>Permitting smoking in public building or office. Section 39-5506, Idaho Code. (Fixed penalty \$67.50, court costs \$16.50, county justice fund fee \$5.00, peace officer training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).</p>	\$124.00
(37)	<p>Refusing to extinguish tobacco product in public building or office. Section 39-5507, Idaho Code. (Fixed penalty \$17.50, court costs \$16.50, county justice fund fee \$5.00, peace officer training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).</p>	\$74.00

INFRACTION OFFENSE

TOTAL AMOUNT  
(Fixed Penalty Plus Court Costs)

(38)	Other infractions. (Fixed penalty \$15.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, ISTARS technology fund fee \$10.00, and emergency surcharge fee \$10.00).	\$72.00
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(c) **Consolidation of Multiple Offenses in Assessing Court Costs.** The court may consolidate multiple non-moving or parking infractions into one offense for the purpose of assessing court costs under I.C. § 31-3201A(c), together with the fixed penalty portion of the penalty for each infraction.

(d) **Withheld Judgments or Suspended Penalties Prohibited.** No court shall have the power to withhold judgment nor to suspend any part of a judgment for a fixed penalty and costs prescribed under this rule.

(e) **Deferred Payment Agreement.** After the entry of a judgment for an infraction, the court, or the clerk within the guidelines set by the court, may enter into an agreement with the defendant for the deferred payment of the fixed penalty plus court costs. Such agreement shall be signed by the defendant and the court, or the clerk on behalf of the court, and shall state in bold letters that failure of the defendant to make the payments when agreed will result in the suspension of the defendant’s driver’s license as provided in Rule 10. Subsequent extensions of time to pay a fixed penalty plus court costs may be granted by the execution of a new agreement by the defendant and the court or the clerk.

(f) **Form of Agreement.** A deferred payment agreement under this rule shall be substantially the following form:

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFERRED PAYMENT
	)	AGREEMENT
	)	
Defendant.	)	
	)	
DOB: _____	)	
DL OR SSN: _____ (State) ____	)	

JUDGMENT HAVING BEEN ENTERED for the charge against the above named defendant and for the penalty or fine and court costs of \$\_\_\_\_\_ and the defendant having shown good cause for a deferred payment;

IT IS HEREBY AGREED that the defendant is granted a Deferred Payment Agreement as follows: \_\_\_\_\_

You are further advised that an additional statutory \$2.00 handling fee will be assessed for EACH partial payment.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED THAT IF YOU DO NOT PAY THE TOTAL AMOUNT DUE WITHIN THE TIME AGREED, IN PERSON OR BY MAIL TO THE COURT, YOUR DRIVER’S LICENSE WILL BE SUSPENDED BY THE IDAHO DEPARTMENT OF TRANSPORTATION OR BY YOUR HOME STATE PURSUANT TO THE INTERSTATE NONRESIDENT VIOLATOR COMPACT IF THIS IS A TRAFFIC INFRACTION. IF YOU DO NOT MAKE THE PAYMENT WHEN AGREED YOU HAVE THE RIGHT TO APPEAR BEFORE THE COURT ON THE \_\_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_\_\_\_ AT \_\_\_\_\_ O’CLOCK \_\_\_\_\_ .M. TO SHOW CAUSE WHY YOUR LICENSE SHOULD NOT BE SUSPENDED FOR FAILURE TO PAY THE TOTAL AMOUNT DUE.

☐ THIS IS A MISDEMEANOR CHARGE — YOU ARE HEREBY NOTIFIED that if you do not pay the fine within the time agreed a warrant may issue for your arrest without further notice.

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk or Judge

RECEIPT

I acknowledge receipt of this Agreement and state that I have read and agree to the terms of this Agreement and acknowledge that I REALIZE THAT MY DRIVER’S LICENSE WILL BE SUSPENDED OR A WARRANT MAY ISSUE FOR MY ARREST IF I FAIL TO MAKE THE PAYMENTS AS AGREED.

\_\_\_\_\_  
Defendant

(g) **Discharge of Judgment.** If, after entry of a judgment for the payment of a penalty, court costs or payment of money to any person or entity, the court determines that the unpaid portion of the judgment is not reasonably collectible for any reason, the court may enter an order discharging the judgment and close the file. A discharge of a judgment on a citation may be entered by endorsing the word “discharged” on the face of the citation together with the date and the signature of the court. Such discharge may be signed and entered by the clerk at the direction of the court. The entry of a discharge of judgment shall not affect the judgment



other than to satisfy the duty to pay the balance of the penalty, court costs and the payment of money to any person or entity; provided, such discharge does not satisfy the duty of the defendant to pay victim's restitution ordered pursuant to Chapter 53 of Title 19, Idaho Code, nor prevent the victim from enforcing the order by execution pursuant to section 19-5305, Idaho Code. (Adopted March 23, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 12, 1988, effective July 1, 1988; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective March 23, 1990; amended April 5, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1991; amended March 26, 1992, effective July 1, 1992; amended February 10, 1993, effective July 1, 1993; amended April 21, 1993, effective July 1, 1993; amended March 30, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended April 3, 1996, effective July 1, 1996; amended February 26, 1997, effective July 1, 1997; amended January 6, 1999, effective January 1, 1999; amended June 7, 1999, effective July 1, 1999; amended June 7, 2000, effective July 1, 2000; amended June 21, 2000, effective July 1, 2000; amended and effective January 30, 2001; amended April 13, 2001, effective July 1, 2001; amended March 5 and April 19, 2002, effective July 1, 2002; amended June 16, 2003, effective July 1, 2003; amended effective July 29, 2003; amended April 22, 2004, effective July 1, 2004; amended April 5, 2005, effective July 1, 2005; amended March 21, 2007, effective July 1, 2007; amended December 19, 2008, effective February 1, 2009; amended April 2, 2010, effective April 15, 2010; amended April 27, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012.)

**Rule 9.1. Entry of judgment by clerk of court.**

Notwithstanding any other provision in these rules, the court may authorize the clerk of the court to sign and enter a judgment against the defendant upon, (1) the entry of an admission to an infraction in person or by mail under Rule 6(a) or, (2) the payment of the total amount due, which includes fixed penalty and costs, by the defendant, or (3) a failure of the defendant to appear in court or before the clerk as provided in Rule 8. (Adopted March 30, 1984, effective July 1, 1984; amended March 21, 2007, effective July 1, 2007.)

**Rule 10. Failure to pay infraction — Suspension of driver's license — Notice of nonpayment — Late payment — Receipt and notice of payment — Other sanctions.**

(a) **Suspension of License.** If a defendant fails to pay a traffic infraction, (1) within the time allowed by a Notice of Default Judgment under Rule 8(d), or (2) within the time allowed by Deferred Payment Agreement under Rule 9(f), or (3) within such further time as allowed by order of the court; then, unless the court makes a finding under Rule 11 that the defendant has

shown that the defendant has complete and continuing financial inability to pay, the court shall sign a notice of nonpayment and send it to the Department of Transportation for suspension of defendant's driver's license as provided by law.

(b) **Form of Notice of Nonpayment.** A notice of nonpayment to be sent to the Department of Transportation shall be in substantially the following form:

	[Court Heading]	
STATE OF IDAHO	)	
	)	Citation Case No.
Plaintiff,	)	_____
vs.	)	
_____	)	
	)	
Defendant.	)	NOTICE OF
	)	NONPAYMENT/
DOB: _____ SEX: _____	)	NONCOMPLIANCE OF
DL OR SSN: _____ (State) _____	)	INFRACTION JUDG-
CDL: _____	)	MENT
VEH LIC: _____	)	
COMM VEH: _____ HAZ MTL: _____	)	

TO: THE DEPARTMENT OF TRANSPORTATION, STATE OF IDAHO  
NOTICE IS HEREBY GIVEN that a traffic infraction judgment was entered against the above named defendant on \_\_\_\_\_, 20\_\_\_\_, in the above action for the infraction of \_\_\_\_\_ issued on \_\_\_\_\_, 20\_\_\_\_, for \$\_\_\_\_\_ and that said defendant was given until \_\_\_\_\_, 20\_\_\_\_, to pay the total amount due, and that said defendant has failed and refused to pay:

- ☐ After notice of judgment and opportunity for hearing.
- ☐ After hearing and finding by the court that the defendant does not have a complete and continuing financial inability to pay.

YOU ARE THEREFORE REQUESTED to immediately suspend the driver's license of the defendant as provided by law or notify the Defendant's home state pursuant to the Interstate Nonresident Violator Compact.

Dated \_\_\_\_\_  
\_\_\_\_\_  
Judge

(c) **Late Payment.** Late payment of an infraction shall be accepted by the court or clerk of the court at any time.

(d) **Form of Receipt and Notice of Payment.** If a defendant pays an infraction after a notice of nonpayment has been sent to the Department of

Transportation under this rule, the court or the clerk shall issue a receipt and notice of payment which shall not be mailed to the Department of Transportation but shall be delivered or mailed to the defendant for use in applying to the Department of Transportation for reinstatement of defendant's license. The receipt and notice of payment shall be in substantially the following form:

	[Court Heading]	
STATE OF IDAHO	)	
	)	
Plaintiff,	)	
vs.	)	
_____	)	RECEIPT AND
	)	NOTICE OF
Defendant.	)	PAYMENT/COMPLIANCE
	)	OF
DOB: _____ SEX: _____	)	INFRACTION JUDG-
DL OR SSN: _____ (State) _____	)	MENT
CDL: _____	)	
VEH LIC: _____	)	
COMM VEH: _____ HAZ MTL: _____	)	

TO: THE DEPARTMENT OF TRANSPORTATION, STATE OF IDAHO

RECEIPT IS HEREBY ACKNOWLEDGED, of the payment of \$ \_\_\_\_\_ by the defendant in the above action in satisfaction of the traffic infraction judgment dated \_\_\_\_\_, for the infraction of \_\_\_\_\_ issued on \_\_\_\_\_, 20\_\_\_\_.

YOU ARE THEREFORE REQUESTED to immediately reinstate the driver's license of the defendant as provided by law upon payment of the required reinstatement fee or notify the defendant's home state pursuant to the Interstate Nonresident Violator Compact.

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk or Judge

TO THE ABOVE NAMED DEFENDANT:

To reinstate your driver's license if suspended in the State of Idaho, you must provide a copy of this notice and pay a reinstatement fee to the Department of Transportation, Driver's Services Section, P.O. Box 34, Boise, ID., 83731-0034.

To reinstate your driver's license if suspended in another state, you must provide a copy of this notice to your home state as proof of payment and notice of compliance.

Copies to: ( ) Defendant \_\_\_\_\_ mailed \_\_\_\_\_ hand delivered  
( ) DOT Idaho

(e) **Other Sanctions.** Nothing in this rule shall limit the inherent powers of the court to enforce its judgments and orders by execution or by other means and sanctions authorized by law.

(f) **Signature of clerk.** Notwithstanding any other provision in this rule, the court may authorize the clerk of the court to sign and send to the Department of Transportation a Notice of Non-Payment of Infraction Judgment in the form provided in subsection (b) of this rule. (Adopted March 23, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 27, 1989, effective July 1, 1989; amended February 10, 1993, effective July 1, 1993; amended March 21, 2007, effective July 1, 2007.)

### **Rule 10.1. Forms and procedures for fish and game infractions.**

The forms provided for in these Infraction Rules and the procedures set forth in these rules for the handling of defaults of an infraction shall be modified to accommodate fish and game infractions. All provisions for the suspension of a license shall refer to the suspension of a fishing, hunting or trapping license as provided for by I.C. § 36-505 and the judgment shall be sent to the Department of Fish and Game rather than the Department of Transportation. Forms provided by the Idaho Statewide Trial Court Automated Records Systems (ISTARS) may be used for these purposes. (Adopted February 10, 1993, effective July 1, 1993.)

### **Rule 10.2. Forms and procedures for other non-traffic infractions.**

The forms provided for in these Infraction Rules and the procedures set forth in these rules for the handling of defaults of an infraction shall be modified for non-traffic infractions by eliminating references therein to the suspension of a driver's license. The judgment shall be sent to the office of the prosecuting attorney rather than the Department of Transportation. Forms provided by the Idaho Statewide Trial Court Automated Records System (ISTARS) may be used for these purposes. (Adopted February 10, 1993, effective July 1, 1993.)

### **Rule 11. Driver's license suspension hearing — Finding by the court — Effect of suspension.**

(a) **Show Cause Hearing.** A show cause hearing as to whether a defendant's driver's license should be suspended for nonpayment of a penalty shall be held by the court, (1) if a defendant appears in court at the time indicated in a Deferred Payment Agreement made under Rule 9(f), or (2) if the defendant requests a hearing before the payment date for a penalty as authorized under a Notice of Default Judgment issued under Rule 8(d), or (3) at any other time in the discretion of the court. The show cause hearing shall be an evidentiary hearing to determine if the defendant has the complete and continuing financial inability to pay the penalty. The defendant shall testify under oath and be subject to cross examination.



(b) **Finding of Court.** After a hearing under this rule, if the court finds that the defendant has a complete and continuing financial inability to pay the penalty, no notice of nonpayment shall be sent to the Department of Transportation but the court may enter appropriate orders regarding the judgment which may include the cancellation of the penalty. If the court finds that the defendant does not have a complete and continuing financial inability to pay the penalty but has not paid the penalty, it may sign a notice of nonpayment of penalty and send it to the Department of Transportation for the suspension of defendant's driver's license and may enter other appropriate orders to enforce payment of the penalty. The court shall not be required to make written findings other than to issue a notice of nonpayment or enter other appropriate orders.

(c) **Effect of Suspension of Driver's License.** If a defendant's driver's license is suspended for nonpayment of a penalty, upon the expiration of such ninety (90) day suspension the clerk of the court will continue to maintain the citation on which the penalty was imposed for a period of three (3) years. If the penalty is not paid within such three (3) year period, the clerk shall then cancel the delinquent penalty and close the file. (Adopted March 23, 1983, effective July 1, 1983; amended March 28, 1986, effective July 1, 1986.)

**Rule 12. Appointment of persons to receive answers to citations or complaints, accept payment of penalties and execute deferred payment agreements.**

Any person appointed by administrative district judge under Rule 12 of the Misdemeanor Criminal Rules shall also have the authority to accept answers to infraction citations or complaints, accept payment of penalties and costs for infraction offenses, execute deferred payment agreements with defendants within the guidelines established by the court, and perform all other duties assigned to the clerk under these rules. (Adopted March 23, 1983, effective July 1, 1983.)

**Rule 13. Method of payment of penalty and costs.**

The fixed penalty and court costs for an infraction offense may be paid by cash, money order, personal check, or cashier's check payable to the clerk of the court, or by major credit card or debit card where procedures for accepting such cards are available. Any employee, deputy, official or agent of any court or any district court clerk accepting a personal check under this rule shall not in any case be liable for the payment or reimbursement of the funds represented by such personal check in the event it is dishonored. (Adopted March 23, 1983, effective July 1, 1983; amended September 4, 2009, effective October 1, 2009.)

**Rule 14. Reporting of proceedings.**

All proceedings of the court with regard to an infraction citation or complaint, or a show cause hearing as to whether a license should be

suspended for failure to pay the fixed penalty and court costs, including all hearings, proceedings, and the trial, if any, shall be reported by a court reporter or recorded by a mechanical means as directed by the court. The citation or complaint, the judgment, and the reporter's notes or recording tape shall be preserved for the time prescribed by order or rule of the Supreme Court. (Adopted March 23, 1983, effective July 1, 1983; amended March 21, 2007, effective July 1, 2007.)

**Rule 15. Appeal to the district court.**

An appeal to the district court from a judgment for an infraction violation may be taken and processed in the manner prescribed for criminal appeals from the magistrates division to the district court by the Idaho Criminal Rules. (Adopted March 23, 1983, effective July 1, 1983.)

**Rule 16. Effective date.**

These rules shall take effect on the 1st day of July, 1983, and shall govern the processing of all citations and complaints for infraction violations occurring on or after July 1, 1983. (Adopted March 23, 1983, effective July 1, 1983.)



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# IDAHO JUVENILE RULES

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## **PART I. SCOPE AND PURPOSE OF RULES.**

### **Rule 1. Scope and purpose of rules.**

The scope and purpose of the Idaho Juvenile Rules is to govern the procedure in the district courts and the magistrates division thereof in the state of Idaho in all actions and proceedings under the Child Protective Act contained in Chapter 16 of Title 16, Idaho Code, hereinafter referred to as the "C.P.A.," and all actions and proceedings arising under the Juvenile Corrections Act contained in Chapter 5 of Title 20, Idaho Code, hereinafter referred to as the "J.C.A."

## **PART II. JUVENILE CORRECTIONS ACT (J.C.A.) PROCEEDINGS.**

### **Rule 2. Jurisdiction under the J.C.A. (J.C.A.)**

The scope and duration of jurisdiction over a juvenile under the J.C.A. shall be as set forth in Chapter 5 of Title 20, Idaho Code.

### **Rule 3. Issuance of summons/subpoena (J.C.A.)**

(a) In the event a juvenile is not in custody and upon the filing of a petition alleging said juvenile comes within the purview of the J.C.A. for an act which would constitute a criminal offense if committed by an adult, the clerk, unless otherwise directed by the court, shall schedule an admit/deny hearing in the case under I.J.R. 6.

(b) Upon scheduling the admit/deny hearing, the clerk or the court shall issue a summons as described in these rules requiring the person or persons who have physical care, custody, or control of the juvenile to appear personally and bring the juvenile before the court for the admit/deny hearing at the time and place stated therein which shall not be more than fifteen (15) days after issuance of the summons, unless extended by court order for cause shown. If the person so summoned is not the parent(s), guardian, or custodian of the juvenile, a summons or notice shall also be issued by the clerk of the court to the parent(s), guardian, or custodian requiring appearance at the admit/deny hearing. If the juvenile charged in the petition has reached 18 years of age, the summons shall require the appearance at the admit/deny hearing of the juvenile only, unless otherwise ordered by the court.

(c) A subpoena may be issued requiring the appearance of any person whose presence is required by the juvenile, the guardian, or any other person whose presence, in the opinion of the court, is necessary. A summons or subpoena may be issued to such persons who include witnesses or anyone who may be a possible resource for the care and treatment of the juvenile, including persons whom the juvenile or family wishes to have present. A party shall be entitled to the issuance of compulsive process for the attendance of witnesses.

(d) In the event it appears to the court that a juvenile is in such condition or surroundings that the juvenile's welfare is endangered, the court may order, by endorsement upon the summons, that the officer serving same take the juvenile immediately into custody and bring said juvenile before the court for safekeeping. By such action, the provisions of the Child Protective Act are automatically invoked pursuant to I.C. § 20-520(m) and I.J.R. 16.

STATUTORY NOTES

**Committee Comments.** There is no former juvenile rule regarding clerks' authority to issue summons in J.C.A. cases. There is, however, statutory authority regarding the issuance of a summons by the juvenile court (I.C. § 20-512).

This rule differs from the present statute (I.C. § 20-513) in two ways. First, it provides that either the judge or the clerk of the court have the authority to issue summons. Secondly, it provides for notification of the parent(s) or guardian, where reasonably practicable, when the summons is for a person other than the parent(s) or guardian of the juvenile. The latter considers situations where the parent(s) or guardian is incarcerated or unavailable for service of process. The former rule required notification to the parent(s) or guardian in such situations, and the modified rule is meant to avoid delay of the proceeding provided that a reasonable and diligent effort

to locate and serve the parent(s) or guardian has been made in unusual cases.

Idaho Code § 20-512 requires the initial appearance to occur within fifteen (15) days of the issuance of the summons. The Committee felt that the fifteen (15) day time frame may be insufficient when considering personal service and administration of court calendars. It is the Committee's intention that the time period for holding the hearing commences with the issuance of the summons and not with the filing of the petition.

It is the Committee's position that the expansion from the J.C.A. to the C.P.A. is not limited to the sentencing stage, and the court may order the case expanded under the provisions of the Child Protective Act at any stage of the proceeding, so long as there are articulable factors before the court which the court may recite as a basis for its order expanding the matter to a C.P.A. proceeding.

JUDICIAL DECISIONS

**Denial of Right to Counsel.**

Where the attorney has been deprived of a realistic opportunity to assist his client, the issue is not one of ineffective counsel, it is one of counsel denied. The right to counsel is so basic to our notions of fair trial and due process that denial of the right is never treated as harmless error; such denial requires setting aside an adjudication under the Youth Rehabilitation Act, §§ 16-1801 — 16-1845, and a remand for further proceedings in which counsel is timely provided. *Kinley v. State*, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

Where the county public defender appointed to represent the accused had only 15 minutes to speak with the accused and go over the case, and accordingly moved for a continuance in order to prepare a defense, to which the prosecutor did not object, the magistrate's denial of the continuance amounted to a denial of the right to counsel in violation of this rule and § 16-1809A, and constituted an abuse of discretion. *Kinley v. State*, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

RESEARCH REFERENCES

**A.L.R.** Right to and appointment of counsel. 25 A.L.R.4th 1072.

**Rule 4. Form of summons (J.C.A.)**

(a) The summons shall substantially conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of:

---

A Juvenile.

## SUMMONS

THE STATE OF IDAHO SENDS GREETINGS TO:

(name)

(address)

(city & state)

**YOU ARE HEREBY NOTIFIED THAT:**

A petition, a copy of which is attached, has been filed in the above-entitled matter in the Magistrate Court of \_\_\_\_\_ County, Idaho, by the prosecuting attorney, alleging that the above-named juvenile has committed an offense which brings said juvenile within the purview of the Juvenile Corrections Act, and

You, the person(s) who has/have the custody or control of said child, are hereby directed to appear personally and bring said child before this court for \_\_\_\_\_ (type of hearing) hearing at the \_\_\_\_\_ Courthouse, \_\_\_\_\_ (address), \_\_\_\_\_ (city), Idaho, on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m.

You are hereby notified that service of the attached petition upon you, as the parent(s), guardian(s), or custodian(s) of this juvenile, does confer the personal jurisdiction of the court upon you and does subject you to the provisions of the Juvenile Corrections Act.

You are further notified that the juvenile and the parent(s) or guardian(s) has/have the right to be represented by an attorney of your choosing, or if financially unable to pay, has/have the right to have an attorney appointed by the court to represent the juvenile or the parent(s) or guardian(s) at county expense. If you wish to have an attorney appointed at county expense, you must appear before the court at the address given above, at least two (2) days, excluding weekends and holidays, before the date of the hearing given above, at \_\_\_\_\_ o'clock \_\_\_\_m., at which time the court shall consider appointment of an attorney for the juvenile and inquire whether the parent(s) or guardian(s) require the separate appointment of an attorney.

WITNESS MY HAND AND SEAL of said Magistrate Court this \_\_\_\_ day  
of \_\_\_\_\_, 20 \_\_\_\_.

CLERK OF THE DISTRICT COURT

by \_\_\_\_\_  
Deputy Clerk

OR

by \_\_\_\_\_  
Magistrate Judge

STATE OF IDAHO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I HEREBY CERTIFY AND RETURN that I have received the above  
Summons and copy of the petition in the above-entitled matter on the  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and personally served the same on  
\_\_\_\_\_ by delivering to \_\_\_\_\_ in \_\_\_\_\_ County, state of  
Idaho, a copy of said Summons duly attested by the clerk of the above-  
entitled court, together with a copy of the petition and a copy of the Order  
Setting Time and Place of Hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

by \_\_\_\_\_  
(Deputy Marshal/Deputy Sheriff)

(Amended and effective August 3, 2006.)

STATUTORY NOTES

**Committee Comments.** The Committee believes that despite the two-day requirement to request court appointed counsel, failure to comply does not constitute, in and of itself, a waiver of that right. The two-day requirement is made to avoid undue court delay and expense.

JUDICIAL DECISIONS

**Legal Aid Attorneys.** If the county is required to pay reasonable fees to court-appointed private counsel, it is also required to pay reasonable fees to legal aid attorneys who are appointed by the court in Youth Rehabilitation Act proceedings. *James ex rel. Dunmire v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

Rule 5. Service of summons (J.C.A.)

(a) Service of a summons shall be made personally by delivery of an attested copy of the summons, with a copy of the petition attached, to the juvenile. Personal service shall be made upon the parent(s), guardian, or custodian of the juvenile if reasonably practicable. If a juvenile is in the legal custody or guardianship of an agency or person other than the parent(s),



service shall also be made by delivering to the legal custodian a copy of the summons with a copy of the petition attached.

(b) If the court determines that personal service is impracticable, the court may order service by certified mail. Service by certified mail shall require a signed receipt by the addressee. Service is complete upon return to the court of the signed receipt.

(c) Service of process shall be completed at least 48 hours before the time fixed in the summons for the hearing. If not, a continuance shall be granted upon request of any party not so served.

(d) Except as otherwise provided by these rules or statutes, service of process and proof of service shall be made by the methods provided in Rule 4 of the Idaho Rules of Civil Procedure. Service of process shall be made by the sheriff of the county where the service is to be made, or by a deputy, or any other peace officer or other suitable person appointed by the court.

(e) A return must be made on any summons served by a sheriff, peace officer, or court marshal by certificate of the officer, pursuant to Idaho Rule of Civil Procedure 4(g)(1), that such service has been made. Service of a summons by any other person shall be returned by affidavit of service in accordance with Rule 4(g)(2) of the Idaho Rules of Civil Procedure.

(f) No service of summons or process shall be required concerning any person who appears voluntarily or files a written waiver of service with the clerk prior to, or upon, appearance at the hearing.

**Rule 6. Admit/deny hearing — Nature of proceeding — Notice — Explanation of rights — Plea — Setting of evidentiary hearing (J.C.A.)**

(a) The admit/deny hearing on a petition filed under the J.C.A., other than detention hearings, shall be designated as the admit/deny hearing and is in the nature of an arraignment in an adult criminal proceeding. At this hearing the court shall also determine the confidentiality status of juvenile case records and proceedings pursuant to Rule 52, I.J.R., and Rule 32(d)(7), I.C.A.R.

(b) The admit/deny hearing may be held before the scheduled date set forth in the summons or notice of hearing upon written waiver, or oral waiver on the record, by all parties of the right to notice of the hearing. Whenever practicable and without violation of the juvenile's right to due process of law, the court should combine the admit/deny hearing with the initial detention hearing in the interest of judicial economy. The court may review and reconsider the detention status of the juvenile at the admit/deny hearing.

(c) The admit/deny hearing in its entirety shall be placed upon the record. At the hearing, the general public shall be admitted only after the court makes a determination under paragraph (a) above. Persons having a direct interest in the case or who work for the court may be permitted to attend subject to the provisions of I.J.R. 52. The juvenile may waive the exclusion of any person not otherwise entitled to be present in court. The presence of

the juvenile is required at the hearing, unless the juvenile is represented by counsel in attendance throughout the hearing and good cause is shown that the juvenile's absence is in the best interest of the juvenile.

(d) Each party shall be given a copy of the petition at, or before, the admit/deny hearing. At the hearing, the court shall inform the juvenile and the juvenile's parent(s), guardian, or custodian:

(1) Of their right to further time, unless waived, if service was not accomplished as provided in I.J.R. 5;

(2) Of the nature and elements of each allegation contained in the petition;

(3) Of their right to retain counsel pursuant to these rules, or if indigent, to have counsel appointed by the court;

(4) Of their right to a reasonable time to consult with counsel before entering a plea;

(5) Of the potential consequences to admission of the alleged offense;

(6) Of the juvenile's right against self-incrimination; and

(7) Of the state's burden to prove the allegations of the petition beyond a reasonable doubt at the evidentiary hearing before the court.

(e) After advising the juvenile in the manner set forth in paragraph (d) and ascertaining that all necessary parties are present, the court shall call upon the juvenile to admit or deny the allegations.

(1) A juvenile may tender a denial or admission of the alleged offense in the absence of the juvenile's parent(s), guardian, or custodian. If the juvenile declines to plead, the court shall enter a denial.

(2) The juvenile, or counsel on behalf of the juvenile, may enter a written admission on any charge which would be a misdemeanor if committed by an adult, provided the written admission, and a properly documented waiver of rights in conformance with paragraph (f), are signed and acknowledged by the juvenile and the parent(s), guardian, or custodian. A denial of any charge may be entered in the absence of the juvenile or the parent(s), guardian, or custodian.

(f) The court may accept an admission upon finding:

(1) That the right to counsel has been knowingly waived if the juvenile is not represented by counsel;

(2) That the admission is knowingly and voluntarily made;

(3) That the juvenile and parent(s), guardian, or custodian have been advised of, and knowingly waived, the juvenile's right against compulsory self-incrimination, the right to a trial, the right to confront and cross-examine opposing witnesses, the right to testify, and the right to have process for the attendance of witnesses;

(4) That the juvenile and parent(s), guardian, or custodian have been advised of the consequences which may be imposed after acceptance of the admission of guilt;

(5) That there is a factual basis for the plea, or the plea is being entered without factual basis to take advantage of a plea bargain; and

(6) Where applicable, the provisions of paragraph (i) have been met.

(g) The juvenile may be allowed to tender an admission to a lesser included offense, or an offense of a lesser degree, or a different offense, which the court may enter after amending the petition.

(h) In the event the juvenile is represented by counsel and no objection is interposed, the court may eliminate the admit/deny hearing in the interest of judicial economy, enter denials to the pending charges, and set the matter pursuant to paragraph (k).

(i) The prosecuting attorney may enter into discussions and reach a proposed plea agreement in conformity with Rule 11 of the Idaho Criminal Rules directly with the juvenile if the juvenile is not represented by counsel. However, the prosecuting attorney may not enter settlement negotiations with a juvenile not represented by counsel unless the parent(s), guardian, or custodian is advised of the discussion and given the opportunity to be present.

(j) In the event the court accepts the admission by the juvenile to the allegations of the petition, it may proceed to informal adjustment pursuant to I.J.R. 11 or schedule the sentencing hearing, and request the preparation of the report on the juvenile by the appropriate entity required pursuant to I.C. § 20-520(1), unless waived by all parties and approved by the court. A sentencing hearing may immediately follow an admit/deny hearing if the court has had an opportunity to consider and review the report required in Section 20-520(1) following an admission to the allegations by the juvenile or has received a written waiver from the juvenile, allowing the court to read the report prior to the admit/deny hearing.

(k) If a denial to a petition is entered, the court shall set the matter for evidentiary hearing (trial), and may set a pretrial conference. Such evidentiary hearing may immediately follow entry of a denial with the consent of the juvenile, defense counsel, and the prosecuting attorney, or may otherwise be set for hearing at a later date pursuant to notice of hearing to all parties in open court on the record, or by written notice of hearing thereafter served upon the parties. (Amended June 25, 1997, effective July 1, 1997.)

#### STATUTORY NOTES

**Committee Comments.** The proposed new rule expands former I.J.R. 21 to embrace the legal principle that juveniles are entitled to the same due process rights as adults in criminal proceedings. It integrates, in whole or part, language from the Utah Juvenile Court Rules of Practice with former I.J.R. 21 to provide greater detail to the substantive

and procedural aspects of the admit/deny hearing. The reader of the proposed rule should be able to understand the purpose of the admit/deny hearing, its relationship to the entire juvenile criminal process in Idaho, and the expectations and responsibilities of the court at that hearing.

#### CASE NOTES

**In General.**

Subsection (j) of this rule supports and

carries into effect the terms of § 20-511. State v. Doe, — Idaho —, 288 P.3d 805 (2012).



**Rule 7. Detention and hearing (J.C.A.)—Detention or protective supervision prior to adjudication.**

(a) A peace officer may take a juvenile into custody and shall take the juvenile forthwith to the court or to a place of detention without an order of the court pursuant to I.C. § 20-516. However, at the time of detention, or at any other time prior to a detention hearing by the court, the officer shall, unless it appears to the officer that it is contrary to the welfare of society or the welfare of the juvenile, release such juvenile to the custody of the parent(s) or other responsible adult upon written promise, signed by such person, to bring the juvenile to the court at a stated time as prescribed by general or specific order of the court.

(b) In the event the court has determined by a showing of probable cause through sworn affidavit or testimony that a crime has been committed and that the juvenile has committed the crime, it may order that the juvenile be taken into custody. The officer serving the order shall immediately take the juvenile into custody for placement in detention or in an alternative placement to detention approved by the court pursuant to I.C. § 20-516 pending a detention review hearing.

(c) A court may order a juvenile taken into custody, or a peace officer may take the juvenile into custody as provided in paragraph (a) of this rule. If a juvenile is not released to the parent(s) or other responsible adult, the court shall thereafter hold a detention hearing not later than 24 hours from the detention, excluding Saturdays, Sundays, and holidays, to determine whether such juvenile should remain in detention, pursuant to I.C. § 20-516. The detention or protective supervision of a juvenile in a juvenile proceeding may be ordered by the court under the following circumstances and conditions:

(1) When the juvenile has run away from the parent(s), guardian, or legal custodian and the court has reason to believe that for said juvenile to remain away from the parent(s), guardian, or legal custodian would be detrimental to the juvenile's welfare; or

(2) The court has reasonable grounds to believe that the juvenile will not appear before the court or its officers at such time as the court may order; or

(3) The court has reasonable grounds to believe that said juvenile will, during the pendency of the juvenile proceeding, be subjected to an environment or to persons whose effect upon said juvenile would be injurious to said juvenile's welfare; or

(4) The court has reasonable grounds to believe that the release of said juvenile would endanger said juvenile or society.

(d) In the event it appears to the court that a juvenile is in such condition or surroundings that the juvenile's welfare is endangered, the court may order, by endorsement upon the summons, that the officer serving same take the juvenile immediately into custody and bring said juvenile before the court for safekeeping. By such action, the provisions of the Child Protective Act are automatically invoked pursuant to I.C. § 20-520(m) and I.J.R. 16.



(e) In the event the court determines as a result of the detention hearing that the detention or protective supervision of the juvenile is not required, the court may enter an order delivering custody of the juvenile to any person or agency found by the court to be in the best interest of the juvenile and society and upon such terms, conditions, and restriction as the court shall determine and include in its order.

#### STATUTORY NOTES

**Committee Comments.** It is the Committee's position that the expansion from the J.C.A. to the C.P.A. is not limited to the sentencing stage, and the court may order the case expanded under the provisions of the

Child Protective Act at any stage of the proceeding, so long as there are articulable factors before the court which the court may recite as a basis for its order expanding the matter into the C.P.A.

#### **Rule 8. Notice of detention (J.C.A.)**

(a) When a peace officer takes a juvenile into custody, with or without a court order pursuant to I.C. § 20-516, the officer shall notify the parent(s), guardian, or custodian of the juvenile as soon as possible by any appropriate means, including but not limited to personal contact, telephonic contact, or written notice.

(b) The officer shall notify the parent(s), guardian, or custodian of:

- (1) The fact that the juvenile has been taken into custody;
- (2) The nature of the charges and the reason for which the juvenile is being detained;
- (3) The location of the juvenile's detention.

(c) If the peace officer releases the juvenile to the parent(s), guardian, or custodian upon written promise by the adult to appear with the juvenile in court, the provisions of I.J.R. 3, regarding issuance of summons, shall apply.

(d) If the peace officer does not release the juvenile and the juvenile is placed in detention, the court shall be informed and shall schedule a detention hearing to be held within 24 hours, excluding Saturdays, Sundays, and holidays, from the time the juvenile was placed in detention. When a juvenile is placed in a detention or shelter facility, the person in charge of the facility shall immediately notify the juvenile's parent(s), guardian, or custodian and shall also promptly give notice to the court that the juvenile is being held at the facility. When a juvenile is detained in a detention or shelter facility, the parent(s) or guardian shall be informed by the person in charge of the facility that they have the right to a prompt hearing in court to determine whether the juvenile is to be further detained or released. The court may at any time order the release of a juvenile, regardless of whether or not a detention hearing is held.

(e) Notice of the detention hearing must be given, whenever possible, by any reasonable means as directed by the court, including but not limited to telephonic, or personal contact, or written notice to the parent(s), guardian, or custodian. No specific time period shall be required for such notice. If the parent(s) are not present at the detention hearing, notice shall be given by the court pursuant to I.C. § 20-516(7).

JUDICIAL DECISIONS

**Cited in:** Merritt v. State, 108 Idaho 20, 696 P.2d 871 (1985).

**Rule 9. Right to counsel (J.C.A.)**

(a) The juvenile has the right to be represented by retained counsel in all proceedings before the court. The court shall appoint counsel for the juvenile if it finds that the juvenile is financially unable to pay for such legal services, unless representation is competently and intelligently waived. The court shall appoint separate counsel for the parent(s) or guardian if the court finds there is a conflict between the interests of the juvenile and the parent(s) or guardian and the court finds that the parent(s) or guardian are financially unable to pay unless representation is competently and intelligently waived.

(b) Pursuant to I.C. § 20-514, the court shall appoint separate counsel for the juvenile, whether or not the parent(s) or guardian are able to afford counsel, unless there is an intelligent waiver of the right of counsel by the juvenile and the court further determines that the best interest of the juvenile does not require the appointment of counsel.

(c) In the event a juvenile appears before the court without parent(s) or guardian, the court shall appoint counsel to represent the juvenile; and

(d) Notice of the right to be represented by counsel, and right to counsel at public expense where financial inability exists on the part of the juvenile, parent(s), or guardian, shall be given at the earliest possible time. In the event a juvenile is detained, notice shall be given simultaneously with the notice of detention hearing and at the outset of a detention hearing. Notice of the right to counsel, and right to counsel at public expense if the parent(s) or guardian are financially unable to pay, shall be stated upon the notice or summons of an admit/deny arraignment hearing and upon the notice or summons of an evidentiary hearing.

STATUTORY NOTES

**Committee Comments.** Reference to custodian has been deleted from this rule since I.C. § 20-514 makes no reference to anyone other than the juvenile, or the juvenile’s parent(s), or guardian as having the right to be represented.

The same section of the Idaho Code provides that the appointment of counsel is dependent upon the financial inability to pay for the services, not indigence.

The intent of the Committee is to make it clear that the juvenile, parent(s), or guardian

all have the right to be represented by counsel—and at public expense if they are unable to afford the same—and that the juvenile has the right to be represented by separate counsel if conflict exists between the interests of the juvenile and that of the parent(s) or guardian, and that the juvenile shall be provided counsel at public expense in such a situation whether or not the parent(s) or guardian have the ability to pay. See I.C. § 20-514.

**Rule 10. Transfer of case for sentencing to county of juvenile’s residence (J.C.A.)**

(a) When a petition alleges the commission of a juvenile offense in a county other than the county of the juvenile’s residence, the matter may be

transferred upon order of the court where the offense is alleged to have occurred (sending court) to the county of the juvenile's residence (receiving court) if the following conditions are met:

(1) (A) The juvenile admits to the allegation or enters into a written agreement as to the charges to be admitted and enters into a written notice of intent to enter an admission to the petition in the county where the offense is alleged to have occurred; or (B) The juvenile has been found by the Court to have committed the offense following evidentiary hearing and to be within the purview of the J.C.A.; and

(2) The sending court finds that transfer of the matter to the receiving court is in the best interest of the juvenile and the prompt administration of the court's business, and the sending court further determines that transfer of sentencing to the county of the juvenile's residence will impose no unreasonable barriers of distance to any persons entitled to be heard at the sentencing hearing.

(b) For purposes of Idaho Juvenile Rules 10, 10A and 10B, a county of the juvenile's residence is deemed to be a county in which the juvenile is actually residing with a parent/legal guardian/legal custodian, or a county in which a proceeding involving the juvenile under the Idaho Child Protective Act is currently pending, or, if a juvenile is over 18 years of age, the county where the former juvenile has established a residence. Any juvenile whose residency cannot be ascertained by the juvenile courts may be deemed homeless and afforded the protections of the Idaho Child Protective Act by invoking Idaho Juvenile Rule 16.

(c) Upon satisfaction of the conditions set forth in (a)(1) and (2) above, the receiving court shall not refuse transfer of the matter hereunder, except upon a finding that the juvenile does not reside in the receiving county.

(d) Upon transferring a case, the sending court shall:

(1) Order the case and all original documents and records therein transferred to the magistrate's division of the district court of the county of the juvenile's residence for sentencing; and

(2) Notify the juvenile and the juvenile's parent(s) and/or legal guardian/legal custodian that any order appointing defense counsel at public expense does not extend beyond the county where the offense occurred, and that further legal representation must be requested through the court in the county of the juvenile's residence; and

(3) Notify the court in the county of the juvenile's residence in writing of the court's order of transfer and the manner in which restitution to any victim(s) has been resolved pursuant to (h) below.

(e) The receiving court shall notify the juvenile and the juvenile's parent(s) and/or legal guardian/legal custodian of the date and time of the juvenile's next appearance.

(f) Following entry of the order of transfer by the sending court, if the juvenile fails to enter an admission as contemplated in the written notice of intent to enter an admission, or the juvenile withdraws the admission previously entered before the sending court, or the receiving court fails or



refuses to accept the admission or transfer of the matter, then all original documents and records shall be promptly returned to the sending court and the matter shall be set for evidentiary hearing. Nothing in this rule shall limit the receiving court's sentencing authority under Idaho Code § 20-520, nor prevent the court from proceeding to sentencing on any matter found within the purview of the court under the Juvenile Corrections Act.

(g) In all cases under this rule, the receiving court shall conduct an admit/deny hearing, if not previously held, pursuant to Idaho Juvenile Rule 6 and may combine the admit/deny and sentencing hearings.

(h) If the issue or the amount of restitution is contested, it shall be resolved by the court of the county where the criminal offense occurred.

(i) Any signature, acknowledgment or consent of a juvenile to a notice of intent to admit shall not be used to incriminate the juvenile in a subsequent trial on the merits of the charge.

(j) The written notification of a juvenile's intention to admit a petition shall substantially conform to the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of: \_\_\_\_\_,  
A Juvenile.

)  
) AGREEMENT TO ADMIT TO  
) CHARGES, PERMISSION TO  
) READ PROBATION REPORTS  
) AND REQUEST TO  
) TRANSFER CASE  
)  
)

After having spoken with my attorney and with my parent(s) (or my guardian, or my legal custodian) I have decided that:

1. I want to have my case sent to the county where I live;
2. I agree to admit to the charge(s) against me when I am in front of the judge in that county;
3. I give up my right to keep this Court from looking at any probation officer reports before sentencing, and ask the Court to do so, in order to decide whether this transfer is in my best interest and the administration of justice; and if so,
4. I ask the Court to order my case transferred to the county where I am now living.

Signature of Juvenile

Signature of Juvenile's Attorney



(k) The sending court’s order of transfer shall substantially conform to the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of: \_\_\_\_\_ ) Case No. \_\_\_\_  
\_\_\_\_\_ )  
\_\_\_\_\_ ) Petition No. \_\_\_\_  
\_\_\_\_\_ )  
A Juvenile. \_\_\_\_\_ ) ORDER OF TRANSFER  
\_\_\_\_\_ )  
\_\_\_\_\_ )

The above petition(s) having been filed on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and the said juvenile having [filed a notice of intent to admit/ admitted the violation(s), as charged] [been found to have committed the violations] on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ ; and

Restitution having been resolved per I.J.R. 10(h) as follows:  
\_\_\_\_\_ ; and

It appearing to the court that the said juvenile is not a resident of \_\_\_\_\_ County, and that it would be in the juvenile’s best interest to be under the jurisdiction of the Magistrate Division of the District Court of \_\_\_\_\_ County, Idaho.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above-named juvenile is within the purview of the Juvenile Corrections Act, and the said cause in the matter of the said juvenile shall be transferred to the Magistrate Division of the District Court of \_\_\_\_\_ County, Idaho, for admit/deny and/or sentencing hearing(s).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

(Amended March 20, 1985, effective July 1, 1985; amended March 8, 1999, effective July 1, 1999; repealed and readopted September 9, 2008, effective November 1, 2008.)

STATUTORY NOTES

**Committee Comments.** Idaho Code § 20-505 grants jurisdiction over juvenile offenders to the court of the county where the juvenile resides or where the offense occurred. Idaho Code § 20-520(1)(n), in specifying one of a juvenile court’s sentencing powers, provides for transfer of a case “to the county where the juvenile and/or the parents reside, if different from the county where the juvenile was charged and found to have committed the

unlawful or criminal act.” Idaho Code § 20-508(9) authorizes the county of the juvenile’s residence to refuse to accept a transfer from another county.

**Rule 10A. Transfer of probation for courtesy supervision. (J.C.A.)**

(a) The dispositional/supervising court, as the sending court, at sentencing or at any time during a probationary period, may enter an order transferring a juvenile probationer’s terms of probation for courtesy supervision to a receiving court in another county within the State of Idaho if:

(1) the sending court determines, upon good cause shown, that the juvenile resides, or intends to reside, with a parent or legal guardian/legal custodian, or in a placement at a residential treatment facility, or a foster home, in the receiving county; and,

(2) the juvenile retains community ties with the county of the sending court through continued maintaining of a residence by a parent or legal guardian/legal custodian, or the continued pendency of a C.P.A. proceeding therein; and

(3) transfer of probation for courtesy supervision is in the best interest of the juvenile and the prompt administration of the court’s business.

(b) Transfer of probation to the receiving court for courtesy supervision shall be temporary, for a period not exceeding six months unless extended by the sending court, and certified copies of the sentencing decree, court minutes, reports, assessments and other pertinent records shall be transferred to the receiving court, the originals of which shall be retained by the sending court.

(c)

(1) Prior to transfer of probation for courtesy supervision, the sending court shall order that all imposed sentencing penalties of detention/jail days yet to be completed by the juvenile probationer shall be served and the costs therefore recovered, in the sending county, unless prior thereto, the receiving court agrees in writing to allow the juvenile to serve said penalties in the receiving county, the costs of which to be recovered there. Any sentencing penalties of detention/jail days that are unscheduled or held at the discretion of the court may be imposed by the receiving court and the cost therefore recovered in the receiving county.

(2) Any order transferring probation for courtesy supervision shall include a requirement that the juvenile probationer shall comply with any groups or programs in the receiving county which are consistent with the sending court’s order of probation and deemed appropriate by the receiving court.

(d) Upon receipt of an order transferring probation for courtesy supervision, the receiving court shall determine the type of supervision and services available in the receiving county which are most consistent with, but not more restrictive than, the transferred order of probation and shall enter an order requiring the juvenile probationer to comply with said supervision and services in the receiving county.

(e)

(1) Any motion for violation of probation alleged to have occurred while a juvenile is on courtesy supervision shall be filed by the prosecuting attorney of the sending county, supported by affidavit of any juvenile court officer or other person with knowledge of said violation, and shall be adjudicated by the court of the sending county.

(2) Any substantive charges including status offenses, misdemeanors or felonies, alleged to have been committed in the receiving county or any other county by a juvenile probationer while on courtesy supervision shall be brought by the prosecuting attorney of the county where the crime allegedly occurred and adjudicated by the juvenile court in that county.

(3) Any victim notification requirements shall be the responsibility of the prosecuting attorney having the duty to initiate the proceedings set forth herein.

(f) The sending court shall have the sole authority to extend, revoke or terminate early the probationary order of any juvenile being supervised in the receiving county under a six-month period of courtesy supervision. In reaching its decision, the sentencing/sending court shall set a review hearing prior to the expiration of the six-month period and consider any requests and reports submitted by the receiving county, and any extension of courtesy supervision shall be for an additional period not exceeding six months; provided, no such extension shall exceed the duration of probation ordered at sentencing.

(g) Any restitution ordered to victims must be determined by the juvenile court of the county where the offense occurred pursuant to Idaho Juvenile Rule 10(h). In cases transferred for courtesy supervision, the monitoring of the receipt of payments for restitution, as well as other payments for fees owed to the sending county, shall be the responsibility of the sending court. Any motion for a probation violation for nonpayment of fees, including restitution, must be pursued, per subsection (5) of this rule, in the sending county. Repayment for fees incurred in the receiving county shall be handled by the receiving court.

(h)

(1) A juvenile probationer under a suspended commitment for secure confinement with the Department of Juvenile Corrections, may be transferred by the sending court to the receiving court only under the terms of an order for courtesy supervision. Any motion for a probation violation must be pursued, per subsection (5) of this rule, in the sending county.

(2) Any non-secure placement of a juvenile committed to the Department of Juvenile Corrections, while the juvenile remains under the custody of the Department, in a county other than the sentencing county, shall be the responsibility of the Department and not deemed to be a courtesy supervision.

(3) In the event that a juvenile is released from the custody of the Department of Juvenile Corrections to a placement outside of the sentencing county, the sentencing court shall hold a hearing pursuant to

- Idaho Juvenile Rule 20 to determine whether to transfer probationer for courtesy supervision under this rule.
- (i) The receiving court shall not refuse transfer of a juvenile probationer for courtesy supervision, except as set forth in Idaho Juvenile Rule 10(c).
  - (j) The receiving court shall assume jurisdiction of a juvenile hereunder when the order transferring probation for courtesy supervision is received.
  - (k) The order transferring probation for courtesy supervision shall substantially conform to the follow form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of:  
  
\_\_\_\_\_,  
  
A Juvenile.  
  
\_\_\_\_\_

)  
) Case No. \_\_\_\_  
)  
)  
) Petition No. \_\_\_\_  
)  
) ORDER OF TRANSFER FOR  
) COURTESY SUPERVISION  
)

The above named juvenile was found to be in the purview of the Juvenile Corrections Act. The juvenile was placed on probation in \_\_\_\_\_ County. From information provided the court, the court finds:

- (1) upon good cause shown, that the juvenile resides, or intends to reside, with a parent or legal guardian/legal custodian, or in a placement at a residential treatment facility, or a foster home, in the receiving county; while,
- (2) the juvenile retains community ties with the county of the sending court through continued maintaining of a residence by a parent or guardian, or the continued pendency of a C.P.A. proceeding, therein; and
- (3) transfer of probation for courtesy supervision is in the best interest of the juvenile and the prompt administration of the court’s business.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above-named juvenile is within the purview of the Juvenile Corrections Act, and pursuant to IJR 10A the juvenile’s probation is transferred to \_\_\_\_\_ County for courtesy supervision. The juvenile probationer shall comply with any groups or programs in the receiving county which are consistent with the sending court’s order of probation and deemed appropriate by the receiving court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

(Adopted September 9, 2008, effective November 1, 2008.)



**Rule 10B. Transfer of probation in its entirety. (J.C.A.)**

(a) The dispositional/supervising court, as the sending court at sentencing, or at any time during a probationary period, may enter an order transferring the entirety of a juvenile probationer's terms of probation to a receiving court in another county within the State of Idaho if:

(1) the sending court determines, upon good cause shown, that the juvenile resides, or intends to reside, with a parent or legal guardian/legal custodian in the receiving county; and

(2) the juvenile retains no further community ties with the county of the sending court because residency by a parent or legal guardian/legal custodian there has ceased; and

(3) transfer of probation in its entirety is in the best interest of the juvenile and the prompt administration of the court's business.

(b) Transfer of probation in its entirety to the receiving court shall be deemed permanent, and all original documents and records therein shall be transferred to the receiving court pursuant to Idaho Juvenile Rule 10(d).

(c) The sending and receiving courts involved in any transfer of probation in its entirety shall follow the requirements and procedures set forth in Idaho Juvenile Rule 10A(c) and (d).

(d) Any motion for violation of probation alleged to have occurred after an order transferring probation in its entirety has been entered by the sending court shall be filed by the prosecuting attorney of the receiving county, supported by affidavit, and shall be adjudicated by the court of the receiving county.

(e) Any county receiving the transfer of probation in its entirety from the sending county, or assuming the supervision of the probation in its entirety under subsection (f) below, shall be deemed to be the county of residence of the juvenile probationer. Any substantive charges alleged to have been committed thereafter by the juvenile probationer shall be petitioned, adjudicated and sentenced pursuant to Idaho Juvenile Rule 10.

(f) At the six-month review hearing regarding courtesy supervision set forth in Rule 10A(f), or at any other time, the sending court may enter an order transferring probation in its entirety, or the receiving court may enter an order, upon its own motion, assuming the supervision of probation in its entirety if the actual residence of the juvenile in the receiving county is found to be stable and permanent, and it is in the best interest of the juvenile and the prompt administration of justice.

(g) Any non-payment of fees, including restitution, owed in the sending county by the juvenile probationer whose probation has been transferred in its entirety to, or assumed in its entirety by, the receiving county may be pursued by a motion for violation of probation in the receiving county or a motion for contempt filed in the sending or receiving county.

(h) No order transferring probation in its entirety by the sending court, nor order assuming supervision of probation in its entirety by the receiving court, shall be entered regarding any juvenile probationer who is under a suspended commitment for secure confinement with the Department of Juvenile Corrections.

- (i) The duration of any probationary period transferred or assumed in its entirety hereunder shall be solely determined by the receiving court.
- (j) The receiving court shall not refuse transfer of probation in its entirety, except as set forth in Rule 10(c).
- (k) The receiving court shall assume jurisdiction of a juvenile hereunder when the order transferring probation in its entirety is received from the sending county or when the order assuming the supervision of probation is entered by the receiving court.
- (l) The order transferring probation in its entirety, or assuming supervision of probation in its entirety shall substantially conform to the following form:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of:	)	Case No. ____
_____	)	Petition No. ____
A Juvenile.	)	ORDER OF TRANSFER OF
_____	)	PROBATION IN ITS
	)	ENTIRETY

The above named juvenile was found to be in the purview of the Juvenile Corrections Act. The juvenile was placed on probation in \_\_\_\_\_County. From information provided the court, the court finds:

- (1) upon good cause shown, that the juvenile resides, or intends to reside, with a parent or legal guardian/legal custodian in the receiving county; and
- (2) the juvenile retains no further community ties with the county of the sending court because residency by a parent or guardian there has ceased to continue; and
- (3) transfer of probation in its entirety is in the best interest of the juvenile and the prompt administration of the court’s business.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above-named juvenile is within the purview of the Juvenile Corrections Act, and pursuant to IJR 10B the juvenile’s probation is transferred to \_\_\_\_\_ County. The juvenile probationer shall comply with any groups or programs in the receiving county which are consistent with the sending court’s order of probation and deemed appropriate by the receiving court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

(Adopted September 9, 2008, effective November 1, 2008.)

### **Rule 11. Informal adjustment (J.C.A.)**

The court, in exercising its discretion, may order an informal adjustment for any case filed under the Juvenile Corrections Act, upon such terms and conditions as the court may deem just and appropriate under the circumstances. The discretion of the court to impose an informal adjustment is not limited by the nature of the charge. The court, in its discretion, may impose or suspend detention as it deems appropriate, pursuant to an informal adjustment. Informal adjustments may be ordered at any stage of the proceedings after admission by the juvenile or finding by the court that the juvenile has committed an offense, upon notice to parties and the opportunity to be heard. The court may order a preliminary inquiry pursuant to I.C. § 20-510 or a social report pursuant to I.C. § 20-520 prior to an informal adjustment.

### **STATUTORY NOTES**

**Committee Comments.** Idaho Code §§ 20-510 and 20-511 deal with informal adjustments. I.C. § 20-510 deals with informal adjustments prior to the entry of an admission to the petition, while I.C. § 20-511(2) authorizes the court to make informal adjustments after the juvenile admits the allegations of the petition.

This rule clarifies the court's discretion to impose informal adjustments, both pre- and post-admission, following the filing of a petition. Responses received from Committee members on the informal adjustment question were virtually uniform in that all desired to allow a great amount of discretion and flexibility in dealing with the different juveniles, charges, and situations which arise

under the J.C.A. Furthermore, the Committee members were not in favor of setting forth definitive criteria for determining whether or not an informal adjustment is appropriate in any or all circumstances. The preference was to allow the court to treat each matter case by case, and to provide for a procedure whereby the respective parties can make the request or recommendation for an informal adjustment.

The Committee also noted that while I.C. § 20-511(2) provides that an informal adjustment can be granted after the juvenile has admitted the allegations, the Committee feels that a judge has authority to issue an informal adjustment after a finding of guilt after a trial.

### **CASE NOTES**

#### **Alternate Sentencing.**

Formal sentencing and informal adjustment are mutually exclusive pathways for resolving juvenile petitions. Therefore, the juvenile defendant is subject to either formal sentencing or informal adjustment. Once the

magistrate court formally sentences a juvenile to two years' probation under § 20-520(1)(a), it has no authority to convert the judgment into an informal adjustment under § 20-511 and this rule. *State v. Doe*, — Idaho —, 288 P.3d 805 (2012).

### **Rule 12. Pretrial conference (J.C.A.)**

At any time prior to the J.C.A. trial (evidentiary hearing), the court, upon motion of the juvenile, the juveniles parent(s), or upon its own motion, may order one or more conferences to consider such matters as would promote a fair and expeditious trial. At the conclusion of the conference, the court shall file a memorandum of the matters agreed upon. No admission made by the juvenile or the juvenile's attorney at the conference shall be used against the



juvenile unless the admissions are reduced to writing and signed by the juvenile and the juvenile's attorney.

### JUDICIAL DECISIONS

**Cited in:** Merritt v. State, 108 Idaho 20, 696 P.2d 871 (1985).

#### **Rule 12.1. Mediation in criminal cases.**

In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of the parties. Not all defendants in a multi-defendant case need join in the request or in the settlement conference/mediation. Decision making authority remains with the parties and not the mediator.

(1) **Definition of "Mediation".** Mediation under this rule is the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing options, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case. Unless otherwise ordered, mediation shall not stay any other proceeding.

(2) **Matters Subject to Mediation.** All misdemeanor and felony cases shall be subject to mediation if the court deems that it may be beneficial in resolving the case entirely. Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 agreements, the handling of restitution and continuing relationship with any victim, are all matters which may be referred to mediation.

(3) **Selection of Mediator.** The court shall select a mediator from those maintained on a roster provided by the Administrative Office of the Courts, after considering the recommendations of the parties. That roster will include senior or sitting judges or justices who have indicated a willingness to conduct criminal mediations and who have completed a minimum of twelve (12) hours of criminal mediation training within the previous two years before being placed on the roster. If the selected mediator is a senior judge or justice, the mediator will be compensated as with any senior judge service, and approval from the trial court administrator must be obtained by the court prior to the mediation.

(4) **Role of the Mediator.** The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any future aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case.



(5) **Persons to be Present at Mediation.** Participants shall be determined by the attorneys and the mediator. The government attorney participating in the settlement discussions shall have authority to agree to a disposition of the case.

(6) **Confidentiality.** Except as provided in I.C. § 16-1605, mediation proceedings shall in all respects be confidential and not reported or recorded.

(7) **Mediator Privilege.** Mediator privilege is governed by Idaho Rule of Evidence 507.

(8) **Communications Between Mediator and the Court.** The mediator may consult with the presiding judge about the terms of a possible plea agreement; otherwise, the mediator and the court shall have no contact or communication except that the mediator may, without comment or observation, report to the court:

(a) that the parties are at an impasse;

(b) that the parties have reached an agreement. In such case, however, the agreement so reached may be reduced to writing, signed by the prosecuting attorney, the Defendant and defense counsel, and submitted to the court for approval;

(c) that meaningful mediation is ongoing;

(d) that the mediator withdraws from the mediation.

(9) **Communications Between Mediator and Attorneys.** The mediator may communicate in advance of the mediation with the attorneys to become better acquainted with the current state of negotiations and the issues to be resolved in the mediation. This communication may be conducted separately with each of the attorneys and without the presence of the defendant.

(10) **Termination of Mediation.** The court, the mediator, or any party may terminate the mediation at any time if further progress toward a reasonable agreement is unlikely or concerns or issues arise that make mediation no longer appropriate. (Adopted March 18, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012; amended February 27, 2013, effective July 1, 2013.)

### **Rule 13. Notice of further proceedings (J.C.A.)**

(a) Notice of the time, date, and place of a pretrial conference, trial, sentencing, or any further proceedings, after an initial appearance or service of summons, may be given in open court, by written acknowledgment of receipt or by mail to any party. Service of the notice shall be sufficient if the clerk deposits the notice in the United States mail, postage prepaid, to the address provided by the party in court, or the address at which the party was initially served, and files a certification of such service, or if notice is sent by registered or certified mail.

(b) The notice of hearing shall substantially conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of: \_\_\_\_\_  
A Juvenile \_\_\_\_\_

)  
) Case No. \_\_\_\_  
) Petition No. \_\_\_\_  
)  
)  
)  
) NOTICE OF HEARING  
)  
)  
)

PLEASE TAKE NOTICE that the above matter has been set for hearing  
in the Magistrate Court at the \_\_\_\_ County Courthouse,  
(address) \_\_\_\_\_, (city) \_\_\_\_\_, Idaho, on the \_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_ o'clock \_\_\_\_m. The nature of the hearing is:

- ☐ Detention Hearing  
☐ Initial (Admit/Deny)  
Hearing  
☐ Evidentiary Hearing  
☐ Sentencing Hearing
- ☐ Motion Hearing  
☐ Restitution  
Hearing  
☐ Other

You are further notified that the juvenile and the juvenile’s parent(s) or guardian have the right to be represented by an attorney of your choosing, or if financially unable to pay, have the right to have an attorney appointed by the court to represent the juvenile, or the juvenile’s parent(s), or guardian at county expense. If you wish to have an attorney appointed at county expense, you must appear before the court at the address given above, at least two (2) days, excluding weekends and holidays, before the date of the hearing given above, at \_\_\_\_\_ o'clock \_\_\_\_m., at which time the court shall consider appointment of an attorney for the juvenile and inquire whether the parent(s) or guardian require the separate appointment of an attorney.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

CLERK OF THE DISTRICT COURT  
By \_\_\_\_\_  
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that copies of this notice were served as follows on this date: \_\_\_\_\_  
Juvenile:  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

\_\_\_\_\_  
Juvenile’s Signature or Hand Receipt

Parent(s), Guardian, Custodian:  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

\_\_\_\_\_  
Parent's(s')/Guardian's/Custodian's  
Signature of Hand Receipt

Defense Counsel:  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

Prosecutor:  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

Other: \_\_\_\_\_  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

Probation Officer/Caseworker  
Hand Delivered \_\_\_\_ Mailed\_\_\_\_

By \_\_\_\_\_  
Deputy Clerk

STATUTORY NOTES

**Committee Comments.** The current rules on issuance of summons, service of summons, notice of detention hearing, and notice of further proceedings (I.J.R. 3, 5, 7, 13, respectively) consolidate the notice requirements of former Idaho Juvenile Rules 3, 17(b), 21(b) and (e), 22(a), and 24(a). The current rules appear in the sequence in which notice requirements will arise in a normal J.C.A. case. Language from the detailed Utah Juvenile Court Rules of Practice was adopted to fill gaps in the explanation of the notice requirements under the former Idaho Juvenile Rules. Form documents which contain the essential

elements of the statutory notice requirements are added to the current rules to assist lawyers and judges in following the correct procedure. These rules do not address the statutory requirement for payment of travel expenses incurred through compulsory attendance for a J.C.A. or C.P.A. hearing, the same being considered an administrative matter of the various counties. Finally, current rules clarify the procedure for issuance of summons in J.C.A. and C.P.A. cases, including allowing the clerk of the court to issue said summons on behalf of the judge.

**Rule 14. Order setting pretrial conference, evidentiary hearing, or sentencing hearing (J.C.A.)**

Upon effective service of process and appearance at the admit/deny hearing, the following order may be used in scheduling pretrial conferences and evidentiary or sentencing hearings in each jurisdiction:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Interest of:  
  
\_\_\_\_\_,  
  
A Juvenile.  
  
\_\_\_\_\_

) Case No. \_\_\_\_  
) Petition No. \_\_\_\_  
)  
) ORDER SETTING  
) MATTER FOR  
) PRETRIAL CONFERENCE  
) AND EVIDENTIARY  
) HEARING OR  
) SENTENCING HEAR-  
) ING AND ORDER  
TO APPEAR

**IT IS HEREBY ORDERED** that the above-entitled matter is hereby set  
for:

PRE-TRIAL	Date _____ at ____ a.m./p.m. o'clock
EVIDENTIARY HEARING	Date _____ at ____ a.m./p.m. o'clock
SENTENCING HEARING	Date _____ at ____ a.m./p.m. o'clock
DETENTION REVIEW	Date _____ at ____ a.m./p.m. o'clock
HEARING	
OTHER _____	Date _____ at ____ a.m./p.m. o'clock

at the \_\_\_\_ County Courthouse, \_\_\_\_ (address) \_\_\_\_, \_\_\_\_ (city) \_\_\_\_, Idaho.

**IT IS FURTHER ORDERED:**

1. That the parties, prior to the pre-trial conference, complete discovery and comply with Rule 16 of the Idaho Criminal Rules; and
2. THAT THE ABOVE-NAMED JUVENILE BE PERSONALLY PRESENT AT ALL SCHEDULED HEARINGS. FAILURE TO APPEAR AT ANY SCHEDULED HEARING WILL RESULT IN A DETENTION ORDER BEING ISSUED AGAINST THE ABOVE-NAMED JUVENILE.

**IT IS FURTHER ORDERED** that the parent(s), legal guardian, or custodian of the above-named juvenile personally appear with said juvenile at all scheduled hearings before this court.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this notice were served as follows on this  
date: \_\_\_\_\_



Juvenile:

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

\_\_\_\_\_  
Juvenile's Signature of Hand Receipt

Parent(s), Guardian, Custodian:

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

\_\_\_\_\_  
Parent's(s')/Guardian's/Custodian's  
Signature of Hand Receipt

Defense Counsel:

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Prosecutor:

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Other: \_\_\_\_\_

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Probation Officer/Caseworker

Hand Delivered \_\_\_\_ Mailed \_\_\_\_

By \_\_\_\_\_  
Deputy Clerk

### **Rule 15. Evidentiary hearing (J.C.A.)**

In the event the juvenile denies the allegations of the petition at the admit/deny hearing, a J.C.A. evidentiary hearing shall be held in accordance with the provisions of the J.C.A. and in accordance with the following procedures:

(a) The hearing shall commence within 90 days from the entry of the denial, unless the hearing is continued for good cause shown. The evidentiary hearing for a juvenile held in continuous preadjudication detention shall commence within 45 days of the initial appearance of the juvenile before the court unless the hearing is continued for good cause shown.

(b) Notice of the hearing must be given by a notice or summons in accordance with I.C. §§ 20-512 and 20-513, unless verbal notice of such hearing has been given to the parties in open court and placed upon the record.

(c) At the hearing the general public and persons having a direct interest in the case or who work for the court may be permitted to attend, subject to the provisions of I.J.R. 52. The presence of the juvenile in the court at the time of the hearing may be waived by the court, but only when good cause is found that it is in the best interest of the juvenile, and only if the juvenile is represented by counsel who is in attendance at all times during the hearing.

(d) When a juvenile, other than the juvenile against whom the petition has been filed, is summoned as a witness in any hearing under the J.C.A., the parent(s), a counselor, a friend, or other person having a supportive relationship with the juvenile shall, if available, be permitted to remain in the courtroom at the witness stand with the juvenile during the juvenile's testimony unless, in written findings made and entered, the court finds that the juvenile's constitutional right to a fair trial will be unduly prejudiced.

(e) The entire hearing shall be placed upon the record.

(f) The rules of evidence and discovery in a J.C.A. evidentiary hearing (trial) are the same as the rules that apply in a criminal proceeding.

(g) All issues shall be tried solely before the court.

(h) The state has the burden of proving beyond a reasonable doubt that the juvenile has committed acts bringing the juvenile within the purview of the J.C.A.

(i) The court shall make a finding as to whether or not the juvenile has committed acts which bring the juvenile within the purview of the J.C.A. In making this finding, the court shall consider only admissible evidence introduced at the hearing and shall not consider any reports, documents, or other information obtained by the judge in making an initial inquiry in the proceeding. (Amended June 25, 1997, effective July 1, 1997.)

#### STATUTORY NOTES

**Committee Comments.** It is the opinion of the Committee that a time limit should be imposed for the evidentiary hearing, unless good cause is shown to extend the time limit. The ninety (90) day time limit is a compromise among the Committee members.

Committee members differed on the time limit that a juvenile can be held continuously

in detention while awaiting evidentiary hearing. The 45 day time limit represents a compromise by the Committee members. This rule still allows for the time to be extended for good cause shown.

#### **Rule 16. Expanding a Juvenile Corrections Act proceeding to a Child Protective Act proceeding (J.C.A.)**

(a) If at any stage of a J.C.A. proceeding the court has reasonable cause to believe that a juvenile living or found within the state is neglected, abused, abandoned, homeless, or whose parent(s) or other legal custodian fails or is unable to provide a stable home environment, as set forth in I.C. Section 16-1603, the court may order the proceeding expanded to a C.P.A. proceeding or direct the Department of Health and Welfare to investigate the circumstances of the juvenile and his or her family and report to the court as provided in I.C. § 16-1616. Any order expanding the proceeding to a C.P.A. proceeding must be in writing and contain the factual basis found by the court to support its order. The order shall direct that copies of all court documents, studies, reports, evaluations, and other records in the court files, probation files, and juvenile corrections files relating to the juvenile/child be made available to the Department of Health and Welfare at its request.

(b) Upon expanding the proceeding to a C.P.A., the court may order the juvenile placed in shelter care under the C.P.A. if that is in the best interest of the juvenile and needed for the juvenile's protection. If the juvenile is placed in shelter care, a shelter care hearing under the C.P.A. must be held within 48 hours, excluding Saturdays, Sundays, and holidays, and notice thereof shall be given to the juveniles parents(s), guardian, or custodian, and to the Department of Health and Welfare.

(c) A copy of the order expanding a J.C.A. proceeding to a C.P.A. proceeding shall be given to the juvenile's parent(s), guardian, or custodian, the Idaho Department of Health and Welfare, the prosecuting attorney and other counsel of record, and the Department of Juvenile Corrections if the juvenile is currently under commitment to the Department, pursuant to these rules and the rules of civil procedure.

(d) No further C.P.A. petition will be required. A petition may be filed to include other children that come within the jurisdiction of the C.P.A. but who are not before the court under the Juvenile Corrections Act. Any petition must be filed 14 days before the date set for the adjudicatory hearing. Any adjudicatory hearing pursuant to I.C. Section 16-1619 will be held within 30 days of the court's determination to expand the proceeding to a C.P.A. proceeding. A notice of the hearing will be served upon the parent(s), the Department of Health and Welfare, the juvenile, and the Department of Juvenile Corrections if the juvenile is currently under commitment to the Department, as though a petition under the C.P.A. has been filed. The burden of going forward with the evidence at the adjudicatory hearing shall remain with the prosecuting attorney.

(e) The proceeding under the J.C.A. will continue unless otherwise ordered by the court. The court may consolidate hearings under both the J.C.A. and the C.P.A. if the purposes of both acts can be served and the rights of the participants are not prejudiced.

(f) The Department of Juvenile Corrections shall have standing as an interested party in the child protective action if the juvenile is in the custody of the Department.

(g) Form of order expanding the Juvenile Correction Act proceeding to a Child Protective Act proceeding. The order expanding the Juvenile Correction Act proceeding to a Child Protective Act proceeding shall substantially conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

MAGISTRATE DIVISION

In the Interest of: \_\_\_\_\_ )  
\_\_\_\_\_ ) Case No. \_\_\_\_\_  
\_\_\_\_\_ )  
\_\_\_\_\_ ) ORDER EXPANDING JUVENILE  
\_\_\_\_\_ ) CORRECTIONS ACT (J.C.A.)  
\_\_\_\_\_ ) PROCEEDING TO CHILD  
A Child Under Eighteen ) PROTECTIVE ACT (C.P.A.)  
(18) Years of Age ) PROCEEDING

This matter came before the Court under the J.C.A. on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_. Based upon the J.C.A. proceeding, the Court has reasonable cause to believe that the above-named child is neglected and/or abused and/or abandoned and/or homeless or that the child's parent(s)/guardian(s)/custodian(s) fail(s) or is/are unable to provide a stable home environment pursuant to Idaho Code Section 16-1603.

In support thereof, the Court does hereby enter findings of fact as follows:

1. The birth date, sex and residence address of the above-named child are:

2. The names and residence addresses of the child's parent(s)/guardian(s)/custodian(s) are: \_\_\_\_\_

(If neither parent is within the state, or if the residence address of neither parent is known, the name and address of any known adult relative residing in Idaho is: \_\_\_\_\_

3. The specific facts which bring the child(ren) within the jurisdiction of the Child Protective Act are:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_

4. (\_\_\_\_\_) (Initial and complete if child/children are to be placed in custody of I.D.H.W.) It is contrary to the welfare of the child [children] to remain in the home and it is in the best interest of the child to be removed from the home pending further proceedings in this case. It is in the best interest of the child to vest legal custody of the child [children] in the Idaho Department of Health and Welfare pending further proceedings. The court makes this finding based on:



(\_\_\_\_\_) information set forth in \_\_\_\_\_, prepared by \_\_\_\_\_, and dated \_\_\_\_\_ which is incorporated by reference in this order.

(\_\_\_\_\_) the following information: \_\_\_\_\_

---

---

Based upon the foregoing findings and conclusions,

THE COURT HEREBY ORDERS that pursuant to I.J.R. 16, the J.C.A. proceeding is hereby expanded to a C.P.A. proceeding. The filing and service of this Order shall have the same effect as the filing and service of a C.P.A. petition.

THE COURT FURTHER ORDERS that: (initial if applicable)

(\_\_\_\_\_) the above-named child(ren) shall be taken forthwith to a place of shelter care by either a peace officer or an Idaho Department of Health and Welfare (I.D.H.W.) caseworker, based upon the best interest of the child(ren) and the need for the child(ren)'s protection and further, that said child(ren) is/are hereby placed in the temporary custody of the I.D.H.W. pending the shelter care hearing and/or further order of the Court; and the shelter care hearing under the C.P.A. shall be held within 48 hours of entry of this Order excluding weekends and holidays and notice of state action shall be given to the child's parent(s)/guardian(s)/custodian(s) and I.D.H.W. as provided by I.J.R. 16(c), and 32.

(\_\_\_\_\_) the above-named child(ren) does/do not appear endangered by present circumstances and may remain in the custody of the parent(s)/guardian(s)/custodian(s) pending the adjudicatory hearing and/or further order of the Court; and the adjudicatory hearing under the C.P.A. shall be held within 30 days of entry of this Order and notice thereof shall be served by summons upon the child(ren), his/her/their parent(s)/guardian(s)/custodian(s), and notice thereof shall be given to I.D.H.W. and the Department of Juvenile Corrections if the juvenile is in the custody of the Department, as provided by Rule 16(d), I.J.R.

(\_\_\_\_\_) the Idaho Department of Health and Welfare shall investigate the applicability of the Indian Child Welfare Act (25 USC 1901) to this proceeding.

(\_\_\_\_\_) copies of all court documents, studies, reports, evaluations, and other records in the court files, probation files and juvenile corrections files relating to the child(ren) shall be made available to the Idaho Department of Health and Welfare at its request.

( \_\_\_\_\_ ) Other: \_\_\_\_\_

\_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
JUDGE

Copies: H. & W. [ ☐ ] Juv. Prob. [ ☐ ] Parent [ ☐ ] Pros. Att. [ ☐ ] Def. Att. [ ☐ ]  
Other [ ☐ ]

(h) Form of order directing the Department of Health and Welfare to investigate. The order directing the Department of Health and Welfare to investigate the circumstances of the juvenile and his or her family shall substantially conform to the following:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_  
MAGISTRATE DIVISION

	)	
In the Interest of:	)	Case No. _____
	)	
	)	ORDER FOR INVESTIGATIVE
	)	REPORT TO THE COURT
	)	UNDER I.J.R. 16
A Juvenile Under 18	)	
years of age	)	
	)	

Pursuant to Rule 16 of the Idaho Juvenile Rules and Section 16-1616, Idaho Code, and good cause appearing therefor;

IT IS HEREBY ORDERED that the Department of Health & Welfare shall conduct an investigation and shall report to the court information concerning the juvenile. This investigation shall include but may not be limited to the circumstances of the juvenile and his/her family. It shall also include appropriate family, social, educational, psychological and law enforcement information as they relate to the juvenile. This report shall be delivered to the court with copies to each of the parents or their attorney, any other legal custodian and the prosecuting attorney at least two (2) days before the date set by this court for hearing on this matter, \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_\_ m. The Department of Health and Welfare shall include with the investigation report a recommendation to this court as to the application of Idaho Juvenile Rule 16 or the application of the Idaho Child Protective Act.

IT IS FURTHER ORDERED that copies of all court documents, studies, reports, evaluations and other records in the court files, probation files and

juvenile corrections files relating to the juvenile be made available to the Department of Health and Welfare at its request.

In support thereof, the Court does hereby enter findings of fact as follows:

1. The birth date, sex and residence address of the above-named juvenile are

2. The names and residence addresses of the juvenile’s parent(s), guardian(s) or custodian(s) are

If neither parent is within the state, or the residence or whereabouts of the parents are unknown, the name of any known adult relative residing in Idaho is

3. The facts which have caused the court to order this report are:

- a.
- b.
- c.

ORDERED this \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_.

Magistrate Judge

Copies: H.& W. [ ] Juv. Prob. [ ] Parent [ ] Pros. Att. [ ] Def. Att. [ ]  
Other [ ]

(Amended March 8, 1999, effective July 1, 1999; amended April 1, 2002, effective July 1, 2002; amended and effective, August 3, 2006; revised effective August 21, 2006.)

STATUTORY NOTES

**Committee Comments.** “*Contrary to the Welfare*” finding under state and federal law. In order to establish eligibility for federal IV-E funding as well as federal adoption assistance funding for children in foster care, federal law requires that the court make a written, case-specific finding, in the first order sanctioning removal of the child from the home, that remaining in the home is contrary

to the welfare of the child. See 45 DFR 1356.21(c). An order removing the child from the home under this rule may be the first order sanctioning removal of the child from the home, and in such cases, this finding is necessary to ensure the child’s eligibility for funding.

Consequences of non-compliance with federal requirements. If the case-specific “con-

trary to the welfare" finding required by federal law is not made, or is not made at the correct time, the error cannot be corrected at a later date to restore funding. The required finding cannot be a simple recitation of the language of the statute; however, if the case-

specific information upon which the finding is based is set forth in a document in the court record (such as an affidavit), the finding can incorporate the document by reference without reiterating the facts as set forth in the document.

### **Rule 17. Sentencing hearing (J.C.A.)**

(a) At the time the court finds that a juvenile is within the purview of the J.C.A. under I.J.R. 15 or the juvenile pleads guilty (admits) to the charge (petition), or as soon thereafter as is practicable, the court shall set time and place for a sentencing hearing and give notice thereof to the juvenile and the parent(s), guardian, or custodian. In the event the time for the sentencing hearing is set in open court, notice of such hearing may be given to the parties verbally and placed upon the record. In the event such hearing is set at a later date, written notice thereof shall be given to the juvenile and the parent(s), guardian, or custodian in the same manner as a notice or summons of the initial J.C.A. hearing. With the consent of the juvenile and the juvenile's counsel the sentencing hearing may immediately follow the J.C.A. evidentiary hearing (trial).

(b) The sentencing hearing shall be an informal hearing in which the court may hear any relevant evidence from the prosecuting attorney; the juvenile; the parent(s), guardian, or custodian; or other investigator having knowledge of the juvenile so as to enable the court to make a considered disposition of the proceeding. The juvenile must be present at the sentencing hearing unless waived by the juvenile upon the advice of counsel after receiving the prior approval of the court.

(c) As a result of the sentencing hearing, the court shall enter a written decree together with findings of fact and conclusions of law finding the juvenile within the purview of the J.C.A. and imposing one or more of the provisions authorized by I.C. § 20-520. If the court determines probation or detention is required, it must be ordered at the time of sentencing wherein commitment to the Department of Juvenile Corrections occurred. In the event the juvenile is placed on probation, such order may include or incorporate by reference the terms, conditions, and requirements of probation in the written decree.

(d) In the event it is proposed by any person that a juvenile be placed in custody or detention outside of the state of Idaho, pursuant to the Interstate Compact on the Placement of Children set forth in I.C. § 16-2102, the court shall first hold a hearing upon 10 days notice to all affected parties to determine whether equivalent facilities are available in the state of Idaho and whether the placing of the juvenile in custody or detention outside the state will be in the best interest of the juvenile or will produce undue hardship. At such hearing, any interested party may testify concerning these issues, and upon conclusion of the hearing, the court shall determine whether the juvenile should be detained or placed in custody outside of the state of Idaho.



(e) If the court has adjudicated the juvenile to be a habitual status offender as defined in I.C. § 20-521, the court may then utilize any sentencing alternative in rehabilitating the habitual status offender that is set out in I.C. § 20-520, except that the juvenile shall not be placed in secure confinement.

(f) If, pursuant to I.C. § 20-523, a written screening team report is compiled, it shall be presented to the court and be made available to the parties at least 48 hours prior to the sentencing hearing, excluding Saturdays, Sundays, and holidays.

### JUDICIAL DECISIONS

**Cited in:** Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978); Merritt v. State, 108 Idaho 20, 696 P.2d 871 (1985).

### **Rule 18. Revocation of formal probation order; revocation of informal adjustment; and entry of adjudication order (J.C.A.)**

(a) When a court has entered an order of formal probation or an informal adjustment order and a motion or petition, together with a sworn affidavit, is filed with the court by the prosecuting attorney alleging that the juvenile has violated the terms and conditions of probation or informal adjustment, the court shall set a hearing on the violation alleged.

(b) At the violation hearing, the burden of proof shall be upon the state by a preponderance of the evidence.

(c) Upon a finding by the court that the juvenile has violated the formal probation order or the informal adjustment order, the court may:

(1) Enter an order reinstating the juvenile on probation on additional terms and conditions;

(2) Enter an order imposing any suspended term of detention or suspended commitment to the Department of Juvenile Corrections;

(3) In the case of an informal adjustment, enter an order of adjudication and impose any sentence available to the court pursuant to I.C. § 20-520.

### STATUTORY NOTES

**Committee Comments.** The Committee addressed the issue of whether or not the court could impose additional or greater sanctions on a probation violation than had been

previously issued and suspended. The Committee decided that this was a substantive legislative issue rather than procedural matter.

### **Rule 19. Standards for commitment to the Department of Juvenile Corrections (J.C.A.)**

(a) A juvenile shall not be committed to the Department of Juvenile Corrections unless the county probation officer has convened a screening team as ordered by the court pursuant to I.C. Section 20-523 to evaluate

alternatives to commitment. Screening teams shall not be required for suspended commitments provided a screening team is convened prior to actual commitment.

(b) A juvenile under the age of twelve (12) years shall not be committed to the Department of Juvenile Corrections unless the court finds that there are extraordinary circumstances. The court may not commit a juvenile offender under the age of ten (10) years to the custody of the Department.

(c) The screening team shall consist of representatives from the County Juvenile Probation Office, the Idaho Department of Juvenile Corrections and the Idaho Department of Health and Welfare. In addition, the screening team may consist of the prosecuting attorney, the defense attorney, local school officials, and any other persons that the court may deem appropriate including parents, custodians or guardians of the juvenile. Participants shall share relevant information concerning the juvenile offender with other screening team members. All such information shall be maintained as confidential pursuant to I.C.A.R. 32.

(d) The screening team shall evaluate: 1) the risks to the community if the juvenile is not committed to the Idaho Department of Juvenile Corrections; 2) the needs of the juvenile including but not limited to mental health or substance abuse treatment; parental, guardian or custodian engagement in counseling and treatment designed to develop positive parenting skills and an understanding of the role in the juvenile's behavior; and 3) what community based programs or alternatives can address the needs and risks identified. The screening team shall employ a strengths-based approach considering the juvenile's and family's strengths as well as weaknesses and include an evaluation of the juvenile's and parent's, guardian's or custodian's abilities, barriers and commitment to participation in the community based programs identified. Community based programs or alternatives to commitment to be considered shall include but are not limited to services identified in I.C. Sections 20-511A and 20-520(i) and any other services provided through the Idaho Department of Juvenile Correction's incentives. In any matter referred to the screening team in which a mental health assessment pursuant to I.C. Section 20-511A or comprehensive substance abuse assessment pursuant to I.C. Section 20-520(i) have been ordered, such assessment shall be expedited and completed before the screening team convenes.

(e) The county probation officer or other court designee shall prepare a written report to the court summarizing the screening team's findings and recommendations. If the screening team does not reach consensus regarding its findings or recommendations, the written report shall contain a summary of the different opinions regarding risks, needs and recommendations. The written report shall be presented to the court and be made available to the parties at least 48 hours prior to the sentencing hearing, excluding Saturdays, Sundays, and holidays.

(f) Before commitment to the custody of the Department of Juvenile Corrections, pursuant to I.C. Section 20-520, the court must make findings on the record that the juvenile meets any of the criteria:

(1) The juvenile has been adjudicated for a crime that would be a felony if committed by an adult and two or more of the following circumstances are present:

(A) The crime is a crime of violence, or is a crime of a sexual nature, or is a crime involving the manufacture, sale or other delivery of a controlled substance;

(B) The crime either did or reasonably could have resulted in serious bodily injury or death to others;

(C) The crime demonstrates that the juvenile has exhibited such wanton and reckless disregard for the property rights of others that release of the juvenile could constitute substantial risk to the community;

(D) Other than the charges presently before the court, the juvenile has been adjudicated or convicted of two or more felonies or three or more misdemeanors within the past 12 months and is presently or has been on probation or committed to the custody of the Department of Juvenile Corrections within the past 12 months;

(E) A community-based program is not available or not appropriate;

(F) The juvenile has failed in a less secure out of home placement;

(G) The juvenile has failed to comply with the terms of a home detention order.

**OR**

(2) The juvenile has been adjudicated for a crime that would be a misdemeanor if committed by an adult and three or more of the following circumstances are present:

(A) Other than the charges presently before the court, the juvenile has been adjudicated or convicted of two or more felonies or three or more misdemeanors in the past 12 months and is presently or has been on probation or committed to the custody of the Idaho Department of Health & Welfare or Department of Juvenile Corrections, within the past 12 months;

(B) The crime demonstrates that the juvenile has exhibited such wanton and reckless disregard for the property rights of others that release of the juvenile could constitute a substantial risk to the community;

(C) The crime either did or could have reasonably resulted in serious bodily injury or death to others;

(D) The crime is a crime of violence, or a crime of a sexual nature;

(E) A community based program is not available or not appropriate;

(F) The juvenile has failed in a less secure out of home placement;

(G) The juvenile has failed to comply with the terms of a home detention order. (Amended March 8, 1999, effective July 1, 1999; amended April 26, 2007, effective July 1, 2007; amended effective January 28, 2009.)



## STATUTORY NOTES

**Committee Comments.** Former I.J.R. 17.1 was enacted by the Supreme Court to provide criteria for placement of a juvenile into secure confinement with the Department of Health and Welfare under the Juvenile Justice Reform Act of 1989. Idaho Code § 16-1826(6) provided that the court, upon commitment of custody of a juvenile to the Department, shall specify whether the commitment is for secure confinement or placement in a community based program. If a commitment was to secure confinement, the recommendation by the court was to be in accord with standards adopted by order of the Supreme Court. Idaho Code § 16-1826(6) was effective

until October 1, 1995, when the Juvenile Corrections Act of 1995 went into effect.

The Juvenile Corrections Act of 1995 does not contain a provision similar to I.C. § 16-1826(6). The Juvenile Rules Committee has been informed that the new Juvenile Corrections Department is working on a "Risk Assessment" tool which will help courts determine which juveniles should be committed to the Department under I.C. § 20-520(f). The Committee elected to recommend that a revised version of former I.J.R. 17.1 be retained until such time as the Supreme Court may adopt different standards.

**Rule 20. Release from state custody (J.C.A.)**

(a) Following the release of a juvenile from the custody of the Department of Juvenile Corrections, or before the juvenile's release if the court deems it appropriate, the court may hold a hearing pursuant to I.C. § 20-533 to review the conditions of probation and determine whether the existing conditions should be amended or eliminated, or if additional conditions should be imposed. Written notice of the hearing shall be provided by the clerk of the court to the juvenile, parent(s), legal guardian or custodian, and any person who has been made party to the proceeding. Notice will be deemed sufficient if the clerk mails notice to the person's last known mailing address.

(1) At this hearing, the court may also order conditions to be complied with by the juvenile's parent(s), legal guardian or custodian, or any person having been made a party of the proceeding that the court deems to serve the best interest of the juvenile or the community.

(2) At this hearing, the juvenile, parent(s), or legal guardian are entitled to the same right of legal representation that would be afforded such persons as provided in I.C. § 20-514.

(b) In the event a juvenile probation officer, as authorized by court order, establishes additional conditions of probation with which the juvenile offender must comply upon the juvenile's release from the custody of the Department of Juvenile Correction, the probation officer shall notify the juvenile at the time the additional conditions are imposed of the juvenile's right to request a hearing before the court to contest the additional conditions. Such notice shall be given to the juvenile in writing and shall also inform the juvenile that a request for hearing to contest the additional conditions of probation must be made in writing to the court within 14 days of receiving the written notice. If the juvenile timely requests a hearing, the clerk shall send written notice of the hearing to all the parties entitled to notice in paragraph (a) of this rule. The court shall have the authority to enter any order it could have under paragraphs (a) or (a)(1) of this rule, and the parties shall have the same right to counsel as provided in paragraph (a)(2) of this rule.



(c) Upon a subsequent violation of probation, the court may recommit the juvenile to the custody of the Department of Juvenile Corrections. In order to impose detention as a sanction for a probation violation, the court may only impose that detention previously suspended at the time of commitment to the Department's custody.

#### STATUTORY NOTES

**Committee Comments.** This rule clarifies the procedure established in I.C. § 20-533 for dealing with juveniles upon release from the custody of the Department of Juvenile Corrections. It also clarifies that the court may continue to issue orders requiring compliance by the parent(s), legal guardian or custodian, or other parties to the proceeding.

Because the statute (I.C. § 20-533) addresses the matter as a 'probation' rather

than a parole issue, the juvenile is entitled to legal representation and court appointed counsel if indigent. (See I.C. § 20-514.) Because the rule authorizes the court to issue orders of compliance to parties other than the juvenile which may be subject to sanctions for wilful noncompliance, these parties are also entitled to counsel. (See I.C. §§ 20-520 and 20-522.)

#### JUDICIAL DECISIONS

**Cited in:** Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978).

#### Rule 21. Application of Idaho Criminal Rules (J.C.A.)

The following Idaho Criminal Rules, or selected parts thereof, shall apply to actions filed under the Juvenile Corrections Act, but only to the extent the criminal rule does not conflict with these juvenile rules:

Rule 5.2	Transcript of Hearing - Copies for Parties
Rule 8(a)	Joinder of Offenses
Rule 11	Pleas
Rule 12	Pleadings and Motions Before Trial and (g) Records
Rule 12.1	Notice of Alibi
Rule 13	Trial Together of Complaints, Indictments, and Information
Rule 14	Relief from Prejudicial Joinder
Rule 15	Depositions
Rule 16	Discovery and Inspection
Rule 17	Subpoena
Rule 19	Place of Prosecution and Trial
Rule 25	Disqualification of Judge
Rule 27	Stipulations Not Binding on Court - Continuance of Trial or Hearing
Rule 28	Interpreters
Rule 29.1(a)&(b)	Motion for Mistrial
Rule 34	New Trial
Rule 36	Clerical Mistakes
Rule 41	Search and Seizure

Rule 41.1	Reclaiming Exhibits - Documents or Property
Rule 42	Contempts
Rule 43.1	Use of Electronic Audio Visual Devices
Rule 44.1	Withdrawal of Counsel
Rule 45	Time
Rule 46.2	No Contact Orders
Rule 47	Motions
Rule 48	Dismissal by the Court
Rule 49	Service and Filing of Papers
Rule 52	Harmless Error
Rules 54.1-54.19	Appeals From a Magistrate to a District Court

(Amended April 1, 2002, effective July 1, 2002.)

**STATUTORY NOTES**

<b>Committee Comments.</b> Because of the criminal nature of juvenile correction proceedings, the Committee felt that the application of certain criminal rules would enhance fairness, efficiency, and justice.	The rule also clarifies that when the language of the criminal rule is inconsistent with the language of the juvenile rule, the juvenile rule shall control.
--	--

**Rule 22. Proceedings by telephone conference or video teleconference (J.C.A.)**

The court may hold a hearing on the initial appearance, detention hearings, and motion hearings by telephone conference or video teleconference to which the juvenile; the juvenile’s attorney, if any; the prosecuting attorney; the parent(s), guardian, or custodian, if available; and the judge are joined in one telephone conference or video teleconference. The audio of the telephone conference or video teleconference shall be recorded by the court, and the court shall cause minutes of the hearing to be prepared and filed in the action. (Amended March 2, 2001, effective April 1, 2001.)

**Rule 23. Right to bail (J.C.A.)**

There is no right to bail for a juvenile in a J.C.A. proceeding.

**Rule 24. Right of appeal under the J.C.A. (J.C.A.)**

The court shall advise the juvenile and the parent(s), guardian, or custodian, if any of them are not represented by counsel, of the right to appeal the decision of the court under I.C. § 20-528.

**Rule 25. Enforcement of a court order directed to a juvenile's parent[s], legal guardian, custodian, or other person made a party to a Juvenile Corrections Act proceeding (J.C.A.)**

In addition to any other sanctions provided by law, the court may use its civil or criminal contempt powers to enforce the willful violation of a court order directing a juvenile's parent[s], legal guardian, custodian, or other person made a party to a proceeding to perform or refrain from doing some act. Contempt actions filed pursuant to this rule are part of the juvenile proceeding and may be prosecuted pursuant to I.C.R. 42 in the juvenile proceeding. (Amended March 8, 1999, effective July 1, 1999.)

**STATUTORY NOTES**

**Committee Comments.** See Rule 42 of the Idaho Criminal Rules (I.C.R.) and I.C. § 7-601.

**Compiler's Notes.** Former Rule 25 (Ad-

opted May 20, 1977, effective July 1, 1977) was rescinded by order of the Supreme Court of March 20, 1985, effective July 1, 1985.

**Rule 26. Discretionary waiver of jurisdiction under the Juvenile Corrections Act.**

(a) Upon the filing of a written Motion to Waive Jurisdiction on a misdemeanor or felony charged under the Juvenile Corrections Act by the prosecuting attorney, the juvenile, or the court, the court shall:

1. Give written notice of the Waiver Hearing at least 10 days before the date of the hearing to the juvenile, the juvenile's parent(s), guardian, or custodian, prosecuting attorney, probation officer (if any) and Department of Juvenile Corrections district liaison. The notice shall inform the juvenile of his or her right to counsel. Service shall be made in the manner provided by I.J.R. 5.

2. Order a full and complete investigation of the circumstances of the alleged offenses and the factors as listed in I.C. Section 20-508 (8)(a) through (f) to be conducted by county probation, or such other agency or investigation officer designated by the court, who shall submit a written report to the court, prosecuting attorney and juvenile or counsel for the juvenile at least 5 days prior to the hearing.

3. The court shall make findings as to whether or not the juvenile should, in the discretion of the court, be waived under the Juvenile Corrections Act.

(b) At the hearing, the court may rely on the investigative report, the juvenile's criminal record in the state of Idaho, certified court records from other states and county probation records. The prosecuting attorney, juvenile, or attorney for the juvenile may present evidence in support of, or opposed to, the contents of the reports and records before the court and the waiver request. Each party shall have the right to present such evidence as may be relevant to the issue of waiver, and the court may consider such hearsay as may be contained in the investigative report, criminal records, or other relevant evidence submitted to the court.

(c) The juvenile may stipulate to waiver but said stipulation shall be reduced to writing or placed upon the record in open court.

(d) Upon waiver, the prosecuting attorney shall file a criminal complaint within 24 hours, excluding Saturdays, Sundays, or holidays, and the court shall remand the juvenile to the custody of the county sheriff and order that an initial appearance on the criminal complaint shall be held pursuant to I.C.R. 5. The juvenile shall be held without bond on a felony, or held pursuant to M.C.R. 13 on a misdemeanor, pending the initial appearance. (Adopted March 8, 1999, effective July 1, 1999.)

#### STATUTORY NOTES

**Committee Comments.** The rule establishes a uniform procedure for discretionary waiver of juvenile jurisdiction pursuant to I.C. 20-508. The rule provides time and notice requirements. Paragraph (a)2 specifies the criteria to be addressed in the investigation report and provides a deadline within which to file the report with the court. The committee recognizes that the report, criminal history and other relevant evidence may contain relevant hearsay which should be reasonably relied upon in determining the issue of

waiver, which is not a determination of guilt or innocence. In addition, the rule allows any party to contest the information provided in the investigative report. Idaho Rules of Evidence 101(d)(2) and 802 allow the Idaho Juvenile Rules to modify the hearsay rule in Juvenile Corrections Act proceedings. Paragraph (d) provides a procedure for the court to follow upon granting the waiver.

**Cited in:** *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 215 P.3d 533 (2009).

#### **Rule 27. Transfer to Juvenile Court.**

(a) In the court's discretion, a misdemeanor citation naming a defendant who was under 18 years of age at the time of the alleged violation may be transferred to juvenile court and treated under the provisions of the J.C.A. The transfer request may be made by the juvenile, the juvenile's attorney, the prosecutor or upon the court's own motion. A party may make the request orally upon the record or in writing. The party making the request shall provide the court, in writing, with the name and address of the juvenile's parent or guardian. Either party may request that the transfer request be set for a hearing. If the court grants the request to transfer the case, the court shall enter a written order transferring the case to the juvenile court.

(b) Upon entry of the transfer order, the misdemeanor case shall be closed and a new juvenile case shall be opened. The citation shall be filed in the juvenile case together with any other documents filed in the misdemeanor case. The citation may serve as the petition, or the prosecutor may file a petition charging the same offense as in the citation. The written transfer order shall remain in the misdemeanor case file, and a copy of the transfer order shall be filed in the new juvenile case.

(c) The clerk shall set the new juvenile case for an admit/deny hearing on the juvenile court calendar. The clerk shall cause a notice of admit/deny hearing to be mailed by certified mail to the juvenile and the juvenile's parent or guardian. The hearing shall be set not less than 14 days from the mailing of the notice.



(d) The admit/deny hearing shall be conducted pursuant to I.J.R. 6. All other hearings and proceedings shall be conducted in accordance with the Juvenile Corrections Act and the Idaho Juvenile Rules. (Adopted April 26, 2007, effective July 1, 2007.)

### **Rule 28. Expungement.**

(a) A petition to expunge filed pursuant to I.C. § 20-525A shall apply only to actions pursuant to the Juvenile Corrections Act. It shall contain the name of the juvenile seeking expungement, name all agencies and their addresses with records the petitioner seeks to have expunged, and make evident the petitioner is in compliance with the provisions of I.C. 20-525A. The petition shall be filed in the county where a disposition was entered under oath and verified by the petitioner. A petition shall be filed in each case in which the petitioner seeks to have records expunged. If the petition is being filed pursuant to I.C. 20-525A(3) and no file exists, a new juvenile proceeding shall be opened upon the filing of the petition to expunge.

(b) Upon the filing of a petition to expunge the clerk shall set a hearing date and give notice to the petitioner, the prosecutor, any entity or person as requested by the petitioner, the prosecutor or as directed by the court. The prosecutor shall comply with the provisions of I.C. 19-5306. The hearing shall be set not less than 14 days from the filing of the notice of hearing. Cases involving the same petitioner may be joined for hearing.

(c) At the hearing or pursuant to stipulation the court shall consider any relevant evidence and make findings. Written findings of fact are not necessary. Upon a determination that the requirements of I.C. 20-525A have been met the court shall enter an order expunging the appropriate records.

(d) The clerk shall attach to the order a certificate of service to the agencies noted in the petition including the Department of Juvenile Corrections. The case will then be sealed and filed in a separate expunged record file and the case entered in the expungement index.

(e) There shall be no disclosure of any record in an expunged case file except as provided in Idaho Court Administrative Rule 32. (Adopted April 26, 2007, effective July 1, 2007.)

## **PART III. CHILD PROTECTIVE ACT PROCEEDINGS (C.P.A.)**

### **Rule 29. Application of other rules (C.P.A.)**

The Idaho Rules of Civil Procedure shall apply to C.P.A. proceedings to the extent that they are not inconsistent with these rules, statutes, or the law. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

### **STATUTORY NOTES**

**Committee Comments.** The Idaho Supreme Court's Child Protection Committee has developed recommended forms and sponsored the Idaho Child Protection Manual.

These resources are consistent with these rules and are available online at <http://www.isc.idaho.gov/childapx.htm>.

### JUDICIAL DECISIONS

#### **Permissive Intervention.**

Allowing permissive intervention in CPA proceedings is inconsistent with the CPA and the statutes governing the termination of

parental rights, therefore, I.R.C.P. 24(b)(2) is inconsistent with the CPA and should not be applied in CPA actions. *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

#### **Rule 30. [Reserved.]**

#### **Rule 31. Emergency (pretrial) removal of a child and/or offender (C.P.A.)**

There are four procedures pursuant to which a child or an alleged offender may be removed from the home prior to the adjudicatory hearing:

(a) A child or an alleged offender may be removed from the home by a peace officer upon a declaration of imminent danger by a peace officer, without prior court order, pursuant to I.C. § 16-1608(1).

(b) A child may be removed from the home by a summons with an order of removal by the court, pursuant to I.C. § 16-1611(4) and I.J.R. 34.

(c) A child may be removed from the home upon order of the court following a shelter care hearing pursuant to I.C. § 16-1615 and I.J.R. 39.

(d) A child may be removed from the home and placed in shelter care upon order of the court when the court expands a J.C.A. proceeding to a C.P.A. proceeding pursuant to I.J.R. 16. (Amended March 28, 2000; effective July 1, 2000; amended and effective August 3, 2006, revised effective August 21, 2006; amended April 26, 2007, effective July 1, 2007.)

#### **Rule 32. Notice of emergency removal (C.P.A.)**

(a) When a child is taken into custody pursuant to I.C. § 16-1608(1)(a) under a declaration of imminent danger, the peace officer shall provide a written notice of emergency removal to the court, and to the parent(s), guardian or custodian, in accordance with I.C. § 16-1609(1).

(b) When an alleged offender is removed from the home pursuant to I.C. § 16-1608(1)(b) written notice of emergency removal shall be provided to the alleged offender.

(c) The notice of emergency removal to the parent(s), guardian, or custodian shall contain a notification of right to counsel and right to court appointed counsel, pursuant to these rules, and shall be given by personal service at least 24 hours prior to the shelter-care hearing. Notice is not required for purposes of the shelter-care hearing in the event the parent(s), guardian, or custodian cannot be located or are out of state.

(d) The notice of emergency removal of the child or alleged offender from the home shall substantially conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Matter of:

)  
) Case No. \_\_\_\_\_

\_\_\_\_\_,

) NOTICE OF EMERGENCY  
) REMOVAL UNDER Idaho  
) Code §§ 16-1608 and 16-1609

A child under the age of  
eighteen (18) Years.

)  
)  
)

GREETINGS TO:

\_\_\_\_\_

(\_\_\_\_\_) The undersigned hereby gives notice that on \_\_\_\_\_, the  
above-named child was removed by a peace officer and taken to a place of  
shelter at a (foster/group) home previously designated by this court for  
his/her immediate care and protection.

(\_\_\_\_\_) The undersigned hereby gives notice that on \_\_\_\_\_, the alleged  
offender was removed from the home for the protection of the child, and the  
child was allowed to remain in the home.

I further certify that in accordance with Idaho Code § 16-1609, I duly  
notified the parent(s), guardian, or custodian of the above named child  
and/or the alleged offender that a shelter care hearing will be conducted by  
this court within (24/48) hours, excluding Saturdays, Sundays, and holi-  
days.

By this notice, the parent(s), guardian, custodian, or the alleged offender  
have been informed of their right to retain and be represented by an  
attorney. If the parent(s), guardian, custodian, or alleged offender cannot  
afford an attorney, an attorney can be appointed by the court.

If you wish to have the court appoint an attorney for you, please immedi-  
ately call (telephone) or go to the \_\_\_\_\_ County Court, (address),  
to make application for a court-appointed attorney because time is of the  
essence.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Person Exercising Emergency Powers

Hearing  
Location: \_\_\_\_\_

Notice  
Served on: \_\_\_\_\_

Day: \_\_\_\_\_

Served by: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Time: \_\_\_\_\_

(Amended and effective, August 3, 2006; revised August 21, 2006.)

**Rule 33. Summons (C.P.A.)**

- (a) After a petition has been filed service of process shall be made as provided in Idaho Code §§ 16-1611 and 16-1612.
- (b) Form of Child Protective Act Summons. The Summons in Child Protective Act cases shall substantially conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Matter of: )  
 )  
 )  
 ) CHILD PROTECTIVE  
 ) ACT SUMMONS  
\_\_\_\_\_, )  
A child under the age of )  
eighteen (18) Years. )  
 )  
 )

TO:

.....  
(name)

.....  
(address)

.....  
(city & state)

**YOU ARE HEREBY NOTIFIED THAT:**

A Petition has been filed in the above-entitled matter in the district court of \_\_\_\_\_ County, Idaho, alleging that the above-named child/ren come/s within the jurisdiction of the Child Protective Act.

A copy of the Petition is attached hereto.

[If seeking an Order of Removal] You, as the individual(s) who has/have the custody or control of said child/ren, is/are hereby directed to appear



personally and bring said child/ren before this court for a/an \_\_\_\_\_ hearing at the \_\_\_\_\_ Courthouse, (address), (city), Idaho, on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

[If not seeking Order of Removal] You, as parent, legal guardian, custodian or \_\_\_\_\_ (other) of the child/ren is/are hereby directed to appear personally before this court for (type of) hearing at the \_\_\_\_\_ Courthouse (address), (city), Idaho, on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

You are hereby notified that service of the attached petition upon you, as the parent(s), legal guardian, or custodian of this/these child/ren, confers personal jurisdiction of the court over you and subjects you to the provisions of the Child Protective Act.

If you fail to appear without reasonable cause, the court may proceed in your absence or proceed against you for contempt of court. If the court proceeds without your presence, you may forfeit all of your rights.

As the parent(s), legal guardian, or custodian, you may be financially liable for the support and/or treatment of the child/ren.

If you are the parent(s), legal guardian, or custodian, you have the right to be represented by counsel. If you are unable to afford an attorney, you have the right to have an attorney appointed by the court to represent you at county expense. If you request to have an attorney appointed at county expense, contact the court in advance of the hearing which is scheduled on the \_\_\_\_\_ date of \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ a.m./p.m. at the following number: \_\_\_\_\_

You are further notified that when a child has been placed in the temporary and/or legal custody of the Idaho Department of Health and Welfare for fifteen (15) out of the most recent twenty-two (22) months, the Department shall, prior to the last day of the fifteenth month, file a petition for termination of parental rights unless the child has been permanently placed with a relative, there are compelling reasons why termination of parental rights is not in the best interest of the child(ren), or, the Department has failed to provide reasonable efforts to reunify the child(ren) with his/her/their family.

DATED \_\_\_\_\_ CLERK OF THE DISTRICT COURT

By: \_\_\_\_\_  
Deputy Clerk

STATE OF IDAHO

)

) ss.

COUNTY OF \_\_\_\_

)

I HEREBY CERTIFY AND RETURN that I have received the above Summons and copy of the petition in the above-entitled matter on the \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_, and personally served the same on \_\_\_\_ by delivering to \_\_\_\_ in \_\_\_\_ County, state of Idaho, a copy of said Summons duly attested by the clerk of the above-entitled court, together with a copy of the petition and a copy of the Order Setting Time and Place of Hearing.

DATED this \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_.

by \_\_\_\_\_  
(Deputy Marshal/Deputy Sheriff)

(Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 27, 2011, effective July 1, 2011; amended April 24, 2013, effective July 1, 2013.)

**Rule 34. Order of removal of child upon issuance of the summons (C.P.A.)**

- (a) The court may order the removal of the child/ren from the home, in accordance with I.C. § 16-1611(4), at the time the Summons is issued. A request for an order of removal must be made in writing, either in the petition or by separate motion of the petitioner. Determination shall be made on facts presented to the court ex parte, either by testimony or affidavit.
- (b) If the Order of Removal of Child is the first court order sanctioning removal of the child/ren from the home, the court shall make written, case-specific findings that remaining in the home is contrary to the child/ren’s welfare and that vesting legal custody with the Department of Health and Welfare or other authorized agency is in the best interest of the child/ren.
- (c) Form of Order of Removal to accompany the Summons. The Order of Removal accompanying the summons shall substantially conform to the following format:

**ORDER OF REMOVAL**

It is contrary to the welfare of the child/ren to remain in the child/ren’s present condition or surroundings, and it is in the best interest of the child/ren to place the child/ren in the legal custody of the Idaho Department of Health and Welfare until the shelter care hearing. This finding is made based on the information set forth in the verified Petition under the Child

Protective Act, and the affidavit attached to and incorporated in the Petition, that have been filed in this case. [Insert additional case factual findings]

IT IS HEREBY ORDERED that a peace officer or representative from an authorized agency promptly take [child/(ren)'s name(s)] to an authorized place of shelter care until the shelter care hearing scheduled before this court at the \_\_\_\_\_ Courthouse, (address), (city), Idaho, on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_ .m.

DATED: \_\_\_\_\_ JUDGE

(Amended March 28, 2000; effective July 1, 2000; amended January 18, 2001, effective July 1, 2001; amended and effective August 3, 2006; revised August 21, 2006; amended April 27, 2011, effective July 1, 2011.)

STATUTORY NOTES

**Committee Comments.** As to subsection (c), federal law requires the court to make a written, case-specific finding that remaining in the home is contrary to the child's welfare. See 45 CFR § 1356.21(c). Idaho Code § 16-1611(4) requires the court to find that remaining in the home is contrary to the child's welfare and that vesting legal custody in IDHW is in the child's best interests. The policy of the rule is to require written case specific findings on both best interest and contrary to the welfare. Failure to timely make the federal finding will result in loss of

federal funding for an otherwise eligible child. If the case-specific finding is not made, or not made at the required time, the error cannot be corrected at a later date to restore funding. The finding cannot be a simple recitation of the language of the statute; however, if the case-specific information upon which the finding is based is set forth in a document in the court record (such as an affidavit), the finding can incorporate the document by reference without reiterating the facts set forth in the document.

**Rule 35. Guardian Ad Litem Programs (C.P.A.)**

- (a) The purpose of Guardian ad Litem programs in Idaho shall be to provide court-appointed volunteer advocacy to abused, neglected, abandoned and/or homeless children.
- (b) Each GAL program shall have a governing body responsible for overseeing compliance with all applicable laws and regulations, adoption of program policies, the defining of program services, and the guidance of program development.
- (c) The GAL programs shall communicate, collaborate, and share information with fellow programs in the state.
- (d) The GAL Program follows written policies for inclusiveness, recruitment, selection, training, retention, effective performance and evaluation of its paid personnel.

(e) Each GAL Program shall develop and follow written policies for its volunteers regarding recruitment; application, selection and screening; training; supervision; volunteer roles and responsibilities; and dismissal.

(1) Each GAL Program shall require that volunteers complete at least 30 hours of required pre-service training and 12 hours of required in-service training per year.

(2) Pre-service training shall include the following topics:

- A. Roles and responsibilities of a GAL volunteer;
- B. Court process;
- C. Dynamics of families including mental health, substance abuse, domestic violence, and poverty;
- D. Relevant state laws, regulations and policies;
- E. Relevant federal laws, regulations and policies, including the Adoption and Safe Families Act (ASFA), the Child Abuse Prevention and Treatment Act (CAPTA), the Indian Child Welfare Act (ICWA), and the Multi Ethnic Placement Act (MEPA);
- F. Confidentiality and record keeping practices;
- G. Child development;
- H. Child abuse and neglect;
- I. Permanency planning;
- J. Community agencies and resources available to meet the needs of children and families;
- K. Communication and information gathering;
- L. Effective advocacy;
- M. Cultural competency;
- N. Special needs of the children served;
- O. Volunteer safety;
- P. Educational advocacy.

(f) Each GAL program shall manage its operations in accordance with generally accepted financial and risk management practices and applicable federal, state and local statutory requirements.

(g) Each GAL program shall purchase liability protection for governing body, organization, program staff and volunteers to the extent that such individuals are not otherwise immune from liability under Idaho law.

(h) Each GAL program shall maintain management information and data necessary to plan and evaluate its services.

(i) Each GAL Program shall maintain complete, accurate and current case records and follow local policies for acceptance and assignment of GAL cases.

(j) The GAL program shall maintain all information regarding a case confidential and shall not disclose the same except to the court or to other parties to the case and to the Department of Health and Welfare, whether or not a party. This duty of confidentiality is not extinguished by the dismissal of the case. Each GAL program shall follow written policies and procedures regarding access to, use of, and release of information about the children it serves to ensure that children's confidentiality is maintained at all times.



(k) Each GAL program shall complete the following national fingerprint based criminal records checks which shall include a complete check of the Idaho Sex Offenders Registry maintained by the Idaho State Police and of the Child Abuse Registry maintained by the Idaho Department of Health & Welfare.

(1) GAL volunteers shall obtain a national fingerprint based criminal records check prior to being assigned a case, at least every two years thereafter and at any time requested by the Program Director;

(2) Program Staff shall obtain a national fingerprint based criminal records check at the time of hire and at anytime thereafter at the discretion of the Program Director; and,

(3) Members of the Board of Directors of the Program shall obtain a national fingerprint based criminal records check upon appointment to the Board and at anytime thereafter at the request of the Board of Directors or the Program Director. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 26, 2007, effective July 1, 2007; amended April 27, 2012, effective July 1, 2012.)

#### STATUTORY NOTES

**Committee Comments.** The standards for Idaho guardian ad litem programs were patterned after the Standards for National CASA Association Member Programs (2006)

developed by National CASA. The Standards for National CASA Association Member Programs (2006) may provide instructive detail to the general standards set forth in this Rule.

#### Rule 36. Guardian Ad Litem (C.P.A.)

(a) As soon as practicable after the filing of the petition, the court shall appoint a guardian ad litem for the child as provided in I.C. § 16-1614.

(b) Upon the resignation or removal of a guardian ad litem, the court shall appoint a successor guardian ad litem for the child or children in accordance with I.C. § 16 1614.

(c) Subject to the direction of the court, the guardian ad litem shall maintain all information regarding the case confidential and shall not disclose the same except to the court or to other parties to the case or to the Department of Health and Welfare, whether or not a party. This duty of confidentiality is not extinguished by the resignation of the guardian ad litem; the removal of the guardian ad litem, or the dismissal of the case. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 27, 2012, effective July 1, 2012.)

#### STATUTORY NOTES

**Committee Comments.** The distinction between the roles of attorney for the child and guardian ad litem (lay or attorney) for the child is significant. A lawyer who represents either the child or the lay guardian ad litem is bound by the Rules of Professional Conduct to represent the child/lay guardian ad litem as a client and to take direction and guidance from

the child/lay guardian ad litem client. An attorney or lay person acting in the role of guardian ad litem for the child advocates in the best interest of the child, but is not bound to advocate the express wishes of the child or take direction from the child. A lay guardian ad litem cannot provide legal representation for the child. *See American Bar Association*

*Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases (1996); ABA Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases (NACC Revised Version) (1999); and NACC Recommendation for Representation of Children in Abuse and Neglect Cases (2001).*

**Rule 37. Right to Counsel (C.P.A.)**

- (a) The court should appoint counsel to represent the guardian ad litem, unless the guardian ad litem has counsel or has waived counsel.
- (b) The court may appoint separate counsel for the child in appropriate cases. The court may consider the nature of the case, the child’s age, maturity, intellectual ability, and other factors relevant to the child’s need for counsel and ability to direct the activities of counsel.
- (c) If there is no qualified guardian ad litem program or qualified guardian ad litem available, the court shall appoint counsel for the child as provided in I.C. § 16-1614.
- (d) The parent(s), guardian, or legal custodian has the right to be represented by counsel in all proceedings before the court. The court shall appoint counsel to represent the parent(s), guardian, or legal custodian if it finds that they are financially unable to pay for such legal services, unless representation is competently and intelligently waived.
- (e) Notice of the right to be represented by counsel, and at public expense where financial inability exists on the part of the parent(s), guardian, or legal custodian, should be given at the earliest possible time. Notice shall be given in the summons, and at the outset of any hearing in which the parent(s), guardian, or legal custodian is making a first appearance before the court. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

**STATUTORY NOTES**

**Committee Comments.** Rule 37(b) does not specify who may request counsel for the child because it is the opinion of the committee that the Department of Health and Welfare, the child or any party may request counsel for the child.

**Rule 38. Stipulations (C.P.A.)**

All or some of the parties may enter into stipulations as to any issue at any stage of a proceeding under the Child Protective Act. Stipulations shall be made part of the court record, and are subject to court approval. The court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interest of the child. Any order entered based on a stipulation must include all case-specific findings required by the state or federal statute or these rules. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

## STATUTORY NOTES

**Committee Comments.** Stipulations by parties are encouraged. However, in order to ensure that the child remains fully eligible for federal funding, orders entered based on such stipulations must include the findings required under these rules. For example rules

that require written case-specific findings include Rule 34 (Endorsement on Summons), Rule 39 (Shelter Care), Rule 41 (Adjudicatory Hearing), and Rule 46 (Annual Permanency Hearing).

**Rule 39. Shelter Care Hearing (C.P.A.)**

(a) The purpose of the shelter care hearing is to determine whether the child will be placed in or remain in shelter care pending the adjudicatory hearing.

(b) The court shall schedule a shelter care hearing whenever a child or alleged offender is removed from the home as described in I.J.R. 31 (a),(b), and (d), or upon the written motion or petition of the petitioner with or without prior removal of a child or alleged offender.

(c) When a child is taken into custody as described in I.J.R. 31 (a) or (d), the court must hold a shelter-care hearing within 48 hours, excluding weekends and holidays.

(d) When an alleged offender is removed from the home under I.J.R. 31 (a), the court must hold a shelter-care hearing within 24 hours, excluding weekends and holidays.

(e) The Idaho Rules of Evidence, other than those regarding privileges, do not apply in a shelter-care hearing as provided in I.R.E. 101(e)(6).

(f) The shelter-care hearing may be continued for a reasonable time by request of the parent(s), guardian, or custodian of the child upon entry of a waiver of the statutory time limits for setting the shelter-care hearing. The court may also grant a reasonable continuance to all other parties or participants upon good cause shown.

(g) At the time of the shelter-care hearing, the court shall advise the child, if present, and the parent(s), guardian, or custodian of their right to be represented by an attorney and, if financially unable to hire an attorney, of their right to be represented by a court-appointed attorney. The court should verify that each party has a copy of the petition and they are advised of the allegations therein; the purpose and scope of the hearing; the possible consequences of the proceedings, including termination of parental rights; the right of the parties to present evidence and to cross-examine witnesses regarding whether the child should return home with or without conditions or whether the child should be placed in protective care; and that failure to appear at future hearings could result in a finding that the petition has been proved, issuance of an order adjudicating that the child is in need of protection or services, and an order transferring permanent legal and physical custody of the child to another.

(h) The shelter-care hearing in its entirety shall be placed upon the record, and the general public shall be excluded in the manner set forth in I.J.R. 52.



(i) Pursuant to I.C. § 16-1615(5), and following receipt of evidence at the shelter care hearing, the court shall enter an order of shelter care/protective order if shown that:

- (1) A petition has been filed; and
- (2) Reasonable cause exists to believe that the child comes within the jurisdiction of the C.P.A.; and
- (3) The department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful; or the department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services; and
- (4) The child could not be placed in the temporary sole custody of a parent having joint legal or physical custody; and
- (5) It is contrary to the welfare of the child to remain in the home, and
- (6) It is in the best interest of the child to remain in shelter care, pending the adjudicatory hearing.

The court's findings as to reasonable efforts to prevent removal shall be in writing, and case-specific. If the shelter care order is the first order sanctioning removal of the child from the home, the court shall make written, case-specific findings that remaining in the home is contrary to the child's welfare and that vesting custody with the department or other authorized agency is in the best interest of the child.

(j) The court may enter a protective order as defined in I.C. § 16-1602(28), in addition to the shelter care order or instead of the shelter care order if it is shown that:

- (1) Reasonable cause exists to believe the child comes within the purview of the C.P.A.; and

- (2) A reasonable effort to prevent placement of the child outside the home could be effected by a protective order safeguarding the child's welfare and maintaining the child in the child's present surroundings.

(k) The court shall enter its order within 24 hours. If the court enters an order placing the child in shelter care, then the court must set the adjudicatory hearing as soon as possible and not more than 30 days after the filing of the Child Protective Act petition, or the date the court orders a Juvenile Corrections Act case expanded to a Child Protective Act case, or service of the endorsement on the summons, whichever occurs later. If the court does not find that the child should remain in shelter care, the court may return the child to the home under a protective order, which will safeguard the child's health, safety or welfare, or may dismiss the petition.

(l) In making the determination as to whether shelter care of the child is required, the court shall consider any relevant facts consistent with subsection (i) of this rule, but generally the existence of any of the following facts will justify ordering temporary shelter care of the child:

- (1) The child is in immediate need of medical treatment; or
- (2) The child is seriously endangered in the child's surroundings and prompt removal appears to be necessary for the child's immediate protection; or



(3) The evidence indicates a danger that some action may be taken which would deprive the court of jurisdiction over the child.

(m) At the shelter care hearing, or at any other time, upon notice and motion by any party, the court may make the following determinations, which shall temporarily suspend further efforts to reunify the child who is the subject of the action with the child's parent, pending further order of the court:

(1) when a termination of parental rights petition has been filed regarding this child; or

(2) there is reason to believe that aggravated circumstances exist; or

(3) the parental rights of the parent to a sibling have been terminated involuntarily. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 26, 2007, effective July 1, 2007; amended April 27, 2012, effective July 1, 2012; amended April 24, 2013, effective July 1, 2013.)

#### STATUTORY NOTES

**Committee Comments.** *“Contrary to the Welfare” finding under state and federal law.* In order to establish eligibility for federal IV-E funding as well as federal adoption assistance funding for children in foster care, federal law requires that the court make a written, case-specific finding, in the first order sanctioning removal of the child from the home, that remaining in the home is contrary to the welfare of the child. See 45 CFR 1356.21(c). Idaho Code §§16-1615 (5) (b) and 16-1619(6) require that the “contrary to the welfare” finding be made at the shelter care hearing and, if the court vests custody of the child in the department, again at the adjudicatory hearing. Failure to timely make the “contrary to the welfare finding” will result in loss of federal IV-E funding for the duration of the child’s stay in foster care.

*“Reasonable Efforts to Prevent Removal” finding under federal law.* Federal law also requires that the court make a finding that either the department did or did not make reasonable efforts to prevent removal of the child from the home. The “reasonable efforts to prevent removal” finding must be made within 60 days of the child’s removal from the home. 45 CFR 1356.21 (b) (i) and (ii). Failure to timely make the federal “reasonable efforts, to prevent removal” finding will result in loss of federal IV-E funding for the duration of the child’s stay in foster care. Federal officials overseeing the funding process have taken the position that a finding that no reasonable efforts were made due to imminent danger to the child does not comply with federal law.

*“Reasonable Efforts to Prevent Removal” finding under state law.* The Idaho statutory

requirement for reasonable efforts to prevent removal differs from the federal requirement. Idaho Code § 16-1615(5)(b), requires that the court find either 1) that reasonable efforts were made but were unsuccessful, or 2) that no reasonable efforts were made due to imminent danger. ***The second finding authorized by state law is a “no reasonable efforts” finding that does not comply with federal law. Making this finding will jeopardize the child’s eligibility IV-E funding.***

*Resolution of State/Federal requirements by Rule 39.* Rule 39(1)(3) has been drafted to require a finding that is both authorized by the first prong of Idaho Code § 16-1615(5)(b) and is consistent with the federal requirement. The Rule requires a finding that either 1) reasonable efforts were made but were unsuccessful, or 2) the department’s efforts were reasonable given that the department accurately determined that no preventative services could be safely provided.

*Consequences of non-compliance with federal requirements.* If the case-specific “contrary to the welfare” and “reasonable efforts” findings required by federal law are not made, or not made at the required time, the error cannot be corrected at a later date to restore funding. The required findings cannot be a simple recitation of the language of the statute; however, if the case-specific information upon which the finding is based is set forth in a document in the court record (such as an affidavit), the finding can incorporate the document by reference without reiterating the facts set forth in the document.

*Recommended Best Practice on Continuances.* Except in extraordinary circumstances

continuances should be for very short periods of time such as two or three days, to ensure compliance with the time requirements applicable to later stages of a Child Protective Act proceeding. If the court enters an order of continuance that addresses the issue of custody of the child in any way, then the order of continuance is the first order sanctioning re-

moval of the child from the home and the case-specific contrary to the welfare finding is required. An alternative practice is to enter the order of continuance and the leave the prior declaration of imminent danger or endorsement on summons in effect without further order of the court.

JUDICIAL DECISIONS

**Cited in:** Doe v. Doe, 151 Idaho 300, 256 P.3d 708 (Feb. 25, 2011).

**Rule 40. Notice of Further Proceedings Including Parents, Foster Parents and Others (C.P.A.)**

(a) After the adjudicatory hearing, any person who is designated by the Department of Health and Welfare as the foster parent, as a preadoptive parent, or as a relative providing care for a child who is in the custody of the department, shall be provided with notice of, and have a right to be heard in, any further hearings to be held with respect to the child. This provision shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to the proceeding solely on the basis of such notice and right to be heard. The Department of Health and Welfare shall provide this notice and shall confirm to the court that the notice was given.

(b) After the adjudicatory hearing, a child eight (8) years of age or older, shall be provided with notice of, and have a right to be heard, either in person or in writing, in any further hearings to be held with respect to the child. The Department of Health and Welfare shall provide this notice and shall confirm to the court that the notice was given. If the child chooses to be heard in writing, the writing shall be filed, copies provided to all parties and to the Department of Health and Welfare, whether or not a party, and considered by the court.

(c) Notice to any party of the time, date, and place of further proceedings after an initial appearance or service of summons may be given in open court, by written acknowledgment of receipt, or by mail. Notice shall be sufficient if the clerk deposits the notice in the United States mail, postage prepaid, to the address provided by the party to the court or the address at which the party was initially served, and files a certificate of such service, or if notice is sent by registered or certified mail.

(d) The notice of hearing shall conform to the following format:

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

In the Matter of:

) Case No. \_\_\_\_\_

\_\_\_\_\_,

) NOTICE OF HEARING

A child under the age of  
eighteen (18) Years.

PLEASE TAKE NOTICE that the above matter has been set for hearing  
in the Magistrate Court at the \_\_\_\_\_ County Courthouse,  
(address), (city), Idaho, on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_ o'clock  
\_\_\_\_.m. The nature of the hearing is:

- \_\_\_\_\_ Shelter-Care Hearing
- \_\_\_\_\_ Pretrial Conference
- \_\_\_\_\_ Adjudicatory Hearing
- \_\_\_\_\_ Case Plan Hearing
- \_\_\_\_\_ Permanency Hearing (Aggravated  
Circumstances)
- \_\_\_\_\_ Review Hearing
- \_\_\_\_\_ Permanency Hearing (12 month)
- \_\_\_\_\_ Other: \_\_\_\_\_

You are further notified that the parent(s), guardian, or custodian have the  
right to be represented by an attorney of your choosing, or if financially  
unable to pay, have the right to have an attorney appointed by the court to  
represent the child or the parent(s), guardian, or custodian at county  
expense. If you wish to have an attorney appointed at county expense, you  
must contact the court at the address given above, at least two days prior to  
the hearing, for the court to inquire whether the parent(s), guardian, or  
custodian require the separate appointment of an attorney.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

CLERK OF THE DISTRICT COURT

By: \_\_\_\_\_  
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that copies of this notice were served as follows on this date:

\_\_\_\_\_  
Parent(s)/Guardian/Custodian:  
Hand Delivered \_\_\_\_ Mailed \_\_\_\_

\_\_\_\_\_  
Parent's/Guardian's/Custodian's  
Signature of Hand Receipt

Defense Counsel:  
Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Prosecutor:  
Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Other:  
Hand Delivered \_\_\_\_ Mailed \_\_\_\_

Probation Officer/Caseworker:  
Hand Delivered \_\_\_\_ Mailed \_\_\_\_

By \_\_\_\_\_  
Deputy Clerk

(Amended and effective August 3, 2006; revised effective August 21, 2006; amended effective December 5, 2007; amended April 27, 2012, effective July 1, 2012.)

**Rule 41. Adjudicatory Hearing (C.P.A.)**

(a) The purpose of the adjudicatory hearing is to determine:(1) whether the child is within the jurisdiction of the court under the Child Protective Act as set forth in I.C. §§ 16-1603; and (2) if jurisdiction is found, to determine the disposition of the child. The court may also determine whether aggravated circumstances exist, if aggravated circumstances were alleged in the petition or raised by written motion with notice to the parents prior to the adjudicatory hearing. The court may make an aggravated circumstances determination at any time after the adjudicatory hearing if aggravated circumstances is raised by written motion with notice to the parents prior to the hearing.

(b) The hearing shall be scheduled as set forth in I.C. § 16-1619. The hearing may not be continued more than 60 days from the date the child was removed from the home, unless the court has made case-specific, written findings as to whether the department made reasonable efforts to prevent the need to remove the child from the home.

(c) The hearing shall be conducted in an informal manner. The Idaho Rules of Evidence apply to the portion of the hearing where jurisdiction



and/or aggravated circumstances is determined. The Idaho Rules of Evidence do not apply to disposition or any other portion of the hearing.

(d) In the event the court finds the child is within the jurisdiction of the court under the Child Protective Act, it shall make findings of fact and conclusions of law indicating the basis of jurisdiction.

(e) If the court finds that the child is within the jurisdiction of the court under the Child Protective Act, and if the court places the child in the custody of the department, and if the court does not find that the parent subjected the child to aggravated circumstances, then the court shall make written, case-specific findings that the department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful or that the department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services.

(f) If the adjudicatory decree is the first order of the court sanctioning removal of the child from the home, the court shall make a written, case-specific finding that remaining in the home is contrary to the welfare of the child, or, in the alternative, removal from the home is in the best interest of the child.

(g) If the court finds that the child is within the jurisdiction of the court under the Child Protective Act, and if the court vests legal custody of the child in the department, and the court does not find that the parent subjected the child to aggravated circumstances, then the court shall order the department to prepare a written case plan, to be filed with the court and served upon the parties five days prior to the hearing on the case plan. The department shall consult with the guardian ad litem and the child's parents in preparing the plan.

(h) If the court finds that the child is within the jurisdiction of the court under the Child Protective Act, and the court places the child under the protective supervision of the department, then the court shall order the department to prepare a written case plan, to be filed with the court and served upon the parties five days prior to the hearing on the case plan. The department shall consult with the guardian ad litem and the child's parents in preparing the plan.

(i) If the court finds that the child is within the jurisdiction of the court under the Child Protective Act, and finds that the parent has subjected the child to aggravated circumstances, then the court shall order the department to prepare a written permanency plan, to be filed with the court and served upon the parties five days prior to the hearing on the permanency plan. The department shall consult with the guardian ad litem, and the child's parents in preparing the plan.

(j) [Deleted] (Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 26, 2007, effective July 1, 2007; amended April 24, 2013, effective July 1, 2013.)

## STATUTORY NOTES

**Committee Comments.** *“Contrary to the Welfare” finding under state and federal law.* In order to establish eligibility for federal IV-E funding as well as federal adoption assistance funding for children in foster care, federal law requires that the court make a written, case-specific finding, in the first order sanctioning removal of the child from the home, that remaining in the home is contrary to the welfare of the child. See 45 CFR 1356.21(c). Idaho Code §§16-1615 (5) (b) and 16-1619(6) require that the “contrary to the welfare” finding be made at the shelter care hearing and, if the court vests custody of the child in the department, again at the adjudicatory hearing. Failure to timely make the “contrary to the welfare finding” will result in loss of federal IV-E funding for the duration of the child’s stay in foster care.

*“Reasonable Efforts to Prevent Removal” finding under federal law.* Federal law also requires that the court make a finding that either the department did or did not make reasonable efforts to prevent removal of the child from the home. “The reasonable efforts to prevent removal” finding must be made within 60 days of the child’s removal from the home. 45 CFR 1356.21 (b) (i) and (ii). Failure to timely make the federal “reasonable efforts to prevent removal” finding will result in loss of federal IV-E funding for the duration of the child’s stay in foster care. Federal officials overseeing the funding process have taken the position that a finding that no reasonable efforts were made due to imminent danger to the child does not comply with federal law.

*“Reasonable Efforts to Prevent Removal” finding under state law.* The Idaho statutory requirement for reasonable efforts to prevent removal differs from the federal requirement. Idaho Code § 16-1615(5)(b), requires that the court find either 1) that reasonable efforts were made but were unsuccessful, or 2) that no reasonable efforts were made due to imminent danger. ***The second finding authorized by state law is a “no reasonable efforts” finding that does not comply with federal law. Making this finding will***

***jeopardize the child’s eligibility IV-E funding.***

*Resolution of State/Federal requirements by Rule 39.* Rule 41(e) has been drafted to require a finding that is both authorized by the first prong of Idaho Code § 16-1615(5)(b) and is consistent with the federal requirement. The Rule requires a finding that either 1) reasonable efforts were made but were unsuccessful, or 2) the department’s efforts were reasonable given that the department accurately determined that no preventative services could be safely provided.

*Aggravated circumstances exception to reasonable efforts requirement.* The only exception to the reasonable efforts requirement of federal law is where the parent subjected the child to aggravated circumstances.

*Consequences of non-compliance with federal requirements.* If the case-specific “contrary to the welfare” and “reasonable efforts” findings required by federal law are not made, or not made at the required time, the error cannot be corrected at a later date to restore funding. The required findings cannot be a simple recitation of the language of the statute; however, if the case-specific information upon which the finding is based is set forth in a document in the court record (such as an affidavit), the finding can incorporate the document by reference without reiterating the facts set forth in the document.

*Recommended Best Practice on Continuances.* Except in extraordinary circumstances continuances should be for very short periods of time such as two or three days, to ensure compliance with the time requirements applicable to later stages of a Child Protective Act proceeding. If the court enters an order of continuance that addresses the issue of custody of the child in any way, then the order of continuance is the first order sanctioning removal of the child from the home and the case-specific contrary to the welfare finding is required. An alternative practice is to enter the order of continuance and the leave the prior declaration of imminent danger or endorsement on summons in effect without further order of the court.

## **Rule 42. Extended Home Visits (C.P.A.)**

If the court vests legal custody of the child in the department, then extended home visits must be approved by the court in writing prior to the extended home visit. For purposes of this rule, an extended home visit is any period of unsupervised visitation between the parent and the child that exceeds forty-eight (48) hours duration. The department may terminate an extended home visit without prior court approval when, in the determina-

tion of the department, termination of the extended home visit and removal of the child is in the best interest of the child. If the department terminates an extended home visit, the department shall prepare a written statement, setting forth when the extended home visit was terminated and the reason(s) for terminating the extended home visit. The statement shall be filed with the court within forty-eight (48) hours (excluding weekends and holidays) of the termination of the extended home visit, and shall be mailed or otherwise provided to the parties. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

#### STATUTORY NOTES

**Committee Comments.** There is an important distinction between an extended home visit and a return home under “protective supervision.” In the former, the Department retains jurisdiction over the child, and the “contrary to the welfare” and “reasonable efforts to prevent removal” findings need be made if the child is returned to care after a home visit that exceeds six (6) months without prior court approval. When the child is returned home under protective supervision,

the Department does not retain custody over the child. If the child is ultimately returned to care, it is treated as a new removal and the “contrary to the welfare” and “reasonable efforts to prevent removal” findings must be made anew. Failure to timely make the “contrary to the welfare” and “reasonable efforts to prevent removal” findings results in the loss of federal IV-E funding for the duration of the child’s stay in foster care.

#### **Rule 43. [Reserved].**

#### **Rule 44. Case Plan Hearing — Permanency Hearing.**

##### **(a) Case Plan: No Finding of Aggravated Circumstances.**

(1) Absent a finding of aggravated circumstances, the case plan shall provide that reunification must be finalized within twelve (12) months from the date the child is removed from the home. If in the child’s best interest, the court may approve an amendment to the case plan extending the time to finalize reunification for up to three (3) months

(2) Absent a finding of aggravated circumstances, if the case plan has a concurrent permanency goal of guardianship, the case plan shall include a schedule to finalize the guardianship within thirteen (13) months from the date the child was removed from the home. Any amendment to the case plan to extend the time to finalize the guardianship must be approved by the court.

##### **(b) Permanency Plan – Aggravated Circumstances Found.**

(1) If the permanency plan has a permanency goal of guardianship, the permanency plan will include a schedule to finalize the guardianship within five (5) months from the date of the judicial determination of aggravated circumstances. Amendments to the permanency plan to extend the time to finalize the guardianship must be approved by the court.

(2) If the permanency plan has a permanency goal of termination of parental rights and adoption, the permanency plan shall include a schedule to finalize the termination of parental rights within six (6) months from the approval of the permanency plan, and has the objective of finalizing the adoption within twelve (12) months from the approval of



the permanency plan. Amendments to the permanency plan to extend the time to finalize the termination of parental rights or the adoption must be approved by the court.

(3) If the court approves a permanency plan with a permanency goal of termination of parental rights and adoption, the court shall order the department to file a petition to terminate parental rights within thirty (30) days of approval of the permanency plan and shall enter a scheduling order that complies with the time limits of this rule and implements the schedule set forth in the permanency plan. The scheduling order may include, but is not limited to, deadlines for filing the petition for termination of parental rights and service of process, the date and time of hearing in the event the petition is not contested, and the date and time of pretrial conference and trial in the event the petition is contested. (Adopted April 24, 2013, effective July 1, 2013.)

**Compiler's notes.** A former rule 44, "Case vated Circumstances" was repealed by order Plan Hearing/Permanency Hearing — Aggra- dated April 24, 2013, effective July 1, 2013.

### **Rule 45. Review hearings (C.P.A.)**

(a) At review hearings, the court shall review compliance with the case plan and/or the permanency plan (whichever is in place at the time of the hearing) and the progress of the department in achieving permanency for the child. The court may:

- (1) modify the case plan or permanency plan as appropriate;
- (2) modify disposition (provided that where a child was placed under the protective supervision of the department, modification is subject to the requirement of section 16-1623, Idaho Code);
- (3) determine whether the department has made reasonable efforts to finalize a permanency plan for the child, and in the case of a child who will not be returned to a parent, review the department's consideration of options for in-state and out-of-state placement of the child;
- (4) enter further orders as necessary or appropriate to ensure the progress of the case towards achieving permanency for the child.

(b) The court may continue a review hearing for a short period of time to give the parties time to respond to substantive issues raised for the first time at a review hearing. The court may enter temporary orders as appropriate pending the continued hearing.

(c) If the next review hearing to be scheduled is combined with the annual permanency hearing described at section 16-1622(4), Idaho Code, the court shall order the department to prepare a written permanency plan, to be filed with the court and served upon the parties at least five (5) days prior to the hearing. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended effective November 13, 2008; amended April 24, 2013, effective July 1, 2013.)



## STATUTORY NOTES

**Committee Comments.** As a matter of view the department's efforts to finalize the best practice the court should regularly re- permanency plan for the child.

**Rule 46. Annual Permanency Hearings**

(a) If the permanency plan has a permanency goal of termination of parental rights and adoption, the permanency plan shall include a schedule which has the objective of finalizing the termination of parental rights within eighteen (18) months from the date the child was removed from the home, and has the objective of finalizing the adoption within twenty-four (24) months from the date the child was removed from the home. Amendments to the permanency plan to extend the time to finalize the termination of parental rights or the adoption must be approved by the court.

(b) If the court approves a permanency plan with a permanency goal of termination of parental rights and adoption, the court shall order the department to file a petition to terminate parental rights within thirty (30) days of approval of the permanency plan and shall enter a scheduling order that complies with the time limits set forth in this rule and implements the schedule set forth in the permanency plan. The scheduling order may include, but is not limited to, deadlines for filing the petition for termination of parental rights and service of process, the date and time of hearing in the event the petition is not contested, and the date and time of pretrial conference and trial in the event the petition is contested, with the objective of finalizing the proceedings on the petition within six (6) months of the date of the permanency hearing. (Adopted April 24, 2013, effective July 1, 2013.)

**Compiler's notes.** A former rule 46, "Permanency Hearings" was repealed by order dated April 24, 2013, effective July 1, 2013.

## STATUTORY NOTES

**Committee Comments.** As to subsection (b): Federal law requires the agency to document, and the court to find, compelling reasons why termination of parental rights and adoption, guardianship, or long-term placement with a relative is not in the best interest of the child, before approving a permanency plan of long term foster care. C.F.R. 1356.21(h)(2).

As to subsection (c): A judicial determination must be made as to whether the Department did or did not make reasonable efforts to finalize the permanency plan that is in effect. 45 C.F.R. 1356.21(b)(2)(i) and (ii) The finding must be a case-specific retrospective review of the efforts made by the Department to finalize the permanency plan that is in effect.

This finding must be made within twelve (12) months of the date the child is considered to have entered foster care and at least once

every twelve (12) months thereafter. 45 C.F.R. 1356.21(b)(2)(i) and (ii). A child is considered to have entered foster care on the earlier of the date of the first judicial finding that the child has been subjected to child abuse or neglect or the date that is sixty (60) calendar days after the date on which the child is removed from the home. A state may use a date earlier than that required by federal regulations. 45 C.F.R. 1355.20 I.C. § 16-1622(4) requires that the hearing to review the permanency plan be held prior to twelve (12) months from the date the child is removed from the home or the date of the court's order taking jurisdiction under this chapter, whichever occurs first.

If a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with federal regulations, the child becomes ineligible under

title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such

a determination is made. 45 C.F.R. 1356.21 (b)(2)(ii).

### **Rule 47. Modification or revocation of disposition or case plan (C.P.A.)**

Any C.P.A. disposition or case plan may be modified or revoked at any time that the court has jurisdiction over the child. If the modification is to remove a child from the home who has been placed there under protective supervision, then the modification shall be made in accordance with the procedure set forth in I.C. § 16-1623. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

### **STATUTORY NOTES**

**Committee Comments.** There is an important distinction between an extended home visit and a return home under “protective supervision”. In the former, the Department retains jurisdiction over the child, and the “contrary to the welfare” and “reasonable efforts to prevent removal” findings need be made only if the child is returned to care after a home visit that exceeds six (6) months without prior court approval. When the child is returned home under protective supervi-

sion, the Department does not retain custody over the child. If the child is ultimately returned to care, it is treated as a new removal and the “contrary to the welfare” and “reasonable efforts to prevent removal” findings must be made anew. Failure to timely make the “contrary to the welfare” and “reasonable efforts to prevent removal” findings results in the loss of federal IVE funding for the duration of the child’s stay in foster care.

### **Rule 48. Termination of parent-child relationship (C.P.A.)**

(a) At any time after the entry of a decree finding that the child is within the jurisdiction of the court under the C.P.A. a petition for termination of the parent child relationship may be filed in accordance with the provisions of I.C. § 16-1624 and Chapter 20, Title 16, of the Idaho Code.

(b) The petition to terminate parental rights shall be filed in the same case as the proceeding under the Child Protective Act, for purposes of judicial administration only. All appointments of attorneys and guardians ad litem in the proceeding under the Child Protective Act shall remain in effect for purposes of proceedings on the petition to terminate, unless otherwise ordered by the court. The petitioner must serve process in accordance with the statute governing termination of parental rights, set forth at Chapter 20, Title 16, Idaho Code. At trial on the petition to terminate parental rights, the petitioner must meet its burden of proof through evidence admissible pursuant to the Idaho Rules of Evidence; no part of the court’s record in the proceeding under the Child Protective Act may be used for purposes of meeting the petitioner’s burden of proof in the trial on the petition to terminate parental rights, unless the part offered is admissible under the Idaho Rules of Evidence, or unless the parties stipulate to its admission. (Amended and effective August 3, 2006; revised effective August 21, 2006.)

**Rule 49. Right of appeal (C.P.A.)**

(a) An aggrieved party may appeal to the district court those orders of the court in a C.P.A. action specified in I.C. § 16-1625. A party may also seek a permissive appeal to the Supreme Court pursuant to Idaho Appellate Rule 12.1.

(b) During the pendency of an appeal of a C.P.A. proceeding, or of an order, decree or judgment terminating parental rights, from the magistrate's division to the district court, and any further appeal to the Supreme Court, the magistrate shall continue to conduct review hearings and annual permanency hearings pursuant to I.C. § 16-1622 and to enter orders thereon, unless otherwise ordered by the district judge or the Supreme Court. If the district judge or the Supreme Court orders that the magistrate judge shall not conduct the review hearings and annual permanency hearings, then the district judge or the Supreme Court will conduct the review hearings and annual permanency hearings. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended March 19, 2009, effective July 1, 2009.)

**Rule 50. Transfer of venue (C.P.A.)**

(a) Transfer of venue in a case under the Child Protective Act is governed by these rules and is not subject to the Idaho Rules of Civil Procedure.

(b) Venue in a case under Child Protective Act may not be transferred prior to the entry of a decree finding the child within the jurisdiction of the court under the Child Protective Act.

(c) In the discretion of the court, venue in a case arising under the Child Protective Act may be transferred when the following conditions exist:

(1) The court has entered a decree finding the child within the jurisdiction of the court under the Child Protective Act;

(2) It is in the best interest of the child;

(3) All parties either agree or do not object to the transfer;

(4) The Department of Health & Welfare is able and ready to provide services in case management in the new county;

(5) The parents or a parent who is the subject of a reunification plan lives in the receiving county;

(6) Prior to the transfer, the judge of the sending county court will communicate either verbally or in writing and obtain consent to the transfer from a judge of the receiving county court; and

(7) All currently needed hearings and findings have been completed and transfer will not jeopardize the ability of the court or parties to comply with the time requirements of the Child Protective Act or these rules.

(d) Counsel of record and guardians ad litem shall continue in the case unless there is a stipulation for substitution of counsel and/or guardians ad litem with the new counsel or guardians ad litem or an order of the receiving court allowing withdrawal of counsel or guardians ad litem.

(e) If a case is transferred, the clerk shall forward the original file to the receiving court and shall maintain a copy of the file in the sending



jurisdiction for record purposes and shall, if possible, transfer any ISTARS record to the receiving county.

(f) The receiving county will conduct a review hearing of the case status within sixty (60) days of receipt of the file. (Added and effective August 3, 2006; revised effective August 21, 2006; amended effective November 13, 2008.)

### STATUTORY NOTES

**Committee Comments.** If parents do not live in the county where the child protection case is open it can limit the effectiveness of reunification efforts or case supervision. Best practice requires court orders limiting parents from moving without court approval. Because the major effort in CPA cases is resolution of the parents' issues, venue is best served in counties where the parents live; not where the department may have placed the

child(ren) for services. A CPA case may arise away from the home county of the parents or a move is in the best interest of resolving CPA issues. In these very limited situations a case should be transferred. This rule deals with transfer within the state of Idaho. Cases may not be transferred to another state. Through the Interstate Compact services may be obtained in member states, but court proceedings remain in Idaho.

## PART IV. RULES HAVING JOINT APPLICATION.

### Rule 51. Application of Idaho Rules of Evidence (C.P.A.) (J.C.A.)

(a) The Idaho Rules of Evidence shall apply to C.P.A. and J.C.A. proceedings except in the following situations:

(1) Detention review hearings. Pre-adjudication detention hearings held under I.C. § 20-516 and Idaho Juvenile Rule 7.

(2) Sentencing hearings. Sentencing hearings held under I.C. § 20-520 and Idaho Juvenile Rule 17.

(b) The Idaho Rules of Evidence shall apply in C.P.A. proceedings only to the portion of the adjudicatory hearing where jurisdiction is being determined, or to the portion of any hearing where aggravated circumstances is being determined.

(c) Where a petition to terminate parental rights has been filed in a C.P.A. case, the Idaho Rules of Evidence shall apply to proceedings on the petition to terminate.

(d) The Idaho Rules of Evidence shall not apply in proceedings under I.C. § 20-511A and Idaho Juvenile Rule 54. (Amended and effective August 3, 2006; revised effective August 21, 2006; amended April 24, 2013, effective July 1, 2013.)

### STATUTORY NOTES

**Committee Comments.** Rule 101 of the Idaho Rules of Evidence contains parallel provisions clarifying their applicability to J.C.A. and C.P.A. actions.



**Rule 52. Closed hearings (C.P.A.) (J.C.A.)**

(a) All C.P.A. hearings shall be closed to the public, except for those persons found by the court to have a direct interest in the case or in the work of the court.

(b) All Juvenile Correction Act proceedings on a petition filed under I.C. § 20-510 shall be closed to the public except for those persons found by the court to have a direct interest in the case or who work for the court, until a admit/deny hearing is held pursuant to Idaho Juvenile Rule 6 to permit the parties to request that the court consider, or permit the court to consider on its own motion, closing the proceedings. Thereafter the proceedings shall be open unless the court enters an order closing them. At the admit/deny hearing, the court shall make a determination whether the proceedings shall be opened or closed to the public as provided in (1) and (2) below:

(1) Juvenile Correction Act proceedings brought against any juvenile under the age of fourteen (14) or brought against a juvenile fourteen (14) years or older who is charged with an act that would not be a felony if committed by an adult may be closed to the public at the court's discretion by a written order made in each case.

(2) Juvenile Correction Act proceedings brought against a juvenile fourteen (14) years or older who is charged with an act that would be a felony if committed by an adult shall be open to the public unless the court determines by a written order made in each case that extraordinary circumstances exist which justify that the proceedings should be confidential.

(c) All hearings and screening team meetings held pursuant to I.C. § 20-511A and Idaho Juvenile Rule 54 shall be closed to the public.

(d) Notwithstanding any other provision of this rule, in every case the court may exclude the public from a proceeding during the testimony of a child witness or child victim if the court determines that the exclusion of the public is necessary to protect the welfare of the child witness or child victim.

(e) Persons found by the court to have a direct interest in the case or who work for the court may attend all Juvenile Corrections Act proceedings.

(f) If a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult is found not to have committed an act that would be a felony if committed by an adult, or the charge is reduced to allege an act that would not constitute a felony if committed by an adult, all further court proceedings may be closed upon written order of the court made in each case.

(g) If a petition filed against a juvenile fourteen (14) years or older alleges acts committed by the juvenile which would be a felony if committed by an adult, and acts which would be a misdemeanor if committed by an adult or a status offense, or if separate petitions are filed against a juvenile fourteen (14) years of age or older which, if consolidated, allege acts which would be a felony if committed by an adult, and acts which would be a misdemeanor if committed by an adult or a status offense, the proceedings relating to all of the charges, including those charges alleging acts which would be a

misdeemeanor if committed by an adult or a status offense, shall be open to the public as though all of the charges allege acts which would be felonies if committed by an adult. The case records and files of the proceedings in such a case shall be subject to the disclosure provisions of Idaho Juvenile Rule 53, and Rule 32 of the Idaho Court Administrative Rules. (Amended June 25, 1997, effective July 1, 1997; amended August 4, 2005, effective August 15, 2005; amended and effective August 3, 2006; revised effective August 21, 2006.)

STATUTORY NOTES

**Committee Comments.** This rule gives the court broad discretion on who may attend juvenile proceedings. The direct interest stand-

dard can be considered on a case-by-case basis. This standard is consistent with I.C. § 16-1613.

**Rule 53. Release of information (C.P.A.) (J.C.A.)**

A court shall not disclose any of the contents of a case file of any action brought under the Juvenile Corrections Act or the Child Protective Act, nor other records of such proceedings, except as authorized under Rule 32 of the Idaho Court Administrative Rules and I. C. § 16-1626 (addressing the disclosure of judicial records.) (Amended and effective August 3, 2006; revised effective August 21, 2006.)

STATUTORY NOTES

**Committee Comments.** This rule is intended to be consistent with I.C.A.R. 32 regarding the disclosure of juvenile court records. It is likewise intended to eliminate

confusion created by inconsistent state statutes and Supreme Court rules by referring to one source only for guidance regarding the disclosure of juvenile court records.

**Rule 54. Mental Health Assessments and Plans of Treatment under I.C. § 20-511A.**

- (a) As used in this rule, “interested parties” means;
- (1) in Juvenile Corrections Act proceedings, the juvenile, the juvenile’s parents, guardians and custodians, the juvenile’s counsel, the prosecuting attorney, the department of health and welfare, the department of juvenile corrections, county probation and any other agencies or person designated by the court.
- (2) in Child Protective Act proceedings, the child, the child’s parents, guardians and custodians, the child’s counsel if any, the child’s guardian ad litem if any, the attorney general or prosecuting attorney appearing in the case, the department of health and welfare, and any other agencies or persons designated by the court.
- (b) When the court has reason to believe that the conditions specified in I.C. § 20-511A(1)(a) and (b) are present, the court may order the department of health and welfare to submit appropriate mental health assessments and a plan of treatment for the court’s approval. The order shall set a time for the submission of the mental health assessment and plan of treatment, which time may be extended for good cause. Notice of the order

shall be given to all interested parties. The order shall give notice to the parents of the juvenile or child that initial costs of the preparation of the assessment and plan of treatment, and of any additional evaluation and/or recommendations under Idaho Code § 20-511A(3) and subsection (e) of this rule, may be borne by the department of health and welfare, but that, pursuant to I.C. § 20-511A(5), these costs and all costs associated with assessment and treatment shall be the responsibility of the parents according to their ability to pay based upon the sliding fee scale established pursuant to I.C. § 16-2433.

(c) At any time after determining that there is reason to believe that the conditions specified in I.C. § 20-511A(1)(a) and (b) are present, the court may order the convening of a screening team consisting of representatives from the department of health and welfare, county probation, local school officials, teen early intervention specialists as provided for under I.C. § 16-2404A, the department of juvenile corrections and/or other agencies or persons designated by the court. The screening team shall review the mental health assessment and plan of treatment and any other relevant information and make written recommendations to the court. Any parents or guardians of the juvenile or child who are available shall be included in the screening team and consulted with regard to the plan of treatment. The order shall set a time for the submission of the written recommendations, which time may be extended for good cause. The order shall designate a leading member of the screening team, who shall have the responsibility for scheduling meetings and submitting the written recommendations of the screening team to the court. Notice of the order shall be given to all interested parties.

(d) The court may:

(1) order any agencies that have treated or had custody of the juvenile or child to release any pertinent information or records to the department of health and welfare for the purpose of mental health assessment and preparation of a plan of treatment;

(2) order the department of health and welfare, county probation, school officials and the department of juvenile corrections to release all pertinent information regarding the juvenile or child to the court and/or the screening team; and

(3) require the parents or guardians of the juvenile or child, and where appropriate require the juvenile or child, to allow information pertinent to the assessment or treatment of the child to be released to the department of health and welfare, the court and/or the screening team.

(e) If the court, after receiving the mental health assessment and plan of treatment submitted by the department of health and welfare and any recommendations from the screening team, determines that additional information is necessary to determine whether the conditions specified in I.C. § 20-511A(1)(a) and (b) are present, or to determine an appropriate plan of treatment for the juvenile, the court may order an evaluation and/or recommendations for treatment to be furnished by a psychiatrist, licensed



physician or licensed psychologist, with the expenses of such evaluation and/or recommendations to be borne by the department of health and welfare.

(f) After receiving the mental health assessment and plan of treatment from the department of health and welfare, any written recommendations from the screening team and any additional evaluations or recommendations for treatment, the court may make a determination of whether the conditions specified in I.C. § 20-511A(1)(a) and (b) are present. If the court finds that such conditions are present, the court shall order mental health treatment in accordance with a plan of treatment as approved or modified by the court. However, the court shall first hold a hearing before making such determination or entering such order if: (1) the court determines that a hearing would be helpful in making such determinations or fashioning the order; or (2) any interested party objects to the entry of such a determination or order; or (3) in-patient or residential treatment would be required as part of the plan of treatment, unless the hearing is waived by the juvenile or child and the parents or guardians of the juvenile or child. Notice of the hearing shall be given to all interested parties.

(g) At the hearing, the court shall consider the mental health assessment and plan of treatment submitted by the department of health and welfare, the recommendations of the screening team and any additional evaluation or recommendations for treatment. The parties may present evidence in support of, or opposed to, the information from any of these sources. Each party shall have the right to present any relevant evidence on the issues of: (1) whether the conditions specified in I.C. § 20-511A(1)(a) and (b) are present; and (2) what should be included in the plan of treatment, if any, ordered by the court.

(h) At the conclusion of the hearing, the court shall determine whether the conditions specified in I.C. § 20-511A(1)(a) and (b) are present. If the court determines that such conditions are present, the court shall order mental health treatment for the juvenile or child in accordance with the plan of treatment as approved or modified by the court. The court shall not order in-patient or residential treatment unless the court determines by clear and convincing evidence that the conditions specified in I.C. § 20-511A(1)(a) and (b) are present and that such treatment is required.

(i) Where the procedures set forth in I.C. § 20-511A and this rule are initiated in a Juvenile Corrections Act proceeding, any communications made by the juvenile to any person participating in an assessment, evaluation or preparation of a plan of treatment for the juvenile, and made for the purpose of such assessment, evaluation or preparation of a plan of treatment, shall not be used against the juvenile for any purpose in the evidentiary hearing in the Juvenile Corrections Act proceeding.

(j) **Forms.**

(1) An order for mental health assessment and preparation of a plan of treatment under subsection (b), and for the convening of a screening team under subsection (c), shall be in substantially the following form:



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_  
)  
IN THE INTEREST OF \_\_\_\_\_ )  
) Case # \_\_\_\_\_  
)  
\_\_\_\_\_, )  
DOB: \_\_\_\_\_ ) ORDER FOR MENTAL HEALTH  
) ASSESSMENT AND PLAN OF  
) TREATMENT AND FOR  
) SCREENING TEAM  
A juvenile under the age )  
Of eighteen years )

Pursuant to I.C. 20-511A it is ordered the Idaho Department of Health and Welfare submit appropriate mental health assessments and plan of treatment for the juvenile. The Department shall submit the assessments and plan of treatment by the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. Upon good cause shown the date may be extended. [If a screening team is convened by the court, the Department may submit their assessments and plan of treatment separately or in conjunction with the recommendations of the screening team.]

[Pursuant to I.C. 20-511A (2) the court convenes a screening team. The team should consist of a representative from:

1. \_\_\_\_\_ Department of Health and Welfare,
2. \_\_\_\_\_ Juvenile Probation  
Office,
3. \_\_\_\_\_ School District,
4. \_\_\_\_\_ Department of Juvenile Corrections,
5. \_\_\_\_\_ agency
6. \_\_\_\_\_

and the parents or guardians of the juvenile. The representative from \_\_\_\_\_ shall be lead member, responsible for scheduling team meetings and submitting the written recommendations to the court.

The team shall review all pertinent information available concerning the juvenile's emotional and mental health and the plan of treatment of the juvenile. Each of the above agencies having information regarding the juvenile's emotional and mental health shall make such material available to the screening team. If additional current information is necessary and can be obtained, it is the order of the court that the parents or guardian's provide confidentiality waivers to obtain any additional current information if necessary. If the screening team determines additional information is necessary to make necessary written recommendations to the court and such information can be obtained only by a court order, the court will be so advised.

Screening team meetings will be confidential and only written recommendations will be made to the court. The team shall issue its written recommendations to the court no later than the \_\_\_\_ day of\_\_\_\_\_, 20\_\_\_\_. This time may be extended upon good cause found by the court.].

Initial costs of assessment and treatment may be borne by the Department of Health and Welfare, but pursuant I.C. 20-511(A) (5) all costs associated with assessment and treatment shall be the responsibility of the parents of the juvenile according to their ability to pay based upon the sliding fee scale established pursuant to section 16-2433, Idaho Code. The financial obligation of the family shall be determined after consideration of all available payment and funding sources including title XIX of the social security act, as amended, all available third party sources, and parent resources according to any order for child support under chapter title 32, Idaho Code.

IT IS SO ORDERED THIS \_\_\_\_, day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

**Note:** The bracket portion of the above order can be used if the judge determines to utilize a screening team.

(2) The form for an order for an additional assessment and recommendations under subsection (e) shall be in substantially the following form:

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

IN THE INTEREST OF \_\_\_\_\_,

DOB: \_\_\_\_\_

A juvenile under the age  
Of eighteen years

)  
)  
) Case # \_\_\_\_\_  
)  
) ORDER REQUIRING  
) ADDITIONAL MENTAL HEALTH  
) ASSESSMENT AND  
) RECOMMENDATIONS  
)  
)

The court having received the mental health assessment and plan of treatment submitted by the Department of Health and Welfare and recommendations of the screening team determines additional information is necessary to make the findings required by I.C. 20-511(A), hereby orders that an \_\_\_\_\_[evaluation/assessment] and recommendations be conducted and submitted by \_\_\_\_\_. The initial cost of such assessment shall be borne by the Department of Health and

Welfare with reimbursement to be made by the parents pursuant to I.C. 20-511A (5).

Dated this \_\_\_\_\_, day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

**Note:** I.C. 20-511(3) provides an evaluation and/or recommendations for treatment to be furnished by a psychiatrist, licensed physician or licensed psychologist. The type of evaluation/assessment may depend upon the information being sought, thus the judge will have to delineate in the order the type of evaluation/assessments necessary.

(3) The order for a plan of treatment under subsections (f) and (h) shall be in substantially the following form:

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF	
THE	
STATE OF IDAHO, IN AND FOR THE COUNTY OF _____	
	)
IN THE INTEREST OF	)
	) Case # _____
_____ ,	)
	)
DOB: _____	) ORDER DESIGNATING
	) A PLAN OF TREATMENT
	)
A juvenile under the age	)
Of eighteen years	)

The court having considered the mental health assessment, other assessments, written recommendations of the screening team and current plan of treatment finds: \_\_\_\_\_

\_\_\_\_\_ The court concludes the juvenile:

(a) Is suffering a substantial increase or persistence of a serious emotional disturbance as defined in section 16-2403, Idaho Code, which impairs his or her ability to comply with the orders and directives of the court, or which presents a risk to the juvenile's safety or well-being or the safety of others; and

(b) Such condition has not been adequately addressed with supportive services and/or corrective measures previously provided to the juvenile, or the juvenile's needs with respect to the serious emotional disturbance are not being met or have not been met.

Based upon the above findings the court orders the approved plan of treatment for the juvenile be as follows

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It is further ordered that the Department of Health and Welfare provide mental health treatment for the juvenile in accord with the above ordered approved plan of treatment. The costs of such treatment shall be borne by the Department with reimbursement required from the parents pursuant to I.C. 20-511(A)(5).

It is further ordered that a review hearing shall be set for the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. At least \_\_\_\_ days before the hearing a report shall be delivered to the court noting all progress and other pertinent information occurring under the ordered plan of treatment. The following shall attend the hearing:

- 7. \_\_\_\_\_ Department of Health and Welfare,
  - 8. \_\_\_\_\_ Juvenile Probation Office,
  - 9. \_\_\_\_\_ School District,
  - 10. \_\_\_\_\_ Department of Juvenile Corrections,
  - 11. \_\_\_\_\_ agency
- and the parents or guardians of the juvenile.

IT IS SO ORDERED THIS \_\_\_\_, day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Magistrate Judge

(Adopted August 4, 2005, effective August 15, 2005; amended April 26, 2007, effective July 1, 2007.)

**Rule 55. Review of Voluntary Out-of-Home Placements**

(a) The department of health and welfare may petition the court for review of voluntary out-of-home placement of children.

(b) The petition shall be signed by the prosecutor or deputy attorney general before being filed with the court. The petition shall be entitled “In the Matter of \_\_\_\_\_, a child under the age of eighteen (18) years”, and shall be verified and set forth with specificity:

- 1. The name, birthdate, sex and residence address of the child;
- 2. The name and residence addresses of the child’s parents, custodian, or guardian,
- 3. The date the child entered the voluntary out-of-home placement, and the nature and location of that placement,
- 4. A statement that review is sought to ensure the child’s eligibility for federal funding for the placement, or statement of such other reasons for which the review is requested.
- 5. The name of the parent, guardian, or custodian consenting to the placement, and in the case of a guardian or custodian, the basis for the guardian or custodian’s authority to consent to treatment on behalf of the child, and a statement that the consent has not been withdrawn.
- 6. A statement that continued voluntary out-of-home placement is in the best interest of the child.



(c) In the case of a voluntary out-of-home placement, the petition shall be accompanied by an affidavit of the department setting forth the basis for the department's determination that continued voluntary out-of-home placement is in the best interest of the child. In the case of a voluntary placement pursuant to the Children's Mental Health Services Act, the petition shall also be accompanied by an affidavit of the child's clinician setting forth the basis for the clinician's determination that the child is seriously emotionally disturbed, and is in need of continued out-of-home placement.

(d) At or following the hearing, the court shall enter an order approving the placement if the court finds that:

1. A petition has been filed.

2. In the case of a voluntary out-of-home placement pursuant to the Children's Mental Health Services Act, the clinician's determination that the child is seriously emotionally disturbed and is in need of continued out-of-home placement is supported by information in the affidavit and/or the clinician's testimony at the hearing.

3. The child's parent, guardian, or custodian has consented to continuation of the placement, and in the case of a guardian or custodian, that the guardian or custodian has authority to consent to treatment on behalf of the child.

4. The voluntary out-of-home placement of the child is in the best interest of the child.

(e) The court's best interest finding shall be in writing and shall be case-specific.

(f) This procedure shall not be used to convert a voluntary placement to an involuntary placement. (Adopted effective November 13, 2008.)

### **Rule 56. Declaration.**

Whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code § 9-1406. (Adopted April 24, 2013, effective July 1, 2013.)

### **Rule 57. [Reserved.]**

## **PART V. MISCELLANEOUS.**

### **Rule 58. ICWA (C.P.A.)**

In any child custody proceeding where the court or any party knows or has reason to know that a child who is the subject of the proceedings is a member of, or is eligible for membership in an Indian tribe, notice of the proceedings shall be provided to the child's parent(s) or Indian custodian and to the appropriate Indian tribe. If the child is an Indian child as defined by the Indian Child Welfare Act, then the provisions of the ICWA, 25 U.S.C. § 1901, et seq., and 25 C.F.R. § 23.11 shall apply. (Amended and effective August 3, 2006; revised effective August 21 2006.)

STATUTORY NOTES

**Committee Comments.** If the child is an Indian child as defined by the Indian Child Welfare Act (ICWA), then ICWA applies. ICWA is discussed in detail in Chapter IX of the Idaho Child Protection Manual. Failure to comply with ICWA could substantially compromise the finality of any proceeding under the Child Protective Act, the termination of parental rights statute and/or the adoption statute.

RESEARCH REFERENCES

**A.L.R.** Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. §§ 1901 et seq.) upon child custody determinations. 89 A.L.R.5th 195.

Rule 59. [Reserved.]

Rule 60. Title and effective date.

These rules shall be known and cited as “The Idaho Juvenile Rules” (I.J.R.). These rules shall take effect on July 1, 1996, and shall govern all proceedings pending on this effective date, or thereafter commenced.

## ORDER FOR PILOT PROJECT

IN RE: PILOT PROJECT )  
FOR IMPLEMENTATION )  
OF RULES OF FAMILY ) ORDER FOR PILOT PROJECT  
LAW PROCEDURE IN )  
FOURTH JUDICIAL )  
DISTRICT )

NOW, THEREFORE, IT IS ORDERED that the Rules of Family Law Procedure as published on the Idaho Supreme Court website shall apply to all family law cases in the Magistrate's Division of the Fourth Judicial District, including divorce, child support, child custody, paternity, proceedings related to the Domestic Violence Crime Prevention Act, and all proceedings, judgments or decrees related to the modification or enforcement of such orders, except contempt. These pilot project rules shall not apply to cases involving the Child Protection Act, Adoption, or Termination and Guardianship. These rules shall apply to all cases filed on or after January 1, 2013, and shall continue until further order of the court. The Rules of Family Law Procedure shall be reviewed at the end of one year.

By Order of the Supreme Court  
Roger S. Burdick  
Chief Justice

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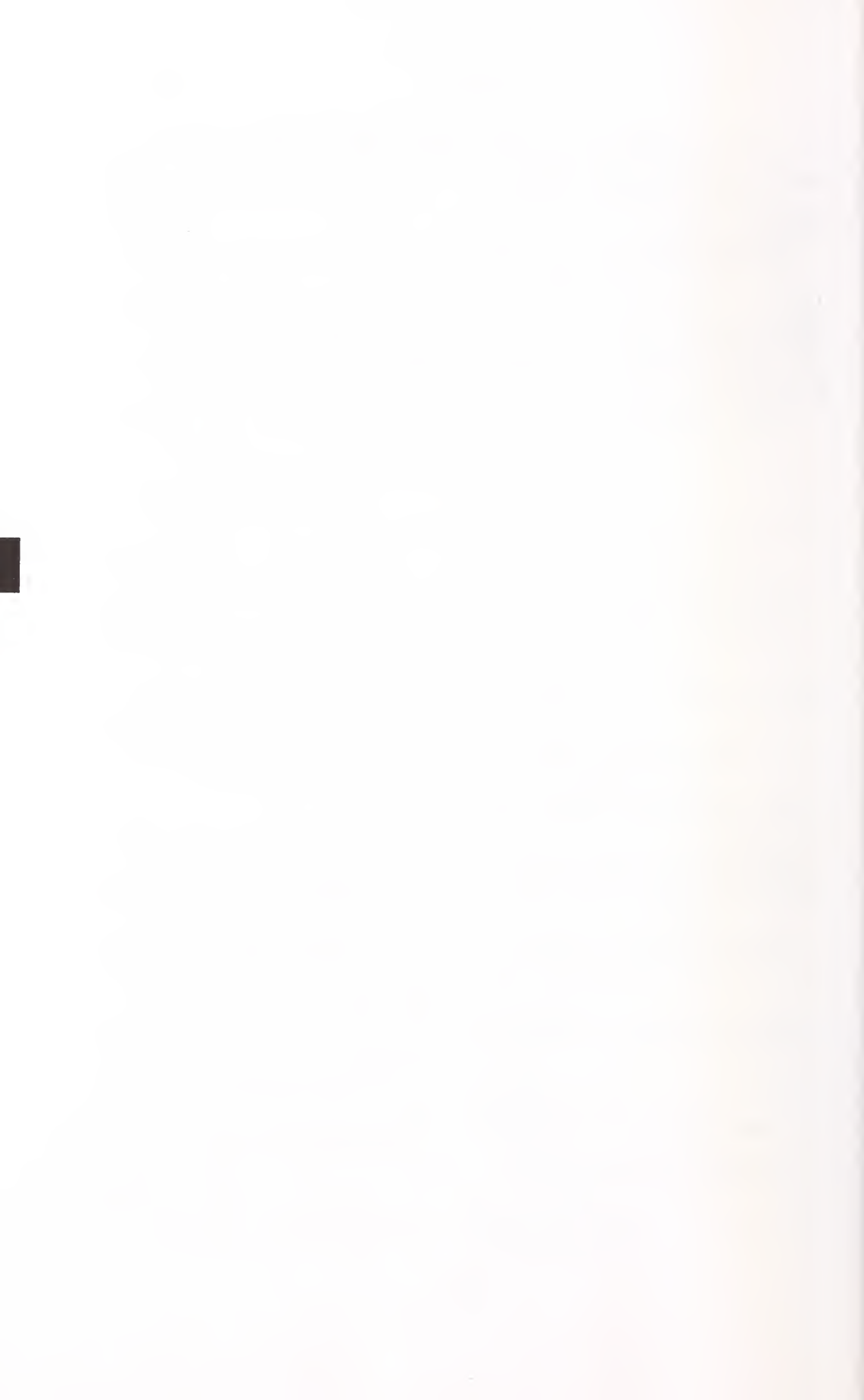
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# IDAHO COURT ADMINISTRATIVE RULES

## RULES GOVERNING THE ADMINISTRATION AND SUPERVISION OF THE UNIFIED AND INTEGRATED IDAHO JUDICIAL SYSTEM.

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## INTRODUCTION

### PURPOSE AND DESIGNATION OF RULES

These rules are for the purpose of administering and supervising the unified and integrated Idaho judicial system by the Supreme Court pursuant to Article V, Section 2, of the Constitution of the State of Idaho. These rules shall supplement all other rules of procedure adopted by the Supreme Court and may be abbreviated as the "Idaho Court Administrative Rules," (I.C.A.R.).

### PART I. SERVICE BY MAGISTRATES.

#### **Rule 1. Practice of law prohibited.**

No magistrate, whether designated as full time magistrate or part-time magistrate, may engage directly or indirectly in the practice of law, nor shall a magistrate be associated with or be a member of any law firm or professional association or corporation engaged in the practice of law, nor shall a magistrate engage in any activity that will conflict with the duties as a judge or magistrate. (Adopted December 27, 1979, effective July 1, 1980.)

#### **Rule 2. Removal of magistrates without cause.**

(a) **Statement of intent.** This rule is promulgated by the Idaho Supreme Court pursuant to the authority of section 1-2207(3), Idaho Code, to govern the proceedings for the removal of a magistrate by the magistrates commission during the first eighteen (18) months after the magistrate takes office following appointment. Proceedings for the removal of a magistrate pursuant to this rule are administrative personnel proceedings and shall not be deemed adversary or judicial in nature. Formal rules of evidence shall not apply to any proceeding under this rule. No provision of this rule shall be construed to limit the gathering of necessary information by the district magistrates commission. As used in these rules, "magistrate" refers to the magistrate who is the subject of the personnel review meeting or the removal proceedings.

(b) **Time and method of removal.** At any time within eighteen (18) months after a magistrate takes office pursuant to appointment, the magistrate may be removed by a majority vote of all of the voting members of the appointing district magistrates commission. A majority vote of a quorum shall not suffice unless it is also a majority of the entire voting membership.

(c) **Grounds for removal.** A magistrate may be removed pursuant to this rule without cause and without a statement of the reason for removal.

(d) **Personnel review meeting.** Prior to holding a removal hearing, the district magistrates commission shall hold a personnel review meeting. The purpose of the meeting is to determine if a removal hearing should be held. The personnel review meeting may be called by the district administrative judge, or the judge's designee or by three members of the district magis-

trates commission upon written application to the administrative judge. Reasonable notice shall be given to all district magistrates commission members but need not be given to the magistrate. The magistrates commission shall set a removal hearing upon demand of three voting members of the commission.

(e) **Removal hearing, notice.** Action to remove a magistrate may be taken at a regular or special meeting of the district magistrates commission upon no less than fourteen (14) days' written notice to all members of the district magistrates commission and the magistrate. Notice to the magistrate shall be by personal service or in such manner as prescribed by the administrative judge. Proof of service shall be lodged with the administrative judge. Such notice shall inform the magistrate that the purpose of the meeting is to consider the magistrate's removal pursuant to section 1-2207, Idaho Code, and that the magistrate may attend such portion of the meeting as permitted by the commission. Notice to the members of the district magistrates commission shall be given by regular mail or personal delivery and shall inform the member that the purpose of the meeting will be to consider the removal of the named magistrate and that action for removal can be taken only by majority vote of all the voting members of the district magistrates commission. The commission may permit the magistrate to testify and produce evidence. Procedural conduct of the meeting shall be determined by a majority vote of the voting members present.

(f) **Confidentiality, records.** All proceedings for the removal of a magistrate shall be closed to the public and confidential. The records of any removal proceeding are confidential and exempt from public access as provided in Rule 32(d), I.C.A.R.

(g) **Subpoena power.** There shall be no subpoena power available for proceedings under this rule.

(h) **Order of removal.** If the district magistrates commission determines that the magistrate should be removed, it shall issue a written order of removal, signed by the chairman of the commission, and shall have the order personally served on the magistrate or mailed to the magistrate by certified mail at the magistrate's judicial chambers or home address. Such order shall provide that the date of termination is effective immediately. The order shall be filed with the clerk of the district court. The administrative judge shall cause a copy to be mailed to the Administrative Office of the Courts.

(i) **Removal for cause.** Nothing contained in this rule shall be deemed to limit the authority of the Judicial Council and the Supreme Court to take action to remove a magistrate for cause pursuant to Section 1-2103A, Idaho Code. (Adopted December 27, 1979, effective July 1, 1980; amended May 1, 1990, effective July 1, 1990; amended June 14, 1999, effective September 1, 1999.)

### **Rule 3. Discipline and removal of magistrates.**

The discipline or removal of a magistrate shall be done by the Supreme Court on recommendation of the Judicial Council pursuant to Section



1-2103A, Idaho Code. (Adopted May 1, 1990, effective July 1, 1990.)

#### STATUTORY NOTES

**Compiler's Notes.** Former ICAR Rule 3 [Adopted December 27, 1979, effective July 1, 1980; amended March 27, 1989, effective July 1, 1989] was rescinded by Order of the Supreme Court adopted May 1, 1990, effective July 1, 1990.

#### **Rule 4. Pro tempore trial judges by agreement.**

(a) Pursuant to Section 12 of Article 5 of the Idaho Constitution pro se parties, or attorneys of record with written approval of their clients, may agree in writing to have a civil action involving a controversy between private parties pending and at issue in the district court or magistrates division of the district court and triable to the court tried by a judge pro tempore designated by them as a trial judge. A judge pro tempore must be a member of the Idaho State Bar in good standing and meet the other constitutional and statutory qualifications for a district judge or lawyer magistrate.

(b) The agreement shall be presented to the administrative district judge of the judicial district for approval. Unless the administrative judge determines, in the judge's discretion, that the agreement should not be approved the administrative district judge shall appoint the person designated in the agreement to become a judge pro tempore to hear and determine all contested matters in the designated case as a trial judge, which appointment shall become effective upon the execution and filing of the oath required by I.C. § 59-401. The agreement, order and oath shall be filed in the action. The action shall thereafter be assigned to the judge pro tempore who shall preside over further proceedings in the action as a trial judge. If the administrative district judge declines to approve the agreement, the judge shall enter an order to that effect, stating the reasons for declining to approve the agreement.

(c) **Power of Judge Pro Tempore.** In conducting proceedings in the designated action, a judge pro tempore within the limits of the cause shall have all of the powers and duties of a district judge or magistrate while presiding over an action as a trial judge. Provided, that a judge pro tempore shall not have the power to hear appeals or to exercise any of the inherent powers of the court, including specifically the power to sanction for contempt or mandamus the conduct of non-parties; all such matters involving the exercise of the inherent power of the court shall be referred to the administrative district judge.

(d) **Hearings and Trials.** All proceedings shall be conducted by the judge pro tempore in the manner prescribed by the statutes and rules governing proceedings in the district court and the magistrates division of the district court; except that upon written stipulation of the parties and approval of the judge pro tempore, a hearing or trial may be conducted at a place other than in a regular courtroom. The place of hearing or trial shall be provided by and at the expense of the parties.

(e) **Records and Files.** The judge pro tempore shall have the responsibility of maintaining the case file and records in the same manner as is done in district court and the magistrates division of the district court. The judge pro tempore shall file all papers in accordance with Rule 5(e) of the Idaho Rules of Civil Procedure. At the conclusion of the proceeding the judge pro tempore shall deposit all records and files in the case with the clerk of the district court or magistrates division of the district court. In case of appeal the judge pro tempore shall settle the record.

(f) **Record of Proceedings.** In accordance with Idaho Code section 1-1103, the parties may stipulate in writing with the approval of the judge pro tempore to waive the reporting or recording of any part of the proceedings or testimony. If the parties desire a record to be made, the parties shall provide the means and bear the expense of making the record.

(g) **Reassignment of Case.** Upon written request of the parties or of the judge pro tempore, or upon the death or disability of the judge pro tempore, the administrative district judge shall reassign the action to a district judge or a lawyer magistrate. A judge pro tempore may be removed by the administrative district judge for the same cause that a district judge or magistrate may be removed.

(h) **Compensation.** The judge pro tempore shall receive such compensation as is agreed upon by the parties and the judge pro tempore, and such compensation shall be paid by the parties directly to the judge pro tempore. The agreement between the parties, as set forth in paragraph 4(a), shall provide that the judge pro tempore is an independent contractor and not an agent nor employee of the Judicial Department.

(i) **Effect of Orders and Judgments.** All orders and judgments entered by the judge pro tempore or pursuant to his or her findings of fact and conclusions of law shall have the same binding effect as a decision or judgment of a district judge or magistrate and be subject to enforcement and appeal in the same manner. (Adopted April 14, 1993, effective July 1, 1993.)

## **Rules 5 – 10.[Reserved.]**

### **PART II. DISPOSITION OF FINES, COSTS, FORFEITURES AND FEES.**

#### **Rule 11. Disposition of bail bond forfeitures in misdemeanor charges.**

In the event of the forfeiture of any bail bond given for a misdemeanor charge or payment of fine pursuant to Rule 14 of the Misdemeanor Criminal Rules, such bail bond shall be allocated and distributed by first allocating the necessary sum to court costs pursuant to section 31-3201A(b), Idaho Code, and then distribute the balance of such bail bond or payment of fine pursuant to section 19-4705, Idaho Code. Upon the forfeiture of any other bail bond given for a misdemeanor charge for failure to appear or for any reason other than a forfeiture under said Rule 14 of the Misdemeanor

Criminal Rules, such bail bond shall be distributed pursuant to section 19-4705, Idaho Code, but no portion of the bail bond shall be allocated to court costs under section 31-3201A(b), Idaho Code. (Adopted December 27, 1979, effective July 1, 1980; amended April 2, 1981, effective July 1, 1981.)

**Rule 12. Marriage ceremony fees. [Repealed effective July 1, 2004.]**

**STATUTORY NOTES**

**Compiler's Notes.** Rule 12, adopted December 27, 1979, effective July 1, 1980; amended July 29, 2003, effective August 1, 2003, was repealed effective July 1, 2004.

**Rules 13 – 20.[Reserved.]**

**PART III. REPORTING OF COURT PROCEEDINGS.**

**Rule 21. Certification of district court reporters.**

No person shall receive appointment as a district court reporter unless such person is a regularly certified shorthand reporter as defined in the Idaho Certified Shorthand Reporters Act, section 54-3101, Idaho Code, *et seq.*; provided, however, that a person may be appointed as a state district court reporter on a temporary basis upon condition that such reporter must make application for regular certification under the Certified Shorthand Reporters Act within thirty (30) days of such appointment, and if the reporter fails to obtain regular certification as a certified shorthand reporter by the second subsequent consecutive examination date by reason of the reporter's failure to pass the necessary examination, or otherwise, then such person shall be removed as a district court reporter and shall not be eligible for reappointment until the person obtains a regular certificate as a certified shorthand reporter, pursuant to section 54-3104, Idaho Code. (Adopted December 27, 1979, effective July 1, 1980; amended December 13, 2006, effective March 1, 2007.)

**Rule 22. Special examination by certified shorthand reporters board.**

Upon the request of a district judge, or the administrative director of the courts, or on its own motion, the Supreme Court may require that a state district court reporter appointed on a temporary basis in accordance with section 54-3104, Idaho Code, be required to pass a special examination to be administered by the Certified Shorthand Reporters Board in order to continue in said appointment on a temporary basis. Any such special examination shall not be held pursuant to the Idaho Certified Shorthand Reporters Act, but shall be held pursuant to the authority of the Supreme Court to establish such additional conditions for appointments as it may choose to prescribe, and shall be subject only to notice of the time and place of the special examination at least fifteen (15) days in advance of the date set for the examination to the person taking said examination. Said special



examination shall be similar in form and content to the regular examinations held by the Certified Shorthand Reporters Board, pursuant to section 54-3111, Idaho Code, and the preparation, administration and grading of the examination shall be governed by rules prescribed by the board. Upon determining the results of the examination, the board shall notify the examinee and the administrative director of the courts as to whether the examinee has passed or failed the examination. Any state district court reporter appointed on a temporary basis who fails to pass the special examination required by the Supreme Court shall be removed as a district court reporter and shall not be eligible for re-appointment on a permanent or temporary basis, until such person obtains a regular certificate as a certified shorthand reporter pursuant to the Idaho Certified Shorthand Reporters Act. (Adopted December 27, 1979, effective July 1, 1980.)

**Rule 23. Notes, files and records — Property of the district court.**

Any person who is removed by reason of the person's failure to pass a necessary or special examination, or who leaves employment for any reason, shall forthwith and without delay turn over all notes, files and records concerning any cases, motions or other matters in which the person has taken part as a district court reporter to the trial court administrator of the judicial district, and it is ordered that all such notes, records, files and information developed in connection with the person's duties as a district court reporter are the property of the district court and that the person shall be personally liable for any loss or destruction of said notes, records, files and information. In the event the preparation of a particular transcript is reassigned to another reporter, the court reporter shall forthwith and without delay turn over to the trial court administrator all notes, files and records concerning the particular matter that is to be transcribed. (Adopted December 27, 1979, effective July 1, 1980; amended January 3, 2008, effective March 1, 2008.)

**Rule 24. Temporary court reporters.**

(a) **Compensation.** In appointing a substitute or deputy court reporter to act in the place of the regular reporter during absence, sickness, or other disability, pursuant to section 1-1108, Idaho Code, in order to obtain state financial reimbursements for compensation or expenses of such substitute or deputy court reporter, the appointing court shall notify and obtain the approval of the administrative director of the courts prior to any employment for which compensation is sought; provided, however, that the administrative director of the courts may approve state compensation or expense payment after employment, if the appointing court was unable to obtain prior approval due to exigent circumstances.

(b) **Manner of appointment.** The court appointing a temporary or deputy court reporter pursuant to section 1-1108, Idaho Code, shall enter an order stating the reason for such appointment, and shall forward a copy of the order of appointment to the administrative director of the courts.



(c) **Amount of compensation.** The amount of state financial compensation and expenses for reimbursement of temporary or deputy court reporters appointed pursuant to this rule shall be established by the administrative director of the courts, subject to regulations of the state of Idaho for travel and subsistence.

(d) **Requests for payment.** Persons requesting payment for work as substitute for deputy court reporters appointed pursuant to this rule shall submit a daily log of the number of hours worked along with a state voucher for payment for services and expenses to the administrative director of the courts. Such voucher shall contain the signature of approval of the judge or court administrator for whom such work was undertaken. (Adopted December 27, 1979, effective July 1, 1980.)

**Rule 25. Reporting of proceedings in the magistrates division.**

(a) **Qualification of reporters, filing reporter notes or tapes.** If a party furnishes a stenographic reporter as provided for in section 1-2212, Idaho Code, such reporter, at a minimum, shall be experienced in adversary courtroom proceedings and be certified by the presiding magistrate to report such proceedings. Said reporter's notes or electronic recording tapes shall be filed with the clerk and be thus available for appeal or other purposes. Said reporter by accepting the reporting assignment submits to the jurisdiction of the court in any subsequent order for a transcription of said notes at the rate agreed upon at the time of the hearing.

(b) **Logs of tapes, or recordings.** A log sheet shall be maintained by the operator of the electronic recording device, which shall accompany the record of the proceedings. Such log shall set forth all the essential events that take place in court. The log shall act as an index of such events by referring to the recording medium to identify speakers, direct and cross-examinations, objections, motions and other significant actions that transpire.

(c) **Form of log sheet.** The log sheet shall be prepared substantially in the following form:

IN THE DISTRICT COURT FOR THE \_\_\_\_ JUDICIAL DISTRICT

MAGISTRATES DIVISION

\_\_\_\_\_ COUNTY

_____	TITLE OF ACTION	_____	TAPE OR DISC NO.
_____	DOCKET NO.	_____	DATE
_____	JUDGE	_____	TIME
_____	TYPE OF ACTION	_____	OPERATOR

Jury ☐      Non-Jury ☐

<u>Parties</u>			<u>Counsel</u>		
Plaintiff(s)	Defendant(s)	Third Party Defendant(s)	Plaintiff(s)	Defendant(s)	Third Party Defendant(s)
1	1	1	1	1	1
2	2	2	2	2	2
3	3	3	3	3	3
LOCATION OF MICROPHONES					
1. Magistrate	2. Witness	3. PA	4. DA	5 Jury	6. Clerk-machine operator

Legend

J - Judge	3d - Third Party Defendant	W1 - Witness No, 1, 2, etc.
P - Plaintiff	DA - Def's Att'y	DX - Direct Exam
PA - Pl's Att'y	3DA - Third Party Def's Att'y	X - Cross Exam
D - Defendant	C - Clerk	

<u>Index Number</u>	<u>Name of speaker; phase of case, cross examination, etc.</u>	
014	Clerk calls case	(Case is identified on tape)
015	Court identifies participants	(Attys identify self and client)
016	PA opening remarks	
017	P's witness sworn	(full name of witness)
020	DX by PA	(Important for transcriber)
025	DX continues	
031	X by PA	(Helps transcriber)
036	Objection by PA	(Note interruption and by whom)
038	Court rules on objection	
039	X continues	
042	Redirect by PA	
044	Witness sworn for P: George T. Smith	
045	DX by PA	
052	X by DA	
056	Redirect by PA	
059	Recross by DA	
062	Witness sworn for P: John T. Rustabout	
063	DX by PA	
068	X by DA	
071	D's witness sworn - John D. Hostilo	
072	DX by DA	

CONTINUATION SHEET

TITLE OF ACTION \_\_\_\_\_ DOCKET NO. \_\_\_\_\_

DATE \_\_\_\_\_ TAPE OR DISC NO \_\_\_\_\_ PAGE NO \_\_\_\_\_ OF \_\_\_\_\_ PAGES

Index  
Number076  
079  
082  
085  
087  
092  
096Name of speaker; phase of case,  
cross examination, etc.DX continues

X by PA

Motion for dismissal by DA

Court denies motion

Summation by PA

Summation by DA

Disposition by Court

(d) **Recording medium.** The reels of tape or other such media together with the box in which it is stored shall be labeled by the operator showing the name of the court, the judge or magistrate thereof, and the inclusive dates when the tape was recorded. It shall be the responsibility of the clerk of the district court to have available an adequate supply of tapes or other recording media for immediate use.

(e) **Storage of tapes or other recording media.** Under supervision of the administrative district judge, or his designee, the clerk of the district court shall be responsible for the storage of the tapes or other media and log sheets to prevent tampering with, loss or damage.

(f) **Transcripts.** Transcripts shall be prepared as directed herein and in accordance with these rules. The transcripts must be neat and free from error. The transcriber must not guess as to the spoken word, but shall replay the recording until the exact meaning is understood. If the exact meaning is still indiscernible, the transcriber must indicate such fact on the transcript. The exact meaning must then be settled as provided in the Idaho Criminal Rules, the Idaho Rules for Civil Procedure, or the Idaho Appellate Rules. (Adopted December 27, 1979, effective July 1, 1980; amended and effective January 10, 2001.)

**Rule 26. Expenses of Court Reporters.**

(a) Expenses for facilities and supplies used by court reporters in performing their official court reporter duties are the responsibility of the county. In addition, it is recommended that the following be supplied by the county:

Stenograph paper

Ink and ribbons

Maintenance on steno writers, including support contracts

Typewriter (if needed)

Office furniture

Computer disks

Audio tapes

Online storage of stenographic notes and transcripts

Office Space (If the county does not have office space available in the courthouse for the court reporters to work, the Administrative District Judge or designee may authorize the court reporters to work out of their home.)

And any other supplies for making the record in the court room.

(b) Expenses for supplies used by court reporters when charging fees under Idaho Code § 1-1105(2) is the responsibility of the court reporter. In addition, it is recommended that the following be supplied by the court reporters:

- Hardware
- Software support
- Binding equipment
- Paper
- Toner
- Copy costs

(If there is no commercial establishment to reproduce transcripts in the city where the trial or hearing is held, then the court reporter shall be allowed to use the copiers of the county and pay the actual costs of such copying.)

And any other supplies for making the official transcripts. (Adopted March 17, 1998, effective October 1, 1998; amended January 3, 2008, effective March 1, 2008.)

## **Rule 27. Attendance of court reporters in district court — Electronic recording of proceedings — Transcripts.**

(a) **District court reporter, attendance required.** A court reporter certified in accordance with Rule 21, I.C.A.R., shall attend all civil trials, hearings on dispositive motions, criminal trials, arraignments, plea hearings, evidentiary suppression hearings, and sentence hearings in the district court, unless such attendance is waived in open court or by a written stipulation signed by the parties, or their counsel of record, and approved by the presiding district judge. The court reporter shall make a shorthand or machine shorthand verbatim record of all oral communications made during such trials or hearings in the presence of the presiding district judge, including communications by all parties, counsel, witnesses, jurors and the judge, except when not feasible during sidebar conferences.

(b) **District court reporter, attendance not required.** At the discretion of the presiding district judge, civil or criminal hearings that are not specified in paragraph (a) of this rule may be electronically recorded in lieu of stenographic means. When recording is by electronic means, a deputy clerk of court must be present during the hearing, and must be operating a fully functional electronic recording machine that is electronically recording all oral communications made in the presence of the presiding district judge, including communications of the parties, counsel, witnesses and the judge.

(c) **Electronic recording.** An electronic recording shall be made of all courtroom proceedings, regardless of whether a court reporter is also



reporting the proceedings by stenographic means. Only if a court reporter is present may the court, for good cause, elect to proceed without an electronic recording. Electronic recordings of district court proceedings are the property of the court and shall be indexed and stored by the clerk of the district court for the period of time specified in rules 37 and 38 of the Idaho Court Administrative Rules.

(d) **Official transcripts.** When a court reporter stenographically reports court proceedings, the court reporter's certified transcript shall be the official transcript of the proceedings. If a court reporter has not reported a district court proceeding, a transcript or partial transcript prepared from the electronic recording of the proceeding becomes the official transcript of the proceeding for all purposes if it is prepared by the district court reporter or a transcriber under the control or supervision of the district court clerk and the transcriber executes a certificate of transcription attesting to its accuracy in the form prescribed by rule 83(k), I.R.C.P.

(1) **Realtime transcripts.** A realtime transcript is not an official transcript as defined under subsection (d) of this rule. Realtime services may be used for interpretive purposes, but cannot be cited to or used in any way as an official transcript.

(2) **Electronic recording.** An electronic recording is not an official transcript as defined under subsection (d) of this rule and cannot be cited to or used in any way as an official transcript.

(e) **Use of official transcripts of district court proceedings.** In all cases where a party desires to place in evidence a transcript or partial transcript of a district court proceeding, or disclose the contents of a transcript during the examination of a witness, the transcript must be an official transcript as provided in subsection (d) of this rule.

(f) **Estimate of Reporter's Fees — Filing.** Upon the conclusion of any trial in the district court, or proceeding in an administrative agency, the reporter shall estimate the cost of preparing a transcript of the trial or proceeding and shall certify the amount thereof in writing which shall be delivered to the clerk and filed in the file of the action or proceeding. In the event the reporter fails to so estimate the fees for a transcript within two (2) days from the conclusion of the trial or proceeding, the estimated fees for preparation of the transcript shall be deemed to be the sum of \$200.00 unless the reporter shall thereafter file the reporter's estimated fees before the filing of a notice of appeal; provided, the reporter's estimated fee may be included in the minute entry of the hearing or proceeding or stamped or endorsed thereon.

(g) **Request for official transcript.** A request for an official transcript of a district court proceeding under this rule must be in writing, submitted to the court reporter or clerk of the district court, and provide substantially the following information: date of request; the proceeding, or portion thereof, to be transcribed; whether the requestor desires that the transcript be expedited; and the requested completion date. The transcriber shall notify the person requesting the transcript of the estimated date of its completion and

the fee. Unless other arrangements are made with the approval of the district court reporter or district court clerk, the transcriber's fee shall be paid in full before delivery of the transcript to the person requesting it. Compliance with deadlines for the preparation of transcripts of proceedings for an appeal takes precedence over the preparation of transcripts made for any other purpose.

**(h) Emergency assistance.**

(1) Unanticipated absence of a court reporter. In those situations where a court reporter is not available due to an unanticipated absence such as death, illness, or temporary absence of a court reporter, and after a good faith effort a replacement cannot be found, the presiding judge may, with or without a stipulation of the parties or their counsel of record, order the recording of any proceedings listed in paragraph (a) to be by electronic recording as the official court record until such time as the unanticipated absence has passed.

(2) Anticipated absence of a court reporter. In those situations where a court reporter is not available due to an anticipated absence, including a vacancy in a court reporter position which has not been staffed pursuant to I.C. Section 1-1101, the Administrative District Judge of the affected judicial district by written Administrative Order, may suspend application of paragraph (a) and (h)(1) of this rule and order the recording of any or all proceedings listed in paragraph (a) to be by an electronic recording in accordance with paragraph (c) as the official court record until such time as the court reporter absence or vacancy has passed.

**(i) Office location and attendance.** District court reporters shall be available during regular office hours. The administrative district judge or designee may authorize a court reporter to work from an alternate location during regular office hours, provided the court reporter is available for court proceedings and may be contacted via a telephone or a call-in system approved by the administrative district judge to report to court. (Amended March 15, 2004, effective July 1, 2004; amended January 3, 2008, effective March 1, 2008; amended March 29, 2010, effective May 1, 2010.)

**Rule 28. Supervision of court reporters — performance of duties.**

District judges are responsible for the direct supervision of their court reporters, including any reporter assigned to the judge for a particular proceeding, and ensuring adherence to the time standards adopted by the Supreme Court for the filing of appellate transcripts. (Adopted January 3, 2008, effective March 1, 2008.)

**Rule 29. Filing of transcripts and extensions of time.**

(a) The reporter of any trial or proceedings shall prepare and lodge with the district court or with the administrative agency the requested transcript within the time limits set out in Idaho Appellate Rule 24. If the reporter is unable to meet this deadline an extension of time must be requested from the Idaho Supreme Court. An extension of time for the preparation and

lodging of the transcript may be obtained by filing a motion for extension of time with the Idaho Supreme Court at least five days before the transcript is due unless good cause is shown for the failure to timely file a motion.

(b) In the event a transcript is 14 days past due, the clerk of the Idaho Supreme Court shall notify the court reporter, trial court administrator, administrative district judge and district judge responsible for supervising the reporter, and the trial court administrator shall take appropriate action which may include (a) imposing disciplinary action, (b) identifying another official reporter in the district who can provide coverage for court proceedings while the transcript is completed, (c) implementing a performance improvement plan that requires weekend and evening hours to complete the transcript(s), (d) identifying a different court reporter who will complete the transcript and be compensated as appropriate, or (e) with approval of the Administrative Director of the Courts, removing the court reporter from the courtroom until the transcript is complete and hiring a different court reporter to provide coverage for court proceedings. In the event a transcript is reassigned to a free lance court reporter, the court reporter must immediately turn over all notes of the particular proceeding to the trial court administrator. The trial court administrator shall notify the clerk of the Supreme Court of the action taken regarding the transcript, including the anticipated date of filing and any reassignment.

(c) The Supreme Court retains the inherent and overriding authority to remove and/or discipline any district court reporter or order the reassignment of preparation of a transcript as may be required for the management of court operations or in the interests of justice. (Adopted January 3, 2008, effective March 1, 2008.)

#### PART IV. COURT RECORDS REQUIRED; PRESERVATION, DESTRUCTION, OR DISPOSITION OF COURT RECORDS.

##### **Rule 31. Records kept by the clerk of the district court.**

The clerk of the district court shall keep records of civil and criminal actions, each to be known as a "Register of Actions," of a suitable form and style, with indexes, and such other records and systems as prescribed by the administrative director of the courts pursuant to section 1-614, Idaho Code. Provided, no entry in the Register of Actions is required for Idaho Uniform Citations for traffic violations, which are classified as infractions in the Idaho Traffic Infractions Act, or other infractions, or misdemeanor charges filed on Idaho Uniform Citations for which there is a plea of guilty at first appearance, in the magistrates division and the "docket" on the citation shall be the only record required for the citation which shall be preserved or may be destroyed as provided in Rule 38(c) of these rules. The file number of each action shall be noted consecutively in the register of actions wherein the first entry of the action is made. All papers filed or lodged with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts and judgments, including writs of executions and satisfactions of



judgments, shall be noted chronologically. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and the returns showing execution of process. The notation of an order or judgment shall show the date of entry of the order or judgment. When trial by jury has been demanded or ordered the clerk shall enter a proper notation of the request for jury trial. (Adopted December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982; amended April 13, 1982, effective July 1, 1982; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990.)

### JUDICIAL DECISIONS

**Cited in:** Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

#### **Rule 32. Records of the judicial department — Examination and copying — Exemption from and limitations on disclosure.**

(a) **Statement of policy.** This rule is adopted pursuant to the Supreme Court's authority to control access to court records, as recognized in the Idaho Public Records Act, I.C. § 9-340A. The public has a right to examine and copy the judicial department's declarations of law and public policy and to examine and copy the records of all proceedings open to the public. This rule provides for access in a manner that:

- (1) Promotes accessibility to court records;
- (2) Supports the role of the judiciary;
- (3) Promotes governmental accountability;
- (4) Contributes to public safety;
- (5) Minimizes the risk of injury to individuals;
- (6) Protects individual privacy rights and interests;
- (7) Protects proprietary business information;
- (8) Minimizes reluctance to use the court system;
- (9) Makes the most effective use of court and clerk of court staff;
- (10) Provides excellent customer service; and
- (11) Avoids unduly burdening the ongoing business of the judiciary.

In the event of any conflict this rule shall prevail over any other rule on the issue of access to judicial records.

(b) **Definitions:** As used in this Rule:

- (1) "Custodian" means the person defined in paragraph (j)(2) of this Rule.
- (2) "Custodian judge" means the Justice, Judge or Magistrate defined in paragraph (j)(3) of this Rule.
- (3) "Personnel" means justices, judges, magistrates, trial court administrators, clerks of the district court and staff of a court.
- (4) "Court record" includes:



(A) Any document, information or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(B) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in an automated case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding, including existing ISTARS reports.

(5) "Physical record" means a judicial branch record, including a court record, that exists in physical form, irrespective of whether it also exists in electronic form.

(6) "Electronic form" means a court record that exists as:

(A) Electronic representations of text or graphic documents;

(B) An electronic image, including a video image, of a document, exhibit or other thing;

(C) Data in the fields or files of an electronic database; or

(D) An audio or visual recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared; irrespective of whether it also exists in physical form.

(7) "Remote access" means the ability whereby a person may electronically search, examine and copy court information maintained in a court record by means of access via the Internet or other publicly available telecommunication mechanism.

(8) "Bulk Distribution" means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation.

(9) "ISTARS" means the automated trial court case management system used to support the operations of the trial courts.

(10) "Compiled Data Information" means information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.

(c) **Applications.** This Rule shall apply to all court records existing on or after the date of adoption of this Rule. Provided, this Rule shall not prevent access to records, otherwise exempt from disclosure by the following persons in the following situations:

(1) If approved by the custodian judge, or the custodian in the case of any record in the judicial council, federal, state and local officials or their agent examining a judicial record in the exercise of their official duties and powers; however, requests for numerous records or records from more than one county must be approved by the Chief Justice.

(2) Parties to an action and their attorney examining the court file of the action, unless restricted by order of the court, except as limited in paragraphs (g)(11), (12), (15) and (17)(F).

(3) Disclosure by the custodian of statistical information that is not descriptive of identifiable persons.

(4) Employees shall have access to their own personnel files.

(5) Judges, clerks, trial court administrators, or other staff employed by or working under the supervision of the courts who are acting within the scope of their duties.

(d) **Access to Court Records, Examination and Copying.** Except as provided in paragraphs (g) and (i), the following are subject to examination, inspection and copying.

(1) Minutes, orders, opinions, findings of fact, conclusions of law, and judgments of a court and notices of the clerk of the court;

(2) Transcripts and recordings of all trials and hearings open to the public;

(3) Pleadings, motions, affidavits, responses, memoranda, briefs and other documents filed or lodged in a case file;

(4) Administrative or other records of the clerk, justice, judge, magistrate or staff of the court unless exempt from disclosure by statute, case law, or court rule; and

(5) A court record that has been offered or admitted into evidence in a judicial action or that a court has considered as evidence or relied upon for purposes of deciding a motion, unless the custodian judge expressly orders otherwise.

(e) **Access to Records Maintained in Electronic Form (Electronic Records).**

(1) The public shall have access to the following if they exist in electronic form:

(A) Litigant/party indexes to cases filed with the court;

(B) Listings of new case filings, including the names of the parties;

(C) The chronological case summary of events;

(D) Calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings and;

(E) Final judgments, orders, or decrees.

Except as provided in paragraphs (g) and (i), the Supreme Court may provide such access from terminals at judicial branch facilities or on-line from any remote location over the Internet.

(2) The public shall not have access to the following data elements in an electronic case record with regard to parties or their family members: the first six characters of social security numbers; street addresses; telephone numbers; and any personal identification numbers, including motor vehicle operator's license numbers and financial account numbers.

(f) **Compiled Information.** Any member of the public may request copies of existing compiled information that consists solely of information that is not exempt from disclosure. In addition, the Supreme Court may compile and provide the information if it determines, in its discretion, that the resources are available to compile the information and that it is an appropriate use of public resources. The Supreme Court may delegate to its staff the authority to make the initial determination as to whether to provide the compiled information.

Compiled information that includes information to which public access has been restricted may be requested from the Supreme Court by any member of the public. The request shall:

- (1) identify what information is sought,
- (2) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and
- (3) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

The response to the request shall be made by the Supreme Court within ten (10) working days following the date of the request.

(g) **Court records exempt from disclosure.** Except as provided in paragraph (h) of this rule, court records specified below are confidential and are exempt from disclosure. Any willful or intentional disclosure of a confidential court record may be treated as a contempt of court.

(1) Documents and records to which access is otherwise restricted by state or federal law;

(2) Pre-sentence investigation reports, except as provided in Idaho Criminal Rule 32;

(3) Affidavits or sworn testimony and records of proceedings in support of the issuance of search or arrest warrant pending the return of the warrant;

(4) Unreturned search warrants;

(5) Unreturned arrest warrants, except bench warrants, or summonses in a criminal case, provided that the arrest warrants or summonses may be disclosed by law enforcement agencies at their discretion;

(6) Unless otherwise ordered by the custodian judge, applications made and orders granted for the interception of wire, electronic or oral communications pursuant to Idaho Code § 18-6708, recordings of intercepted communications provided to the court, and reports made to the court regarding such interceptions under Idaho Code § 18-6708(7);

(7) Except as provided by Idaho Criminal Rules or statutes, records of proceedings and the identity of jurors of grand juries;

(8) Except as provided by the Idaho Criminal Rules or Idaho Rules of Civil Procedure, the names of jurors placed in a panel for a trial of an action and the contents of jury qualification forms and jury questionnaires for these jurors, unless ordered to be released by the presiding judge;

(9) Juvenile court records as hereinafter provided:

(A) All court records of Child Protective Act proceedings.

(B) All court records of Juvenile Corrections Act proceedings on a petition filed under I.C. § 20-510 pending an admit/deny hearing held pursuant to Rule 6, I.J.R. to permit the parties to request that the court consider, or permit the court to consider on its own motion, closing the records and files. Thereafter the court records shall be open unless the court enters an order exempting them from disclosure. At the admit/deny hearing the court shall determine whether the court records shall remain exempt from disclosure as provided in 1. and 2. below:



1. Court records of Juvenile Corrections Act proceedings brought against a juvenile under the age of fourteen (14), or brought against a juvenile fourteen (14) years or older who is charged with an act that would not be a felony if committed by an adult, shall be exempt from disclosure if the court determines by a written order in each case that the records should be closed to the public.

2. Court records of Juvenile Corrections Act proceedings brought against a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult, shall be exempt from disclosure if the court determines upon a written order made in each case that extraordinary circumstances exist which justify that the records should be confidential.

(C) If a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult is not found to have committed an act which would be a felony if committed by an adult or the charge is reduced to allege an act which would not constitute a felony if committed by an adult, all existing and future case records and documents shall be exempt from disclosure if the court determines by written order in each case that the court records should be closed to the public.

(D) Notwithstanding any other provision of paragraph (g)(9) of this rule, reports prepared pursuant to I.C. § 20-520(1), and other records and reports described in paragraph (g)(17) of this rule are exempt from disclosure.

(E) Notwithstanding any other provision of paragraph (g)(9) of this rule, if a juvenile is adjudicated guilty of an act which would be a criminal offense if committed by an adult, the name, offense, and disposition of the court shall be open to the public.

(F) Notwithstanding any other provision of paragraph (g)(9) of this rule, the court shall make available upon the written request of a superintendent or an employee of the school district authorized by the board of trustees of the school district, the facts contained in any records of a juvenile maintained under Chapter 5, Title 20, Idaho Code. If a request is made to examine records in courts of multiple districts, it shall be ruled upon by the Chief Justice.

(10) Mental commitment case records; provided, the court may disclose these records when consented to by the person identified or his or her legal guardian, or the parent if the individual is a minor. The court in its discretion may make such records available to the spouse, or the immediate family of the person who is the subject of the proceedings;

(11) Adoption records, except that an adopted person may obtain non-identifying medical information in all cases; the court may also in its discretion make information from the adoption records available, upon such conditions as the court may impose, to the person requesting the record, if the court finds upon written verification of a medical doctor a compelling medical need for disclosure;



(12) Records of proceedings to terminate the parent and child relationship under Chapter 20 of Title 16, Idaho Code, except that the child may obtain non-identifying medical information in all cases, and the court may also in its discretion make information from the records available, upon such conditions as the court may impose, to the person requesting the record, if the court finds upon written verification of a medical doctor a compelling medical need for disclosure;

(13) All records of proceedings relating to the consent required for abortion for minors brought pursuant to I.C. 18-609A(1) or (3);

(14) All records of proceedings relating to the judicial authorization of sterilization procedures pursuant to I.C. 39-3901;

(15) Documents filed or lodged with the court in camera;

(16) Domestic abuse files maintained pursuant to domestic violence crime prevention acts, except orders of the court;

(17) Records maintained by a court that are gathered at the request or under the auspices of a court (other than records that have been admitted in evidence);

(A) to determine an individual's need for counseling, rehabilitation, treatment or assistance with personal conflicts;

(B) to assist in assigning an appropriate disposition in the case, including the ADR screening report and screening reports prepared by Family Court Service coordinators or their designees;

(C) to provide the court with a recommendation regarding the custody of minor children;

(D) to provide a court with a psychological evaluation of an individual;

(E) to provide annual or other accountings by conservators and guardians, except to interested parties as defined by Idaho law;

(F) the family law case information sheet.

(18) A reference list of personal data identifiers or an unredacted copy of a document filed pursuant to I.R.C.P. 3(c).

(19) All court filings, including attachments, in guardianship or conservatorship proceedings whether temporary or permanent, and whether for an adult, a minor, or a developmentally disabled person, except to interested persons as defined in section 15-1-201, Idaho Code, guardians ad litem, court visitors, or any monitoring entity as defined by Idaho law, or any attorney representing any of the foregoing; provided, however, the following shall not be exempt from disclosure:

(A) the register of actions for the case;

(B) letters of guardianship and letters of conservatorship, and any supplemental orders, decrees or judgments describing, limiting, or expanding the rights and duties of the guardian or conservator;

(C) any order by the court regarding bond by a conservator, and the conservator's bond;

(D) any order, decree, or judgment dismissing, concluding, or otherwise disposing of the case.

(20) The records in cases involving child custody, child support, and paternity, except that officers and employees of the Department of Health and Welfare shall be able to examine and copy such records in the exercise of their official duties; and provided further that the following shall not be exempt from disclosure to any person:

(A) the register of actions for the case;

(B) any order, decree or judgment issued in the case, which shall be drafted and issued in compliance with the provisions of Rule 3(c)(4) of the Idaho Rules of Civil Procedure.

This subsection (g)(20) shall apply only to records in cases filed on or after July 1, 2012, and to records in cases in which a motion to modify an order, decree, or judgment was filed on or after July 1, 2012.

(21) Records of judicial work product or drafts, including all notes, e-mail, memoranda or drafts prepared by a judge or a court-employed attorney, law clerk, legal assistant or secretary;

(22) Personnel records, application for employment and records of employment investigations and hearings, including, but not limited to, information regarding sex, race, marital status, birth date, home address, telephone number, applications, testing and scoring materials, grievances or complaints against an employee, correspondence, and performance evaluations; provided the following are not exempt from disclosure: a public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, status, workplace, employing agency, and any adverse official action taken against an employee as a result of a grievance or complaint (except a private letter of reprimand), and after such action is taken (except when the action is a private letter of reprimand), the record of any investigation and hearing leading to the action;

(23) Applications, testing and scoring to be included on a court maintained roster;

(24) Computer programs and related records, including but not limited to technical and user manuals, which the judicial branch has acquired and agreed to maintain on a confidential basis;

(25) Records maintained by the state law library that link a patron's name with materials requested or borrowed in the patron's name with a specific subject about which the patron has requested information or materials;

(26) Allegations of attorney misconduct received by the Idaho State Bar and records of the Idaho State Bar relating to attorney discipline, except where confidentiality is waived under the Idaho Bar Commission Rules;

(27) All records relating to applications for permission to take the Idaho bar examination or for admission to practice as exempted from disclosure in the Idaho Bar Commission Rules;

(28) All records and records of proceedings, except the identity of applicants for appointment to judicial office, of the Idaho Judicial Council or any District Magistrates Commission pertaining to the appointment,

performance, removal, disability, retirement or disciplining of judges or justices. Provided, however, that the record of a disciplinary proceeding filed by the Judicial Council in the Supreme Court loses its confidential character upon filing;

(29) Bulk distribution of electronic court data is not allowed. However, at its discretion, the Supreme Court may grant requests for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry.

**(h) Permissive Release of Judicial Decision in Exempted Categories.** Records of courts' determinations in proceedings exempt from disclosure under (g) of this rule may, by direction of the court issuing the determination, be subject to inspection, examination and copying in a manner that preserves the anonymity of the participants to the proceeding. In particular, the Supreme Court and the Court of Appeals may provide copies of their rulings in appeals from proceedings exempt from disclosure under paragraph (g) by using "John Doe/Jane Doe" designations or other anonymous designations in documents made available for inspection, examination and copying. Further deletions from the decisions may be made if necessary to preserve anonymity.

**(i) Other Prohibitions or Limitations on Disclosure and Motions Regarding the Sealing of Records.** Physical and electronic records may be disclosed, or temporarily or permanently sealed or redacted by order of the court on a case-by-case basis. Any person or the court on its own motion may move to disclose, redact, seal or unseal a part or all of the records in any judicial proceeding. The custodian judge shall hold a hearing on the motion after the moving party gives notice of the hearing to all parties to the judicial proceeding and any other interested person, guardian ad litem, court visitor, ward or protected person, personal representative, guardian, or conservator designated by the custodian judge. In ruling on whether specific records should be disclosed, redacted or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest in privacy or public disclosure predominates. If the court redacts or seals records to protect predominating privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests. Before a court may enter an order redacting or sealing records, it must also make one or more of the following determinations in writing:

(1) That the documents or materials contain highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person, or

(2) That the documents or materials contain facts or statements that the court finds might be libelous, or

(3) That the documents or materials contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to a person having an interest in the documents or materials, or



compromise the security of personnel, records or public property of or used by the judicial department, or

(4) That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals, or

(5) That it is necessary to temporarily seal or redact the documents or materials to preserve the right to a fair trial.

In applying these rules, the court is referred to the traditional legal concepts in the law of the right to a fair trial, invasion of privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding highly intimate or financially sensitive material about persons. When a record is sealed under this rule, it shall not be subject to examination, inspection or copying by the public. When the court issues an order sealing or redacting records, the court shall also inform the Clerk of the District Court of which specific files, documents and ISTARs records are to be sealed or redacted. Sealed files shall be marked "sealed" on the outside of the file. Sealed or redacted records shall be placed in a manila envelope. That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals, marked "sealed" with a general description of the records, their filing date and date they were sealed or redacted. When a file has been ordered sealed, or when records within a file have been ordered sealed or redacted, the electronic record shall reflect such action and shall be limited accordingly. When the court issues an order redacting records for purposes of public disclosure, the records in the court file or in the custody of the court shall not be altered in any fashion. The originals shall be placed in a manila envelope marked "sealed" with a general description of the records, and a redacted copy, so marked, shall be substituted for the originals in the court file. An order directing that records be redacted or sealed shall be subject to examination, inspection or copying by the public to the extent that such disclosure does not reveal the information that the court sought to protect in issuing the order. The decision on a motion to redact, seal or unseal records may be reconsidered, altered or amended by the court at any time. When the court issues an order disclosing otherwise exempt records, it shall place appropriate limitations on the dissemination of that information.

**(j) Request for Records.**

(1) Any person desiring to inspect, examine or copy physical records shall make an oral or written request to the custodian. If the request is oral, the custodian may require a written request. The custodian may request contact information as provided in I.C. § 9-338(4). A request for public records and delivery of the public records may be made by electronic mail. The request must clearly identify each record requested so that the custodian can locate the record without doing extensive research and continuing requests for documents not yet in existence will not be considered. The custodian may provide the requester information to help the requester narrow the scope of the request or to help the requester make the request more specific when the response to the request is likely to be voluminous.



(2) **Custodian Defined.** The custodian of judicial public records is designated as follows:

(A) For any record in a case file in the Supreme Court or Court of Appeals, the custodian is the Clerk of the Supreme Court or a deputy clerk designated in writing.

(B) For any record not in a case file in the Supreme Court or Court of Appeals, the custodian is the Administrative Director of the Courts or other person designated in writing by the Chief Justice.

(C) For any record in a case file in a district court or magistrate court, the custodian is the Clerk of the District Court or a deputy clerk designated in writing.

(D) For any record not in a case file in the district court or magistrate court, the custodian is the Trial Court Administrator of the judicial district, or judge or magistrate designated by the Administrative District Judge.

(E) For any record in the judicial council, the custodian is the Executive Director of the Judicial Council.

(F) For any record in the Idaho State Bar, the custodian is the Executive Director of the Idaho State Bar or other person designated in writing by the Idaho State Bar Commissioners.

(G) For the purposes of the ISTARS system, the ISTARS Datawarehouse, and compiled information, the custodian is the Administrative Director of the Courts or other person designated in writing by the Chief Justice.

(3) **Custodian Judge.** The custodian judge of a judicial public record is designated as follows:

(A) For any record in the Supreme Court, ISTARS or the ISTARS Datawarehouse the custodian judge is the Chief Justice, or the Vice-Chief Justice in the absence of the Chief Justice.

(B) For any record in the Court of Appeals, the custodian judge is the Chief Judge of the Court of Appeals, or a Judge of the Court of Appeals designated in writing.

(C) For any record in a case file in the district court or magistrate court, the custodian judge is the presiding magistrate or judge of that case, or judge or magistrate designated in writing by the Administrative District Judge.

(D) For any record not in a case file in the district court or magistrate court, the custodian judge is the Administrative District Judge of that judicial district, or other district judge or magistrate designated in writing by the Administrative District Judge.

(E) For any record in the judicial council, the custodian judge is the Chief Justice or the Vice-Chief Justice in the absence of the Chief Justice.

(F) For any record in the Idaho State Bar, the custodian judge is the Administrative District Judge of the Fourth Judicial District of the State of Idaho or a district judge designated in writing by the Administrative District Judge.

(4) **Response to Request.** The custodian shall respond to a request for examination of public records. Within three (3) working days from receipt of request, the custodian shall disclose the records requested, refer the request to the custodian judge for determination, or give written notice of denial of the request. Provided, if the custodian determines that it will take more than three (3) working days to determine whether the request should be granted, or that a longer period of time is needed to locate or retrieve the requested records, the custodian shall so notify the person making the request, and the response shall then be made by the custodian within ten (10) working days following the date of the request. If the documents requested are disclosed by the custodian, no other notice need be given by the custodian. The custodian is not under a duty to compile or summarize information contained in records, nor is the custodian obligated to create new records for the requesting party, except as provided herein. The custodian may deny a request for a copy of all or part of a transcript of an administrative or judicial proceeding or other voluminous publication or document when by rule or statute it may be obtained from the preparer of such record after payment of a fee. Efforts should be made to respond promptly to requests for records.

(5) **Response by Custodian Judge.** If a custodian determines that there is a question as to whether records should be disclosed pursuant to a request, or if a request is made for a ruling by a judge after the custodian denies the request, the custodian shall refer the request to the custodian judge for determination. The custodian judge shall make a written determination as to whether the records should be disclosed within ten (10) working days following the request. In the sole discretion of the custodian judge, an informal hearing may be held by the custodian judge on the question of whether the records should be disclosed. The custodian judge shall determine the time and place of the hearing and the notice to be given by the custodian to the person requesting the records and any other interested person. If a hearing is held under this rule, the response to the person requesting the record may be delayed a reasonable time after the conclusion of the hearing.

(6) **Cost of Copying Records.** The cost to make a paper copy of any record filed in a case with the clerk of the district court shall be as specified in I.C. § 31-3201. The cost for any other copying of any record shall be determined by order of the Supreme Court or the Administrative District Judge in accordance with the provisions of I.C. § 9-338(8). The costs so determined shall be paid, in advance, by the person requesting the records. Any delay in paying the costs of copying the records shall extend the time for response by the custodian. In the event that a person wishes to have a copy of a court record that can be easily copied to digital media by court personnel, the person making that request shall provide the appropriate media to the court for that purpose.

(7) **Proceedings after Denial.** If a custodian denies a request for the examination or copying of records, the aggrieved party may file a request

for a ruling by the custodian judge. If the custodian judge denies a request for the examination or copying of records, the sole remedy of any aggrieved person shall be to institute proceedings for disclosure in the district court in accordance with I.C. § 9-343. (Adopted April 26, 2007, effective July 1, 2007; amended December 30, 2008, effective February 1, 2009; amended March 18, 2011, effective July 1, 2011; amended March 29, 2012, effective July 1, 2012; amended April 27, 2012, effective July 1, 2012.)

## JUDICIAL DECISIONS

### ANALYSIS

Burden of Proof.  
Court Discretion.  
Expungement.  
Record Not Exempt from Disclosure.  
Substantive Due Process.

#### **Burden of Proof.**

The text of the rule does not place a burden on the state to demonstrate the public interest in disclosure after the defendant showed that he had sustained economic harm because his records were not sealed. *State v. Gurney*, 152 Idaho 502, 272 P.3d 474 (2012).

#### **Court Discretion.**

Subsection (i) gives a court discretion to consider the many types of economic or financial loss that may be reasonably asserted as a claimed justification for sealing court records, including financial harm asserted by those convicted of crimes. Because the public interest in access to criminal court records is obviously weighty, it would be an exceptional circumstance where a custodian judge would find that interest exceeded by a convicted person's assertion of economic harm flowing from a conviction. *Doe v. State*, — Idaho —, 290 P.3d 1277, 2012 Ida. App. LEXIS 60 (2012).

#### **Expungement.**

After a defendant files a motion with the trial court seeking to expunge his criminal records, which reflect his arrest, filing, and acquittal by jury of the charge, the court should conduct a hearing under this rule and make a factual determination as to whether the defendant's privacy interest or the public interest in disclosure predominates. If the court finds that the defendant's privacy interest predominates, then the court must make

written findings and may redact or seal the defendant's court records to the least restrictive extent necessary to protect his privacy interests. *State v. Turpen*, 147 Idaho 869, 216 P.3d 627 (2009).

#### **Record Not Exempt from Disclosure.**

Grant of summary judgment in favor of the publication and against the individual in his action for invasion of privacy after the publication printed a photographic representation of a document from a court file accusing the individual of homosexual activity was proper where there was nothing indicating that an order was ever entered prohibiting or limiting disclosure of the statement pursuant to I.C.A.R. 32(d) and the individual failed to point to any statute or case law that would have exempted the statement from disclosure. *Uranga v. Federated Publs., Inc.*, 138 Idaho 550, 67 P.3d 29 (2003).

District court did not err in denying defendant's motion to seal his criminal case on the ground of economic hardship, where the court properly determined that the public interest in disclosure predominated over defendant's privacy interests, even though defendant presented evidence of economic harm suffered as he sought employment and housing. *State v. Gurney*, 152 Idaho 502, 272 P.3d 474 (2012).

#### **Substantive Due Process.**

The rule does not violate substantive due process rights, because the State's interests are rationally related to the rule's confidentiality requirement in the Idaho Judicial Council's proceedings. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 28 P.3d 1006 (2001), cert. denied, 534 U.S. 1115, 122 S. Ct. 923, 151 L. Ed. 2d 887 (2002).

**Cited in:** *State v. Marsh*, — Idaho —, 283 P.3d 107 (Ct. App. 2011).

## **Rules 33 – 36.[Reserved.]**



**Rule 37. Minimum standards for preservation, destruction, or disposition of trial court records — Civil actions.**

(a) **General Standards for Retention.** This rule requires courts to preserve certain records indefinitely and authorizes the destruction of others. Whenever in this rule it is required that a record be preserved, it may be preserved either in the form of the original document, microfilm, or other archival media. Courts using any type of microfilming process must follow the Idaho Standards for Microfilming Court Records in order to ensure that the film is of archival quality. All equipment purchased and services contracted must meet these standards.

(b) **Preservation and Destruction of Court Records.** The following schedule sets out the minimum time period that must pass before records can be destroyed and the specific records that must be preserved when destroying a file. It is within each court’s discretion to exceed the minimum time period before destruction or to preserve additional records:

CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/MINIMUM RECORD TO PRESERVE
All civil & special cases (including domestic relations <b>not involving children</b> ) unless listed specifically below	1 year from expiration of the time for appeal or determination of an appeal, or the determination of a proceeding following appeal, whichever is later, unless otherwise specifically provided	ROA All court minutes Proof of Service Findings of Fact & Conclusions of Law Final Order, Judgment or Decree Property Settlement Renewal/Satisfaction of Judgment Notice of Intent to Destroy Exhibits
Probate	1 year from expiration of the time for appeal or determination of an appeal, or the determination of a proceeding following an appeal, whichever is later, unless otherwise specifically provided	ROA All court minutes Proof of Service Will Letters Testamentary Letter Intestate Inventory/Appraisal Finding of Fact & Conclusions of Law Final Order, Judgment or Decree Final Accounting Notice of Intent to Destroy Exhibits



CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/MINIMUM RECORD TO PRESERVE
Guardianship/ Conservatorship	1 year after guardianship or conservatorship has been terminated	ROA All court minutes Proof of Service Finding of Fact & Conclusions of Law Final Order, Judgment or Decree Final Accounting Notice of Intent to Destroy Exhibits
Child Protective Act (See Rule 38 for Youth Rehabilitation Act/Juvenile Corrections Act)	1 year from expiration of the time for an appeal, or determination of an appeal, or the determination of a proceeding following an appeal, whichever is later, unless otherwise specifically provided	ROA All court minutes Proof of Service Finding of Fact & Conclusions of Law Final Order, Judgment or Decree Any reports submitted Notice of Intent to Destroy Exhibits
Domestic Relations <b><u>involving children</u></b>	Until the time the youngest child reaches the age of majority	ROA All court minutes Proof of Service Finding of Fact & Conclusions of Law Child Support Orders Decrees/Modified Decrees Notice of Intent to Destroy Exhibits Support payment records Property Settlement Agreements

CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/MINIMUM RECORD TO PRESERVE
Adoptions/Termination of Parental Rights	<b>ALWAYS KEEP ENTIRE FILE</b>	ROA All court minutes Entire File
Recordings & Tapes Stenographic Records, and all related logs	Recordings, tapes and stenographic records with related logs and indexes 5 years from date of hearing; provided, that recordings of any case may be destroyed when that case is eligible for destruction, and stenographic records with related logs and indexes may be destroyed upon settlement of reporter's transcript on appeal	None
Exhibits, admitted or rejected	Following 10 days notice to the parties after expiration of time for appeal or from the determination of an appeal, or from the determination of a proceeding following an appeal, whichever is later, unless otherwise specifically provided	None

(c) **Notice to Historical Society.** The court shall give written notice to the Idaho State Historical Society of the intent to destroy or dispose of any record. No record shall be disposed of or destroyed for 90 days following notice unless the Idaho State Historical Society gives written notice to the court that it has no interest in obtaining or preserving the record.

(d) **Sealed Records.** Documents in sealed cases may be preserved either in the form of the original document or a microfilmed or other permanent copy thereof; provided, however, that when preserved by microfilm, the microfilm shall be designated as “sealed” or shall be maintained in a separate sealed area. Sealed documents are not sent to the Historical Society, thus no notice to the Historical Society is necessary before sealed documents are destroyed. (Adopted May 22, 2000, effective July 1, 2000.)

#### STATUTORY NOTES

**Compiler’s Notes.** A former Rule 37 (Adopted June 15, 1987, effective November 1, 1987) was rescinded by Supreme Court Order of April 27, 1995, effective July 1, 1995.

Another former Rule 37 (Adopted December 27, 1979 effective July 1, 1980) was re-

scinded by Supreme Court Order of June 15, 1987, effective November 1, 1987.

A former Rule 37 (Adopted April 27, 1995, effective July 1, 1995) was rescinded by Supreme Court Order of May 27, 2000, effective July 1, 2000.

#### JUDICIAL DECISIONS

**Cited in:** Blankenship v. Kootenai County, 125 Idaho 101, 867 P.2d 975 (1994).

### **Rule 38. Minimum standards for preservation, destruction or disposition of trial court records — Criminal actions and infractions.**

(a) **General Standards for Retention.** This rule requires courts to preserve certain records indefinitely and authorizes the destruction of others. Whenever in this rule it is required that a record be preserved, it may be preserved either in the form of the original document, microfilm, or other archival media. Courts using any type of microfilming process must follow the Idaho Standards for Microfilming Court Records in order to ensure that the film is of archival quality. All equipment purchased and services contracted must meet these standards.

(b) **Preservation of Court Record, Other Than Exhibits, While Defendant Incarcerated.** Notwithstanding any provision of this rule, no court record, excluding exhibits, pertaining to a criminal conviction or a juvenile corrections act adjudication, may be destroyed while a defendant or juvenile is incarcerated or being held in any state or county institution in connection with the conviction to which the records pertain, nor while a defendant or juvenile is participating in a court-ordered probation or rehabilitation program or is subject to conditions of parole in connection with the conviction to which records pertain.

(c) **Preservation of Exhibits in Certain Cases.** In any case in which a sentence of life imprisonment or death has been imposed, the exhibits shall not be destroyed while the defendant is incarcerated or being held in any state or county institution in connection with the conviction to which the records pertain, nor while a defendant is participating in a court-ordered probation or rehabilitation program or is subject to conditions of parole in connection with the conviction to which the records pertain. In all other

criminal cases, the exhibits may be destroyed following ten days notice to the parties after expiration of the time for appeal or from the determination of an appeal, or from the determination of a proceeding following an appeal, whichever is later.

(d) **Preservation and Destruction of Court Records.** The following schedule sets out the minimum time period that must pass before records can be destroyed and the specific records that must be preserved when destroying a file. It is within each court’s discretion to exceed the minimum time period before destruction or to preserve additional records:

CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/ MINIMUM RECORD TO PRESERVE
Criminal action, including DUI/DWP	1 year from expiration of time for appeal ....*	ROA All court minutes Complaint/Amended Complaint Indictment/Amended Indictment Information/Amended Information Notification of Defendant’s Rights Notification of Subsequent Penalties All Judgments Notification of intent to destroy exhibits Payment history if money is due
Traffic action, other than DUI/DWP	1 year from expiration of time for appeal .... *	If money is due keep all judgments & payment history otherwise destroy entire file



CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/ MINIMUM RECORD TO PRESERVE
Infractions	1 year from expiration of time for appeal .... *	None
Youth Rehabilitation Act/ Juvenile Corrections Act	1 year from expiration of time for appeal ....*	ROA All court minutes Petition/ Amended Petition Acknowledgement of Rights Any reports submitted Findings of Fact & Conclusions of Law Final Order, Judgment, Decree Notification of intent to destroy exhibits Payment history if money is due
Recordings & Tapes Stenographic Records, and all related logs and indexes	Recordings and tapes 5 years from date of hearing; provided, that recordings of any case may be destroyed when the case is eligible for destruction. Stenographic records, related logs and indexes upon settlement of the report's transcript on appeal	None

...\* or from the determination of an appeal, or from the determination of a proceeding following an appeal, whichever is later. Keep the entire record if the defendant/juvenile is incarcerated, on probation, on parole, or in a rehabilitation program in connection with the conviction in which the records pertain.

CASE TYPE/TYPE OF RECORD	MINIMUM TIME TO KEEP ENTIRE RECORD	WHEN DESTROYING/ MINIMUM RECORD TO PRESERVE
Exhibits, admitted or rejected	Following 10 days notice to the parties after expiration of time for appeal .... **	None

...\*\* or from the determination of an appeal, or from the determination of a proceeding following an appeal, whichever is later. However, if the sentence imposed was life imprisonment or death, then the exhibits must be kept while the defendant is incarcerated, on probation, on parole, or in a rehabilitation program in connection with the conviction to which the records pertain.

(e) **Notice to Historical Society.** The court shall give written notice to the Idaho State Historical Society of intent to destroy or dispose of any record. No record shall be disposed of or destroyed for 90 days following notice unless the Idaho State Historical Society gives written notice to the court that it has not interest in obtaining or preserving the record.

(f) **Sealed Records.** Documents in sealed cases may be preserved either in the form of the original document or a microfilmed or other permanent copy thereof; provided, however, that when preserved by microfilm, the microfilm shall be designated as “sealed” for shall be maintained in a separate sealed area. Sealed documents are not sent to the Historical Society, thus no notice to the Historical Society is necessary before sealed documents are destroyed. (Adopted April 27, 1995, effective July 1, 1995; amended March 20, 2000, effective July 1, 2000; amended May 22, 2000, effective July 1, 2000.)

STATUTORY NOTES

**Compiler’s Notes.** Former Rule 38 (Adopted December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987) was rescinded by

Supreme Court Order of April 27, 1995, effective July 1, 1995.  
Another former Rule 38 (Adopted April 27, 1995, effective July 1, 1995) was rescinded by Supreme Court Order of May 22, 2000, effective July 1, 2000.

**Rule 39. Destruction of recordings.**

Notwithstanding Rules 37 and 38 any tape or other recording of any criminal or civil proceeding may be erased or destroyed after the same has been transcribed and settled by the court, where any rule requires such settlement of the transcript. (Adopted March 28, 1986, effective July 1, 1986.)

**Rule 40. Appellate court records.**

(a) **Original Records Kept by Clerk of Supreme Court and Court of Appeals.** The Clerk of the Supreme Court and Court of Appeals shall keep records of civil and criminal appeals and other proceedings, each to be known as a "Register of Actions," of a suitable form and style, with indexes, and such other records and systems as prescribed by the Administrative Director of the Courts. The Register of Actions shall be printed and placed in the case file on the date the case is finally closed, and in the discretion of the Clerk of the Supreme Court and Court of Appeals, the Register of Actions maintained electronically may be erased 10 years following date of remittitur.

(b) **Preservation, Destruction or Disposition of Original Appellate Court Records, Civil Actions and Other Proceedings.** The entire case file in civil actions and other proceedings shall be preserved for 10 years following date of remittitur. All documents of every nature, kind and description pertaining to civil appeals or other proceedings, and all reporter's transcripts of district court proceedings and district court clerk's records may be destroyed 10 years from date of remittitur.

(c) **Preservation, Destruction or Disposition of Original Appellate Court Records, Criminal Actions.** The entire case file in criminal actions shall be preserved for 10 years following date of remittitur. All documents of every nature, kind and description pertaining to criminal appeals, and all reporter's transcripts of district court proceedings and district court clerk's records may be destroyed 10 years from date of remittitur; except that the entire case file for all murder convictions shall be retained permanently by the Clerk of the Supreme Court and Court of Appeals.

(d) **Notice to Idaho Historical Society.** Provided, however, no document or property which has been filed or placed with the court shall be disposed of or destroyed without first giving the Idaho State Historical Society 120 days' notice as to the date upon which such documents or property were to be disposed of or destroyed. During such notice period, the Idaho State Historical Society shall be permitted to examine, copy, or take such documents or property subject to such limitations as ordered by the court to protect property of others and preserve confidential or privileged information.

(e) **Copies of Appellate Records Provided to Research Facilities.** Following the date the case is finally closed, the Clerk of the Supreme Court and Court of Appeals shall provide copies of the records of civil and criminal appeals and other proceedings, to the Idaho State Law Library and the Law Library of the University of Idaho College of Law. Records forwarded by the Clerk of the Supreme Court and Court of Appeals to the research facilities shall be retained by the facilities as determined by the records retention policies of the facilities. (Adopted June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

**Prevailing Party.**

Even though a judgment had been certified as final pursuant to I.R.C.P. Rule 54(b), because the certified judgment did not dispose of all of the parties' claims, an appellate court

could not determine the prevailing party and could not award attorney fees. *Asbury Park, LLC v. Greenbriar Estate Homeowner's Ass'n*, 152 Idaho 338, 271 P.3d 1194 (2012).

PART V. OTHER COURT STANDARDS AND PROCEDURES.

**Rule 41. Court facilities.**

The administrative district judge of each judicial district shall have the authority and power to provide for adequate law libraries for the district courts and the magistrates division under the statutes of this state as part of the necessary facilities and equipment necessary for the courts to function and carry out their judicial responsibilities. It shall be the duty of the administrative district judge or acting administrative district judge to budget for a current set of the Idaho Code, the Idaho State Bar Desk Book and a law dictionary for each district judge and magistrate. In addition, it is recommended that the following legal resources, in current editions and with current supplementation, should be readily available to each judge and magistrate in the district as a minimum: the city and county codes of municipalities within the court's jurisdiction, the Idaho Reports, citators covering the reports and statutes of Idaho, a digest of Idaho cases, the Idaho jury instructions, a treatise of Idaho law on evidence, a treatise on criminal law and procedure, a subscription to the Idaho Law Review of the College of Law of the University of Idaho, and an advance sheet service for Idaho cases. The Supreme Court will recommend to the county commissioners and clerks the acquisition of hardware, software, facilities, and subscriptions to implement the use of computer assisted legal research (CALR) in county law libraries. If these recommendations are implemented in a county, the administrative district judge may modify the recommended legal research resources available to each judge and magistrate by deleting those resources that are readily and economically accessible through the CALR resources available in the county law library. (Adopted December 27, 1979, effective July 1, 1980; amended March 23, 1990, effective July 1, 1990.)

JUDICIAL DECISIONS

ANALYSIS

Contract Action.  
Prevailing Party.

**Contract Action.**

When a contract is clear and unambiguous, the reviewing court uses the plain meaning of the words, not the intent of the parties. Thus, where city, as third-party beneficiary, did not demonstrate that any terms of the sublease were ambiguous and, as such, had failed to establish that there was a genuine issue of

fact which would have made district court's summary judgment award improper, city's appeal was without foundation and respondent was entitled to an award of attorney fees on appeal. *Navarrete v. City of Caldwell*, 130 Idaho 849, 949 P.2d 597 (Ct. App. 1997).

**Prevailing Party.**

Even though a judgment had been certified as final pursuant to I.R.C.P. Rule 54(b), because the certified judgment did not dispose of all of the parties' claims, an appellate court



could not determine the prevailing party and      LLC v. Greenbriar Estate Homeowner's Ass'n,  
could not award attorney fees. Asbury Park,      152 Idaho 338, 271 P.3d 1194 (2012).

**Rule 42. Administrative judge — Selection, term and duties.**

(a) In each judicial district, an administrative judge shall be elected by a majority of the district judges within the district. If a majority of the district judges cannot agree as to who shall be the administrative judge, then an administrative judge shall be appointed by a majority of the justices of the Supreme Court.

(b) The administrative judge shall be elected or appointed for a term of three years, subject to reelection.

(c) In the event of a vacancy in the office of administrative judge, a replacement shall be elected by a majority of the district judges within the district to complete the unexpired term. If a majority of the district judges cannot agree as to who shall be elected to complete the unexpired term, then an administrative judge shall be appointed by a majority of the justices of the Supreme Court.

(d) The administrative judge may be removed by a majority vote of the district judges of the district.

(e) The powers and duties of the administrative judge include all those powers and duties as established by the Supreme Court. (Adopted August 4, 2005, effective August 15, 2005.)

**Rule 43. Trial court administrators.**

A district trial court administrator may be appointed by the Supreme Court in each judicial district, to carry out the Supreme Court's constitutional responsibility to administer and supervise the state court system and to carry out those administrative duties of the District Court that may be delegated to the trial court Administrator by the Administrative Judge. The authority to hire a district trial court administrator rests in the Supreme Court, and has been delegated to the Administrative Director of the Courts. District trial court administrators shall be selected jointly by both the Administrative Director of the Courts, acting on behalf of the Supreme Court, and the involved Administrative Judge. If there is disagreement concerning the process of selection, the selection itself, or concerning duties to be performed, the matter shall be resolved by the Chief Justice of the Supreme Court, provided that the Chief Justice shall consult jointly with the Administrative Director of the Courts and the involved Administrative Judge prior to making the final determination. A district trial court administrator performs work under the general direction and supervision of the Administrative Judge, and assists the Supreme Court, through the Administrative Director of the Courts, in the Court's constitutional duties to administer and supervise a unified and integrated judicial system and to carry out those administrative duties of the District Court that may be established by statute or inherent power of the court. (Adopted December 20, 1988, effective December 20, 1988.)

**Rule 43A. Administrative Conference.**

(a) The members of the Administrative Conference shall include the following members, or their designees:

- (1) the Justices of the Supreme Court;
- (2) the Chief Judge of the Court of Appeals;
- (3) the Administrative District Judges of each of the judicial districts;
- (4) the Trial Court Administrators of each of the judicial districts;
- (5) the President of the District Judges' Association;
- (6) the current President, the immediate past President, and the President-elect of the Magistrate Judges' Association;
- (7) the Administrative Director of the Courts; and
- (8) such other persons as the Supreme Court may designate as members of the Administrative Conference.

(b) The Administrative Conference shall meet four (4) times each year, or according to such other schedule as the Administrative Conference may adopt, and at such other times as the Chief Justice shall direct.

(c) It shall be the responsibility of the Administrative Conference collectively, and of each member of the Administrative Conference individually, to make decisions in such a manner as to promote the effective administration of justice throughout the state of Idaho, without preference to any area, region, or class of persons.

(d) Subject to the constitutional and statutory authority and responsibility of the Supreme Court to administer and supervise the judicial system and to adopt rules of practice and procedure for all courts, the Administrative Conference shall have the responsibility to make recommendations on the following subjects:

- (1) the formulation of policies for the judiciary;
- (2) the development and refinement of the Mission Statement of the Idaho Courts;
- (3) the development of standards for the trial courts and of plans for improving all court operations, with reliance upon evidence-based practices;
- (4) the development of proposals for the improved administration of the courts;
- (5) the development of policies for ensuring access to the courts and enhancing service to the public;
- (6) the development of the Supreme Court's budget proposals;
- (7) legislation that will improve the operation of the judicial branch and promote the effective administration of justice;
- (8) the promotion of recruitment and retention of judges and other judicial branch employees, including steps to improve compensation and the working environment;
- (9) the formulation of policies for training and continuing education of judges and other court personnel;
- (10) the improvement and expansion of the use of technology in the judicial branch in order to reduce costs, improve access to the courts, and promote the speedy resolution of cases;

(11) the development of policies to promote the timely disposition of cases and effective use of judicial resources, including the development of time standards for the resolution of various classes of cases;

(12) the development of uniform standards for the reporting of court caseloads and other statistical data to facilitate improved administration of the judicial system and more effective tracking of costs, benefits, and workloads;

(13) the development of policies to ensure the security of judges, court personnel, and court facilities, and the adoption of emergency plans that include a coordinated response with appropriate government entities.

(e) In addition, the Administrative Conference shall have the following responsibilities:

(1) to assist all justices, judges, and court leaders to achieve effective leadership;

(2) to share and discuss challenges and concerns in the operation of the courts and to attempt to achieve solutions through an open exchange of views, knowledge and experience;

(3) to facilitate effective communication and dialogue with the executive and legislative branches of state government and with counties, cities, and other entities;

(4) to promote the well-being and effectiveness of judges and other judicial branch employees. (Adopted March 8, 2012, effective April 1, 2012.)

#### **Rule 44. Nonjudicial Days.**

(a) **Nonjudicial Days Enumerated** — The nonjudicial days for the state of Idaho are as follows:

(1) Every Sunday;

(2) January 1 (New Year's Day);

(3) July 4 (Independence Day);

(4) November 11 (Veterans' Day);

(5) December 25 (Christmas Day);

(6) Third Monday in January (Martin Luther King, Jr. — Idaho Human Rights Day);

(7) Third Monday in February (Washington's Birthday);

(8) Last Monday in May (Decoration Day);

(9) First Monday in September (Labor Day);

(10) Second Monday in October (Columbus Day);

(11) Fourth Thursday in November (Thanksgiving Day);

(12) First Tuesday after the First Monday in November of every even numbered year (General Election Day);

(13) Everyday appointed by the President of the United States, or the Governor of the state of Idaho, for a public fast, thanksgiving or holiday. Provided, if a nonjudicial day falls on Saturday, it will be celebrated on the preceding Friday, or if it falls on Sunday, it will be celebrated on the succeeding Monday.

(b) **Judicial Action on Nonjudicial Days.** On nonjudicial days the Idaho Courts shall not conduct judicial business and do not have to attend their courts except they may:

- (1) Give upon request, instructions to a jury when deliberating on a verdict;
- (2) Receive a verdict or discharge a jury;
- (3) Issue injunctions and writs of prohibition;
- (4) Hear proceedings to recover personal property;
- (5) Issue a Warrant of Arrest or Search Warrant;
- (6) Arraign a defendant as required by law;
- (7) Set or modify bail of a defendant;
- (8) Issue an order in a domestic violence matter;
- (9) Issue any emergency order in any civil or criminal case in the discretion of the district or magistrate judge.

Provided, the office of the clerk of the district court shall be open to conduct business on a general election day. (Adopted October 16, 1997.)

**Rule 45. Cameras in the courtroom.**

(a) “Audio/visual coverage,” as used in this rule, means broadcast video, audio, and photographic coverage or recording of public proceedings before district and magistrate judges. “Broadcast” means the transmission of images or sounds by any electronic means, including but not limited to television, radio, Internet, email or streaming. Audio/visual coverage is authorized subject to the discretion of the presiding judge. The presiding judge maintains the right to limit audio/visual coverage of any public hearing when the interests of the administration of justice requires. Authorization may be revoked at any time, without prior notice, when in the discretion of the court it appears that audio/visual coverage is interfering in any way with the proper administration of justice.

(b) The presiding judge may, at his or her discretion, limit, restrict, or prohibit audio/visual coverage at any proceeding. Any decision regarding audio/visual coverage is not subject to appellate review.

(c) Audio/visual coverage of the following proceedings is prohibited:

(1) There shall be no broadcast, video or audio coverage or recording of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench. There shall be no audio/visual coverage of notes upon the counsel table, nor of any exhibits before they are admitted into evidence.

(2) There shall be no audio/visual coverage of in-camera sessions or judicial deliberations.

(3) There shall be no audio/visual coverage of proceedings when they are closed to the public including adoptions, mental health proceedings, child protective act proceedings, termination of parent child relations, grand jury proceedings, issuance of arrest and search warrant proceedings covered by Rule 32, Idaho Court Administrative Rules, or a compa-



able rule when the proceeding may be closed to effectuate the purposes of the rule.

(d) The presiding judge may exclude audio/visual coverage of a particular participant or direct that the identity or audio of a participant be concealed upon a determination that such coverage will have a substantial adverse effect upon a particular individual. It is expected the presiding judge will exercise particular sensitivity to victims of crime.

(e) The administrative district judge shall promulgate rules governing audio/visual coverage outside the courtroom in courthouses within the judicial district.

(f) It is the responsibility of each broadcast news representative present at the beginning of each session of court to achieve an understanding with all other broadcast representatives as to who will function at any given time, or in the alternative, how they will pool their coverage. This understanding shall be reached outside the courtroom and without imposition upon the presiding judge or court personnel. The presiding judge shall not be called upon to resolve any disputes except to determine that if the broadcast representatives cannot agree broadcast coverage will not take place.

(g) Approval of audio/visual coverage must be obtained in advance from the presiding judge.

(h) If audio/visual coverage is authorized, rules governing the media shall be established at each judge's discretion. An order permitting audio/visual coverage of court proceedings shall not include any restriction on the time when, the place where, or the manner in which the content of the audio/visual coverage may be aired or published. Audio/visual coverage may be authorized subject to the following guidelines:

(1) **Jury** — Photographing or videotaping of the jury or jurors is prohibited, including during jury selection.

(2) **Light** — Existing light only may be used for still photography or video coverage. Electronic flash or artificial lighting is prohibited.

(3) **Camera Noise** — Camera noise and distractions shall be kept to a minimum.

(4) **Still Photography** — Electronic flash is prohibited. Photographers must use quiet camera equipment to minimize distraction from the judicial proceedings.

(5) **Video Coverage** — No video or television camera shall give any indication of whether it is operating.

(6) **Audio** — Any audio equipment shall be placed as determined by the presiding judge. There shall be no broadcast of confidential communications. If there is coverage by both radio and television, the microphones used shall serve each system without duplication.

(7) **Location** — Media shall be in a position at least 15 minutes before court begins. Media positions shall not change while court is in session. The specific location or locations of media must be approved in advance by the presiding judge or designee.

(8) **Dress** — Media representation shall present a neat appearance and conduct themselves in keeping with the dignity of the court proceedings as determined by the presiding judge.

(9) **Pooling of Video and Broadcast Coverage** — Only one video and broadcast camera operator shall be permitted in the courtroom unless the presiding judge allows additional cameras. Any arrangements for pooling of video and broadcast coverage must be made by the media organizations.

(10) **Pooling of Still Photography** — Only one still photographer shall be permitted in the courtroom unless the presiding judge allows additional still photography. Any arrangements for pooling of still photography coverage must be made by the media organizations.

(11) **Sharing of Pool Photography, Video and Broadcast Coverage** — If the presiding judge determines that only a pool photographer or video and broadcast camera operator shall be permitted in the courtroom, the pool photographer and video and broadcast camera operator shall share their images and audio recordings with all news organizations, either print or broadcast, that request them in a timely fashion. All images and audio recordings captured in the courtroom, whether before, during or after the actual court proceedings, by the pool photographer or video and broadcast camera operator shall be shared as required by this rule.

(i) The presiding judge may require any media representative to demonstrate adequately in advance of a proceeding that the equipment to be used meets the standards of the rule.

(j) The public shall not be required to incur any expenses to accommodate cameras or other equipment covered by this rule. Any proposal by media representatives to modify existing facilities at media expense to accommodate use of equipment in the courtroom shall be submitted to the trial court administrator for the district. A final proposal shall be submitted to the administrative district judge for acceptance, modification or rejection. When planning courtroom construction or remodeling, consideration shall be given to accommodations that will provide broadcast and print media with reasonable access to court proceedings.

(k) The Media/Courts Committee shall evaluate audio/visual coverage on an ongoing basis, and at any time bring forth recommendations to amend this rule.

(l) The request for approval to video record, broadcast or photograph a court proceeding and order granting or denying such request should be in substantially the following form:

**Request for Approval/  
Judge's Proposed Order**

Directions: Fill out the form below, and present both the signed Request for Approval and proposed Order to the presiding judge's office.

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR  
THE COUNTY OF \_\_\_\_\_.

\_\_\_\_\_  
PLAINTIFF(S)

V.

\_\_\_\_\_  
DEFENDANT(S)

)  
) REQUEST TO OBTAIN  
) APPROVAL TO  
) VIDEO/AUDIO RECORD,  
) BROADCAST OR  
) PHOTOGRAPH A COURT  
) PROCEEDING  
)  
)

I hereby request approval to:

\_\_\_\_\_ video/audio record

\_\_\_\_\_ broadcast

\_\_\_\_\_ photograph

the following court proceeding:

Case No.: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Presiding Judge: \_\_\_\_\_

I have read Rule 45 of the Idaho Court Administrative Rules permitting cameras in the courtroom, and will comply in all respects with the provisions of that rule, and will also make certain that all other persons from my organization participating in video or audio recording or broadcasting or photographing of the court proceedings have read Rule 45 of the Idaho Court Administrative Rules and will comply in all respects with the provisions of that rule.

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
News Organization Represented

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Date

ORDER

THE COURT, having considered the above Request for Approval under Rule 45 of the Idaho Court Administrative Rules, hereby orders that permission to **video/audio record** the above hearing is:

[ ] GRANTED; under the following restrictions in addition to those set forth in Rule 45 of the Idaho Court Administrative Rules:

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[ ] DENIED.

THE COURT, having considered the above Request for Approval under Rule 45 of the Idaho Court Administrative Rules, hereby orders that permission to **broadcast** the above hearing is:

[ ] GRANTED; under the following restrictions in addition to those set forth in Rule 45 of the Idaho Court Administrative Rules:

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[ ] DENIED.

THE COURT, having considered the above Request for Approval under Rule 45 of the Idaho Court Administrative Rules, hereby orders that permission to **photograph** the above hearing is:

[ ] GRANTED; under the following restrictions in addition to those set forth in Rule 45 of the Idaho Court Administrative Rules:

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[ ] DENIED.

All images and audio recordings captured in the courtroom, whether before, during or after the actual court proceedings, by any pool photographer or video and broadcast camera operator shall be shared with other



media organizations as required by Rule 45 of the Idaho Court Administrative Rules.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

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Justice/Judge

(Adopted March 30, 1999; amended December 26, 2000, effective January 2, 2001; amended December 6, 2005, effective December 15, 2005; amended effective August 22, 2007; amended effective August 8, 2008; amended effective March 30, 2009; amended effective July 13, 2009; amended December 9, 2009, effective January 1, 2010.)

## **Rule 46. Cameras in the courtroom — Guidelines.**

### **STATUTORY NOTES**

**Compiler's Notes.** Rule 46a and Rule 46b, adopted December 29, 2000, effective January 9, 2001, contain guidelines for use of cameras in hearings before the Supreme Court and Court of Appeals in Boise (Rule 46a) and outside Boise (Rule 46b).

### **Rule 46a. Cameras in the Supreme Court courtroom.**

Media coverage of public hearings and appeals before the Supreme Court and Court of Appeals in the Supreme Court courtroom in Boise are subject to the following guidelines:

1. **Behavior.** Any media coverage must be designed so as to not interfere with the dignity of the proceedings, or to distract counsel or the Court.

2. **Dress.** Media representatives should present a neat appearance in keeping with the dignity of the proceedings.

3. **Recording.** Any recordings or broadcasts must originate from the audio system provided by the Court. No separate mikes will be allowed to be set up in the courtroom. The Court will provide a series of balanced line outlets for use with standard connections to connect to television cameras, radio broadcasting devices and recorders. In the event of demand greater than the outlets provided, media representatives will make pooling arrangements among themselves. No taping or recording of conversations between co-counsel or counsel and client is allowed.

4. **Authorization.** Authorization to access the press box overlooking the courtroom must be obtained from the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals in advance of the hearing and will be limited to working media representatives and others approved by the Court. The Clerk of the Courts shall provide a chart of Justices and Judge seating to be posted in the press box.

5. **Equipment.** The use of an electronic flash with any camera is prohibited. No additional lighting will be allowed without approval of the court and no camera should give audio or visual indication of whether it is or is not operating. Cameras may be set up and taken down in the press box

overlooking the courtroom only so long as such actions do not distract from the judicial proceedings.

**6. Official Record of Proceeding.** The recording machine operated by the Clerk is the only official record of the appeal hearing, and no party shall cite in any court or administrative agency proceeding any other recording of the Supreme Court or Court of Appeals hearings.

**7. Movement In Courtroom.** Media representatives are allowed to cover the proceedings from the courtroom floor as long as they remain in the area reserved for the general public and as long as they do not excessively move around the courtroom or assume body positions inappropriate to a courtroom proceeding or otherwise distract from the appellate proceedings.

**8. Liaison.** The Administrative Director of the Courts and or the Clerk of the Supreme Court shall maintain communication and liaison with media representatives so as to ensure smooth working relationships and to provide any suggestions to improve these guidelines.

**9. Live Coverage of Court Proceedings.** Live coverage of any hearing or appeal may be restricted in the interests of the administration of justice.

**10. Not Applicable to Coverage or Broadcasting Outside of Supreme Court Courtroom.** This rule shall not apply to media coverage of judicial events or public activities outside the courtroom of the Supreme Court, including, but not limited to, the front steps or other public areas of the Supreme Court Building. (Adopted January 29, 2007, effective February 5, 2007; amended August 8, 2008, effective August 8, 2008.)

#### STATUTORY NOTES

**Compiler's Notes.** A former Rule 46a (adopted December 29, 2000, effective January 9, 2001; amended December 6, 2005, effective December 15, 2005) was repealed by Supreme

Court Order of January 29, 2007, effective February 5, 2007, which adopted the present rule.

#### **Rule 46b. Cameras in courtroom during terms of court outside of Boise.**

Media coverage of proceedings in the Supreme Court and the Court of Appeals outside of the Supreme Court courtroom in Boise are subject to the following guidelines:

**1. Authorization.** Approval to broadcast or photograph a Supreme Court or Court of Appeals proceeding must be obtained in advance from the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals and will be limited to working media representatives and others approved by the Court.

**2. Behavior.** Media representatives are allowed to cover the proceedings as long as they remain in the area reserved for the general public, do not excessively move around the courtroom, or assume body positions inappropriate to a courtroom proceeding or otherwise distract from the appellate proceedings.

**3. Dress.** Media representatives should present a neat appearance in keeping with the dignity of the proceedings.

4. **Equipment.** The use of an electronic flash with any camera is prohibited. No additional lighting will be allowed without approval of the court and no camera should give audio or visual indication of whether it is or is not operating. Cameras must be set up and taken down at a time that will not distract from the judicial proceedings.

5. **Official Record of Proceeding.** The recording machine operated by the Clerk is the only official record of the appeal hearing, and no party shall cite in any court or administrative agency proceeding any other recording of the Supreme Court or Court of Appeals hearings. No taping or recording of conversations between co-counsel or counsel and client is allowed.

6. **Liaison.** The Clerk of the Supreme Court or Court of Appeals shall maintain communication and liaison with media representatives so as to ensure smooth working relationships and to provide any suggestions to improve these guidelines.

7. **Not Applicable to Coverage or Broadcasting Outside of Supreme Court Courtroom.** This rule shall not apply to media coverage of judicial events or public activities outside the courtroom used by the Supreme Court or Court of Appeals when hearing appeals outside of Boise. This shall include, but is not limited to, the front steps or other public areas of the courthouse or building where the Supreme Court or Court of Appeals are hearing appeals. (Adopted January 29, 2007, effective February 5, 2007; amended August 8, 2008, effective August 8, 2008.)

#### STATUTORY NOTES

**Compiler's Notes.** A former Rule 46b (adopted December 29, 2000, effective January 9, 2001; amended December 6, 2005, effective December 15, 2005) was repealed by Supreme

Court Order of January 29, 2007, effective February 5, 2007, which adopted the present rule.

#### **Rule 47. Criminal history checks.**

This rule applies to persons applying to be included in the roster of Parenting Coordinators pursuant to Rule 16(l), I.R.C.P., to persons seeking appointment as supervised access providers pursuant to Rule 16(o) I.R.C.P., to family court services coordinators, to domestic violence court coordinators, to persons seeking to be placed on the roster of evaluators of domestic assault or battery pursuant to Rule 33.3 I.C.R., to guardian ad litem program directors and to staff members and volunteers of guardian ad litem programs. The criminal history check will consist of a self-declaration, fingerprints of the individual, information obtained from the Federal Bureau of Investigation, the National Criminal History Background Check System, Bureau of Criminal Identification, and the Sexual Offender Registry, and as required by statute or rule the statewide child abuse registry and adult protection registry. A record of all criminal history background checks shall be maintained in the office of the Supreme Court with a copy going to the applicant in accord with subsection (f) of this rule. A criminal history background check conducted pursuant to this rule and maintained in the office of the Supreme Court, may be used for any position identified under



this rule including parenting coordinators, supervised access providers, family court services coordinators, guardian ad litem program directors and staff and volunteers of guardian ad litem programs so long as the fingerprints of the applicant have been submitted and the criminal history check has been conducted within the preceding twelve months.

(a) **Self-declaration.** Individuals who are subject to a criminal history check shall complete a self-declaration form signed under penalty of perjury that contains the name, address and date of birth which appears on a valid identification document issued by a governmental entity. The self-declaration is the individual's request for the criminal history check to be done and authorizes the Supreme Court to obtain information and release it as required without liability. The applicant shall disclose any conviction or pending indictment for crimes and to furnish a description of the crime and the particulars and any other information as required. The Supreme Court, through its administrative offices, shall complete the criminal history check and inform the individual of the results.

(b) **Updating criminal history checks.** Every individual subject to this rule shall complete an updated criminal history check at least every five (5) years. An updated criminal history check shall include a self-declaration form, state and local checks, and child and adult protection checks. The Supreme Court or any appointing court may, at its discretion, require a criminal history check or updated criminal history check of any individual subject to this rule at any other time. Five (5) years will be calculated from the date of the individual's most recent Criminal History Check letter of approval.

(c) **Designated crimes resulting in an unconditional denial.**

1. **Unconditional Denial.** Individuals subject to this rule shall not be eligible to serve if they have pled guilty or been found guilty of one (1) or more of the designated crimes listed below, or their equivalent, under the laws of any other jurisdiction, regardless the form of the judgment or withheld judgment.

2. **Designated Crimes.** No exemption shall be granted for any of the following designated crimes:

- a. Armed robbery, as defined by Section 18-6501, Idaho Code;
- b. Arson, as defined by Sections 18-801 through 18-805, Idaho Code;
- c. Crimes against nature, as defined by Section 18-6605, Idaho Code;
- d. Forcible sexual penetration by use of a foreign object, as defined by Section 18-6608, Idaho Code;
- e. Incest, as defined by Section 18-6602, Idaho Code;
- f. Injury to a child, felony or misdemeanor, as defined by Section 18-1501, Idaho Code;
- g. Kidnapping, as defined by Sections 18-4501 through 18-4503, Idaho Code;
- h. Lewd conduct with a minor, as defined by Section 18-1508, Idaho Code;
- i. Mayhem, as defined by Section 18-5001, Idaho Code;



j. Murder in any degree, voluntary manslaughter, assault or battery with intent to commit a serious felony, as defined by Sections 18-4001, 18-4003, 18-4006, 18-4015, 18-909 and 18-911, Idaho Code;

k. Poisoning, as defined by Sections 18-4014 and 18-5501, Idaho Code;

l. A felony involving a controlled substance, where the judgment or withheld judgment was entered within seven (7) years preceding the denial;

m. Possession of sexually exploitative material, as defined by Section 18-1507A, Idaho Code;

n. Rape or male rape, as defined by Sections 18-6101 and 18-6018, Idaho Code;

o. Felony stalking, as defined by Section 18-7905, Idaho Code;

p. Sale or barter of a child, as defined by Section 18-1511, Idaho Code;

q. Sexual abuse or exploitation of a child, as defined by Sections 18-1506 and 18-1507, Idaho Code;

r. Any felony punishable by death or life imprisonment;

s. Any felony involving any type or degree of embezzlement, fraud, theft or burglary, where the judgment or withheld judgment was entered within seven (7) years preceding the denial.

t. Abuse, neglect, exploitation or abandoning of a vulnerable adult, as defined by Sections 18-1505 and 18-1505A, Idaho Code; or

u. Attempt, solicitation or conspiracy to commit any of the designated crimes.

(d) **Conditional denials.** Except with respect to any crime which results in an unconditional denial under subsection (c) of this rule, the Administrative Director of the Courts may conditionally deny an individual's application, if the criminal history check reveals a plea, finding or adjudication of guilt to any felony or misdemeanor, (excluding traffic violations which do not result in a suspension of the individual's driver's license), the individual has been found to have committed abuse or neglect in a child protection or adult protection case, or the individual appears on either the child abuse registry or the adult protection registry. The Administrative Director may also conditionally deny an application if the results of the criminal history check reveal that the individual has falsified or omitted information on the self-declaration form. A conditional denial becomes a final unconditional denial within twenty-one (21) days from the date of the conditional denial notice unless, prior to the expiration of this period, the individual requests an exemption review which shall be conducted as provided in subsection (e) of this rule. The twenty-one (21) day period for filing a request for an exemption review may be extended by the Administrative Director for good cause.

(e) **Exemption reviews.** If an exemption review is requested in accordance with subsection (d) of this rule, the Administrative Director of the Courts shall initiate an exemption review in regard to any cause, action or crime for which a conditional denial was issued under subsection (d) of this

rule. As determined by the Administrative Director, the review may consist of a review of the documents and supplemental information provided by the individual, a telephonic interview with the individual, an in-person review hearing or any other review of the individual's criminal history. The Administrative Director may appoint a subcommittee from the Idaho Supreme Court's Children and Families In the Courts Committee and/or the Child Protection Act Committee to conduct any exemption review provided for under subsection (e) of this rule. Exemption reviews shall be governed by and conducted as follows.

**1. Scheduling An Exemption Review.** Upon receipt of the request for an exemption review, the Administrative Director shall determine the type of review to be conducted. If an in-person review hearing is not scheduled, one of the other types of review enumerated above shall be conducted within fifteen (15) business days from the receipt of the request. If an in-person review hearing is scheduled, the hearing shall be held within fifteen (15) business days from the receipt of the request and the applicant shall be provided with at least seven (7) days notice of the hearing date.

**2. Factors To Be Considered.** During the review, the following factors shall be considered:

- a. The severity or nature of the crime or other findings;
- b. The period of time since the incident(s) under current review;
- c. The number and pattern of incident(s);
- d. Circumstances surrounding the incident(s) that would help determine the risk of repetition;
- e. Activities since the incident(s) such as continuous employment, education, participation in treatment, payment of restitution, or any other factors which may be evidence of rehabilitation;
- f. Granting of a pardon by the Governor or the President; and
- g. The falsification or omission of information on the self-declaration form and other supplemental forms submitted.
- h. The relationship between the crime or finding and the position sought.
- i. Any other factor deemed relevant by the exemption review subcommittee.

**3. Decision After Review.** A notice of decision shall be issued within fifteen (15) business days of the date of review.

**(f) Criminal history records.** Criminal history checks done pursuant to this rule become the property of the Supreme Court and shall be held confidential subject to the provisions of Rule 32, I.C.A.R.

**1. Release Of Criminal History Checks.** A copy of the criminal history check shall be released:

- a. To the individual named in the criminal history upon receipt of a written request to the Supreme Court, provided the individual also releases the state from all liability; or
- b. In response to a subpoena issued by a court of competent jurisdiction.

**2. Release Of Information Obtained Through A Criminal History Check.** Information may be released, upon written request or upon signed release by the individual who is the subject of the criminal history check, to:

- a. any judge considering appointment of the subject individual; and
- b. as otherwise required by law.

**3. Retention Of Records.** The criminal history record, supplemental documentation received, notes from the review, and the decision shall be retained by the Supreme Court for a period of not less than six (6) years after the criminal background check is completed.

**4. Use And Dissemination Restrictions For FBI Criminal Identification Records.** According to the provisions set for in 28 CFR 50.12, the Supreme Court shall:

- a. Notify the applicant or individual fingerprinted that the fingerprints will be used to check the criminal history records of the FBI;
- b. In determining the suitability for licensing or employment, provide the applicant or individual the opportunity to complete or challenge the accuracy of the information contained in the FBI identification record;
- c. Afford the applicant or individual fifteen (15) days to correct or complete the FBI identification record or to decline to do so; and
- d. Advise the applicant or individual who wishes to correct the FBI identification record that procedures for changing, correcting, or updating are set forth in 28 CFR 16.34.

(g) **Confidentiality.** Before any information obtained in a criminal history check may be released to the person who is the subject of the record, to another governmental agency, or to a private individual or organization, the Supreme Court will comply with federal Public Law 103-209 and 92-544. (Adopted July 1, 2002, effective July 1, 2002; amended September 13, 2004, effective October 1, 2004; amended March 24, 2005, effective July 1, 2005; amended April 26, 2007, effective July 1, 2007; amended effective March 10, 2008; amended effective March 24, 2009; amended effective September 4, 2009; amended April 27, 2011, effective July 1, 2011.)

**Rule 48. Emergency closure of court operations — Record of closure — Disaster emergency plan.**

(a) When an emergency or threatened emergency causes or threatens the destruction or partial destruction of court facilities, including the offices of the district court clerk, or interrupts the performance of court operations or poses a threat to the safety of court personnel, including personnel of the district court clerk's office, the administrative judge, or his or her designee if the administrative judge is unavailable, may order the closure of the district court and related offices, including the district clerk's office, until the safe operations of the court and its offices can be restored. Whenever a threat poses an immediate risk of harm to court personnel or members of the public, court operations shall be suspended and court facilities and person-



nel shall immediately be evacuated pending further directive of the administrative judge or designee. The administrative judge or designee shall promptly notify the Supreme Court of any emergency closure. When the conditions creating the emergency have passed, the administrative judge or designee shall provide for the immediate resumption of court business by the most expeditious and practical means possible, which may include alternate operational hours or moving court operations to alternate facilities, if necessary.

(b) The district court clerk shall maintain a record of the date and time of any emergency closure of the clerk's office and the date and time of its reopening. This record and a copy of the order closing court offices and operations shall be forwarded to the Supreme Court.

(c) The administrative judge shall designate a person in each county to prepare and maintain a current written disaster emergency plan relating to district court operations which shall include a coordinated response with the board of county commissioners and other local officials for the prompt restoration of judicial services after an emergency closure of court operations. The written disaster emergency plan relating to district court operations shall be approved by the administrative judge prior to its final adoption. (Adopted June 17, 2002, effective July 1, 2002.)

#### **Rule 49. Electronic devices in court facilities.**

(a) "Electronic devices," as used in this rule, means cell phones, personal computers, personal digital assistants, and other similar devices capable of transmitting, receiving, recording or storing messages, images, sounds, data or other information by electronic means.

(b) Unless the administrative district judge or the presiding judge in a case issues an order prohibiting or restricting the carrying or use of electronic devices:

(1) Electronic devices may be carried in court facilities or courtrooms.

(2) Electronic devices may be used for the purpose of note taking in courtrooms or court facilities, and such notes may be transmitted from the courtroom or court facility.

(c) Electronic devices may not be used for the recording or transmission of sounds or images in or from courtrooms except as permitted under Rule 45, Rule 46a, or Rule 46b of the Idaho Court Administrative Rules. The transmission of sounds or images in or from court facilities outside of the courtroom shall be permitted only when consistent with the provisions of Rule 45 of the Idaho Court Administrative Rules and with any orders issued by the administrative district judge pursuant to Rule 45(e) of the Idaho Court Administrative Rules. If an electronic device is capable of recording or transmitting sounds or images, these functions shall not be activated while the electronic device is in the courtroom unless approval for the recording or transmission of sounds or images has been obtained pursuant to Rule 45, Rule 46a, or Rule 46b of the Idaho Court Administrative Rules.

(d) Electronic devices shall not be used in a manner that interferes with court proceedings or the work of court personnel. Any electronic device



capable of emitting sounds that would be audible in the courtroom must be set to a silent or vibrate mode. Cell phone calls shall neither be made from nor answered in the courtroom.

(e) The Administrative District Judge or the presiding judge in any case may restrict the carrying or use of electronic devices in the courtroom by court personnel.

(f) Attorneys in a matter before the court and their employees and agents may make reasonable and lawful use of electronic devices in connection with the proceeding unless such use is restricted or prohibited by the Administrative District Judge or presiding judge.

(g) Jurors shall not possess or carry electronic devices during deliberations. The use of electronic devices by jurors or prospective jurors during their jury service shall be subject to other restrictions as provided by court rules, orders, or instructions.

(h) The provisions of this rule, and of any order prohibiting or restricting the use of electronic devices, shall apply to all members of the public including members of the news media, and shall be communicated to members of the news media and to members of the public entering court facilities by signs or other appropriate means.

(i) Any person who violates the provisions of this rule or any order of the Administrative District Judge or order of the court regarding the possession or use of electronic devices may be found in contempt of court. Court personnel may confiscate and retain an electronic device that is used in violation of this rule or of such order, subject to further order of the court or until the owner of the electronic device leaves the building. (Adopted November 29, 2012, effective January 1, 2013; amended December 18, 2012, effective January 1, 2013.)

#### STATUTORY NOTES

**Compiler's Note.** The December 18, 2012 amendment, referred to in the historical note, corrected the original court order adopting this rule, but did not affect the text of the rule.

#### **Rule 50. [Reserved].**

#### **Rule 51. Effective date.**

These rules, shall take effect on the first day of July 1980. (Adopted December 27, 1979, effective July 1, 1980.)

#### **Rule 52. Policy declaration relating to court interpreters.**

(a) **Statement of policy.** It is the policy of the Supreme Court and the intent of these rules to secure the rights, constitutional and otherwise, of persons who, because of a non-English-speaking cultural background or physical impairment, are unable to understand or communicate adequately in the English language when they appear in the courts, are involved in court proceedings, or are otherwise seeking access to the courts..

(b) **Definitions.** For the purpose of these rules, the following words have the following meanings:

(1) “Appointing authority” means a district or magistrate judge, including pro tem and retired judges within the scope of their appointments, or the judge’s designee.

(2) “Certified – Master Level interpreter” means an individual who has passed the certification exam with an 80 percent or higher on each portion of the exam: simultaneous, consecutive, sight-English, and sight-foreign. The score for the sight translation portion of the exam will not be combined.

(3) “Certified interpreter” means an individual who has passed the certification exam with a 70 percent or higher in the simultaneous and consecutive portions, and an average of 70 percent across both sight-English and sight-foreign. Must achieve a minimum score of 65 percent in both sight translations.

(4) “Conditionally approved interpreter” means an individual who has received an overall score of 55 percent or higher on the certification exam without reaching the certified or master level, with no single score falling below a 50 percent, including on the separate sight translation scores. An individual may fall under this level of qualification for a period of only two years.

(5) “Court proceeding” means any civil, criminal, domestic relations, juvenile, traffic, or other in-court proceeding in which a non-English-speaking person is a principal party in interest or a witness.

(6) “Non-English-speaking person” means any principal party in interest or witness whose communication or understanding in the English language does not permit effective participation in a court proceeding.

(7) “Principal party in interest” means a person involved in a court proceeding who is a named party or who will be bound by the decision or action or who is foreclosed from pursuing his or her rights by the decision or action which may be taken in the proceeding.

(8) “Registered interpreter” means no certification exam exists for the language, yet the individual has passed the written exam with an 80 percent and has completed the orientation workshop, and has passed an oral English exam and other language proficiency assessment.

(9) “Witness” means anyone who testifies in any court proceeding.

(c) **Implementing responsibilities.** The Supreme Court shall administer the State Court Interpreter Program. The Administrative Director of the Courts shall establish programs and develop resources for the improvement of court interpreting services, including training and certification of interpreters, establishing and maintaining a program policy manual, maintaining and distributing a directory of interpreters, and collecting and analyzing statistics or other data pertinent to interpreter utilization. An inventory of standard forms and training materials will also be maintained.

(d) **Priority of appointment for interpreters.**

(1) Subject to subsections (d)(2) and (d)(3) of this rule, an interpreter shall be appointed when the appointing authority or his/her designee

determines that a principal party in interest or witness does not communicate in or understand the English language sufficiently to permit effective participation in a court proceeding.

(2) In any court proceeding in which an interpreter is required, the appointing authority shall appoint an interpreter according to the following priority:

- (A) a certified – master level or certified interpreter,
- (B) a conditionally approved interpreter,
- (C) a registered interpreter.

The appointing authority may appoint an interpreter of lower priority on the foregoing list only when good cause exists. Good cause includes, but is not limited to, a determination made prior to the proceeding by the appointing authority that:

- (i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of an interpreter of higher priority are not reasonably available to the appointing authority; or
- (ii) The current list of certified interpreters maintained by the Idaho Supreme Court does not include an interpreter certified in the language spoken by the non-English speaking person.

The court is not required to articulate such a determination in a court proceeding, unless the appointment of an interpreter is challenged by a party. If a party challenges the appointment of an interpreter, the court shall make a determination on the record as to whether the appointment of the interpreter conforms with the provisions of this rule.

(3) In extraordinary circumstances, upon a finding by the court that no certified master level interpreter, certified interpreter, conditionally approved interpreter or registered interpreter is available, and that it is necessary to conduct the proceedings before such an interpreter is likely to become available, the appointing authority may appoint a person as interpreter if the appointing authority finds that such person is able to interpret from English to the language of the non-English speaking person and from the language of that person into English.

(e) **Interpreter oath.** All court interpreters, before commencing their duties, shall take the following oath:

“Do you solemnly swear or affirm that you will interpret and/or translate accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the Idaho Code of Professional Responsibility for Interpreters in the Judiciary?”

A district judge or magistrate judge may administer the oath to an interpreter in writing, and the written oath shall be filed with the clerk of the district court for the county. Once the oath has been filed, it shall remain in effect until such time as the interpreter is removed under subsection (f) of this rule, and while the written oath remains in effect it need not be administered to the interpreter at any subsequent court proceeding in the county.



(f) **Removal of an interpreter in an individual case.** Any of the following actions shall be good cause for a judge to remove an interpreter: (1) being unable to interpret adequately; (2) knowingly and willfully making false interpretation while serving in an official capacity; (3) knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity; (4) failing to appear as scheduled; (5) misrepresentation of credentials or other material misstatement of fact relative to appointment as an interpreter; (6) removal from the Idaho Supreme Court’s list of interpreters; and (7) a plea of guilty or finding of guilt, regardless of the form of judgment or withheld judgment, of a crime substantially related to the qualifications, functions, or duties of an interpreter, or that involves dishonesty, fraud, or moral turpitude; (8) failing to follow other standards prescribed by law and the Idaho Code of Professional Responsibility for Interpreters in the Judiciary.

(g) **Cost of interpreter services.** In all court proceedings in which an interpreter is appointed, the court shall determine a reasonable fee for the interpreter’s services, which shall be paid out of the district court fund or paid by the county as prescribed by law. (Adopted September 25, 1998, effective November 1, 1998; amended December 13, 2004, effective December 15, 2004; amended August 4, 2005, effective August 15, 2005; amended September 30, 2008, effective August 28, 2008.)

ANALYSIS

Request for Interpreter.  
Shared Interpreter.

**Request for Interpreter.**

Dutch business owner did not request an interpreter for his depositions and the district court did not have occasion to determine whether the owner was in need of one before he was deposed; therefore, contrary to the owner’s assertion, the district court did not err in failing to sua sponte appoint him an interpreter for his depositions. *Vreeken v.*

*Lockwood Eng’g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).

**Shared Interpreter.**

Defendants’ rights were not violated when they were required to share a single interpreter during the final day of their trial, as at least one interpreter provided service for both defendants at all times throughout the trial, complying with § 9-205, Idaho Crim. R. 28, this rule, and the United States Constitution. *State v. Herrera*, 149 Idaho 216, 233 P.3d 147 (2009).

**Rule 53. Court assistance services.**

(a) **Statement of Policy.** It is the policy of the Supreme Court to ensure access to the courts by all persons, including those who may not have the benefit of legal representation. The purpose of this rule is to provide a means for assisting persons who do not have legal representation, by authorizing Court Assistance Officers to provide those litigants with educational materials, court approved forms, limited assistance in completing court forms, and information about court procedures so they might better understand the legal requirements of the court system, and to provide referrals to legal, community and social services organizations and resources providing similar assistance.

(b) **Definitions.** For the purposes of this rule, the following words have the following meanings:



(1) "Court Assistance Officer" is a person qualified under guidelines adopted by the Supreme Court to provide a full range of court assistance services.

(2) "Deputy Clerk" is an employee of the District Court Clerk who is assigned the responsibility of providing a limited range of court assistance services under guidelines adopted by the Supreme Court, as part of his or her overall clerical duties.

(3) "Project Director" is a person appointed by the Administrative Director of the Courts to oversee and coordinate the statewide operation of court assistance services.

(c) **Court Assistance Services.** Full or limited court assistance services shall be provided in every county.

(1) Where feasible, those services should be provided through a court assistance office staffed with a full or part time Court Assistance Officer, who has the training to provide a full range of court assistance services and referrals under guidelines established by the Supreme Court.

(2) Where the appointment of a Court Assistance Officer is not feasible, the District Court Clerk shall appoint a Deputy Clerk to provide limited court assistance services as defined by the Supreme Court's guidelines. The Project Director shall be notified of the assignment, and provide input on the selection if requested.

(d) **Assignment of Court Assistance Officers.** A Court Assistance Officer may be an employee of the District Court Clerk, or another county employee who is under the direction of the Administrative District Judge or Trial Court Administrator, or an independent contractor retained by the Supreme Court who is under the direction of the Administrative District Judge or Trial Court Administrator. The Administrative District Judge or Trial Court Administrator, the Project Director, and the District Court Clerk shall provide advice and consent in the selection and assignment of Court Assistance Officers under guidelines for minimum qualifications established by the Supreme Court for that position.

(e) **Management of Daily Operations.** The Administrative Judge or Trial Court Administrator shall be responsible for managing and supervising the day-to-day activities of Court Assistance Officers who have been retained by the Court or are county employees other than deputy clerks. The District Court Clerk shall be responsible for managing and supervising the day-to-day activities of Court Assistance Officers who are employees of the District Court Clerk, and Deputy Clerks who provide limited court assistance services. The Administrative District Judge or Trial Court Administrator, and the Program Director, may, from time to time, provide input on the performance of employees of the District Court Clerk providing court assistance services, which shall be considered by the District Court Clerk, in good faith.

(f) **Policy and Rules of Conduct.** The Supreme Court shall establish guidelines for court assistance services which specifically define the types of referrals, instructions, forms, educational materials, and information about

the court and court processes, which may be provided by a Court Assistance Officer or Deputy Clerk, as well as requirements for education and training of court assistance personnel.

(g) **Unauthorized Practice of Law.** It is the policy of the Supreme Court to encourage the use of attorneys whenever possible. The materials and assistance provided through court assistance services are not intended as a substitute for legal advice. Services, materials or information provided by Court Assistance Officers or Deputy Clerks providing court assistance services under the guidelines established by the Supreme Court shall not constitute the unauthorized practice of law.

(h) **Schedule of Fees.** Charges for forms, materials and other services provided under this rule shall not exceed the amounts defined in the following Cost Recovery Fee Schedule, adopted by the Supreme Court pursuant to the authority of section 32-1406, Idaho Code. Fees collected for court assistance services shall be distributed as required by section 32-1406, Idaho Code.

#### **COST RECOVERY FEE SCHEDULE FOR COURT ASSISTANCE SERVICES**

The fees set forth are the maximum amounts which may be charged. There is no charge for forms downloaded from court websites.

Forms which are available as a packet include all forms necessary for completing the stated action if the matter is uncontested, and includes form review to ensure the forms are completed properly. The costs for form packets are set forth below. The maximum fee for forms not purchased as part of a packet is \$.25 per page. The maximum fee for form review when forms are not purchased as a packet is \$5.00. A waiver of fees shall be issued if it is shown to the Court Assistance Officer's satisfaction that the applicant's household income is less than 125% of the Federal Poverty Guidelines. Additional cost recovery charges may be assessed if forms are combined with other family court services and/or workshops.

Divorce - Available Divorce Packets:	On Paper and/or on Disk - \$30
Default Divorce -- with children	
Default Divorce -- without children	
Agreed Divorce -- with children	
(Joint Petition)	
Agreed Divorce -- without children	
(Joint Petition)	
Responding to a Divorce Complaint -- with children	
Responding to a Divorce Complaint -- without children	
Custody, Paternity and Support - Available Custody Packets:	On Paper and/or on Disk - \$20

Filing for Custody, Visitation and  
Support  
Agreed (joint) Petitions for Custody,  
Visitation and Support  
Responding to a (Divorce) Complaint  
-- with children

Modifications - Available Modification Packets: On Paper and/or on  
Disk - \$15

Filing a Motion to Modify an Order or  
Decree  
Agreed (Joint) Modification  
Responding to a (Divorce) Complaint  
-- with children

Name Change Petitions - Available Name Change Packets On Paper and/or on  
Disk - \$15

Name Change  
Minor Name Change

Landlord-Tenant Actions - Available Landlord-Tenant Packets: On Paper and/or on  
Disk - \$15

Eviction for Non-payment of Rent  
(Landlord's Packet)  
Requesting Repairs (Tenant's  
Complaint for Specific Performance)  
Requesting Security Deposit Refund  
Tenant Answer (to Eviction)

Per page charge

Enforcement Actions - Available Enforcement Packets: On paper and/or on  
Disk

Enforcing Orders to Pay Third Parties  
(Obtaining a Partial Judgment  
Enforcing An Existing Court Order)

Per page charge

Guardianship - Available Guardianship Packets: On Paper and/or on  
Disk - \$20

Guardianship of a Minor

(i) **Waiver of Fees.** Fees for court assistance services shall be partially or fully waived for persons found to be financially unable to pay fees based upon guidelines established by the Supreme Court. (Adopted September 13, 2004, effective October 1, 2004; amended August 4, 2005, effective August 15, 2005.)

**Rule 54. Guardianships and conservatorships.**

Every individual seeking appointment as a guardian or conservator shall file with the court a certificate of completion of the Supreme Court's on-line training course relating to the duties and responsibilities of a guardian or conservator prior to the issuance of permanent letters of guardianship or conservatorship unless otherwise waived by the court for good cause. The Supreme Court may charge a \$25.00 fee to participants to cover the cost of furnishing this training. This fee shall be deposited in the guardianship pilot project fund as provided in section 31-3201G, Idaho Code. This rule shall not apply to cases involving the guardianship or conservatorship of a minor. (Adopted April 27, 2011, effective August 1, 2011; amended September 7, 2011, effective September 15, 2011.)

**Rule 54.1. Ex Parte Communication.**

A. In order to carry out the court's oversight role in monitoring compliance in conservatorship or guardianship proceedings, communications which might be considered ex parte communications under Canon 3(B) of the Code of Judicial Conduct, may be received and reviewed by the court under the provisions of this rule.

B. If the communication raises a concern about a guardian or conservator's compliance with their statutory duties and responsibilities, the court may:

1. Review the court file and take any action that is supported by the record, including ordering a status report, inventory, or accounting;
2. Appoint a Guardian ad Litem;
3. Refer the communication to a court investigator, visitor, attorney, or Guardian ad Litem for further action;
4. Refer the matter to the appropriate law enforcement agency or prosecutor's office;
5. Refer the matter to the appropriate licensing agency;
6. Refer the matter to appropriate agencies, including but not limited to child or adult protective services;
7. Set a hearing regarding the communication, compel the guardian or conservator's attendance, and/or require a response from the guardian or conservator concerning the issues raised by the communication;
8. Decline to take further action on the communication, with or without replying to the person or returning any written communication received from the person.

C. If the communication does not raise issues of compliance and would otherwise be prohibited ex-parte communication under Canon 3(b) of the Code of Judicial Conduct, the court shall:

1. Return the written communication to the sender, if known; and
2. Disclose the communication to the guardian or conservator, Guardian ad Litem, and all parties and their attorneys.

D. The court shall disclose any ex parte communication reviewed under section 2 of this rule, and any action taken by the court, to the guardian or



conservator, Guardian ad Litem, and all parties and their attorneys, unless the court finds good cause to dispense with disclosure. If the court dispenses with disclosure, it must make written findings in support of its determination of good cause and preserve the communication received and any response made by the court. The court may place its findings and the preserved communication under seal or otherwise secure their confidentiality. (Adopted May 15, 2013, effective July 1, 2013.)

**Rule 55. Drug courts and mental health courts.**

(a) The Idaho Drug Court and Mental Health Court Act specifies the goals, purposes, policies for acceptance and related operating guidance for the operation of drug courts and mental health courts in Idaho. In addition, the Act establishes a statewide Drug Court and Mental Health Court Coordinating Committee and vests it with responsibility for establishing standards and guidelines and providing ongoing oversight of the operation of drug courts and mental health courts in Idaho. This rule provides additional direction for the development, establishment, operations, and termination of drug courts and mental health courts. The provisions of this rule apply to all drug courts and mental health courts, including those addressing adult felony or misdemeanor cases, juvenile cases, or child protection cases.

(b) Judicial districts planning to establish a new drug court and/or mental health court must submit a letter of intent to the Statewide Drug and Mental Health Coordinator, signed by the Administrative District Judge and the Trial Court Administrator, no less than six months in advance of a proposed starting date. The Statewide Drug Court Coordinator will advise the Drug Court and Mental Health Court Coordinating Committee and shall offer assistance in planning, coordination, identifying available funds, and providing training. The Coordinating Committee will advise the judicial district as to available funding and a feasible starting date, within thirty (30) days of receiving the letter of intent.

(c) Any judicial district planning to apply for training to assist in the development or ongoing operation of a drug court and/or mental health court, through an application to the Department of Justice for the Drug Court Planning Initiative, must notify the Drug and Mental Health Court Coordinator, through the Administrative District Judge and Trial Court Administrator, prior to the submission of their training application. The Statewide Drug and Mental Health Coordinator will schedule a pre-training briefing with the team, in advance of their participation in the national training, to orient the team to Idaho statute, guidelines, and available resources. Acknowledgement of or participation in the national training will not guarantee that the Drug Court and Mental Health Court Coordinating Committee will approve the subsequent proposal for the new drug court and/or mental health court.

(d) The judicial district must submit an operations application, on a form to be prescribed by the Drug Court and Mental Health Court Coordinating

Committee, prior to beginning operations of a new drug court and/or mental health court. This application shall be signed by the Administrative District Judge and the Trial Court Administrator and shall be submitted to the Drug Court and Mental Health Court Coordinating Committee no less than sixty days in advance of a proposed starting date. The Drug Court and Mental Health Court Coordinating Committee shall approve or disapprove the application and may adjust the proposed starting date, consistent with available resources. The operations application shall include the following:

(1) A memorandum of agreement (MOA) signed by the Administrative District Judge, Trial Court Administrator, one or more proposed presiding judges, the prosecuting attorney(s) and city attorneys for the participating jurisdictions, the public defender(s) for the participating jurisdictions, the community supervision agency, and other community entities such as the Regional Substance Abuse Authority and/or Regional Mental Health Council. This MOA will describe each agency or organization's participation and specific commitments to the drug or mental health court.

(2) Documentation of training of the core team for the drug court and/or mental health court either through the National Drug Court Planning Initiative or by the Statewide Drug and Mental Health Court Coordinator.

(3) Assurance of understanding and a plan for addressing the applicable Statewide Guidelines For Effectiveness And Evaluation.

(4) Assurance of understanding and plan for collecting and reporting required data, including utilization of the ISTARS Drug Court System.

(e) Any district court operating a drug court and/or mental health court shall annually review and report back to the Statewide Drug Court and Mental Health Coordinating Committee, through the Administrative District Judge and Trial Court Administrator, as to how the court is operating in accordance with the Guidelines, the approved participant capacity, and any directions from the Drug Court and Mental Health Court Coordinating Committee.

(f) A judicial district planning to terminate a drug court and/or mental health court must submit a letter of planned termination, to the Statewide Drug and Mental Health Court Coordinator for communication to the Drug Court and Mental Health Court Coordinating Committee, signed by the Administrative District Judge and Trial Court Administrator, as soon as reasonably possible and prior to the proposed ending date. The Drug Court and Mental Health Court Coordinating Committee shall approve or disapprove the planned termination and may adjust the proposed termination date. (Adopted August 5, 2005, effective August 15, 2005.)

#### **Rule 56. Coordinated family court services cost recovery fees.**

Charges for family court services shall not exceed the amounts defined in the following Cost Recovery Fee Schedule, adopted by the Supreme Court pursuant to the authority of section 32-1406, Idaho Code. A waiver of fees shall be issued if it is shown to the family court services coordinator's satisfaction that the applicant's household income is less than 125% of the

Federal Poverty Guidelines. Fees collected for family court services shall be distributed as required by section 32-1406, Idaho Code.

COST RECOVERY FEE SCHEDULE FOR COORDINATED FAMILY COURT SERVICES

Mediation	\$75.00 per hour
Development of parenting schedules	\$75.00 per hour
Alternative Dispute Resolution screening and referral reports	\$75.00 per hour
Children and family needs and risk assessments	\$75.00 per hour
Psycho-educational information for high conflict families	\$75.00 per hour
Pilot projects for case resolution as approved by Children and Families in the Courts Committee	\$75.00 per hour
Parent education on the needs of children	\$20.00 per hour

(Adopted September 18, 2005, effective September 15, 2005.)

**Rule 57. Time standards for case processing.**

(a) The following time standards are adopted as guidelines for judges, trial court administrators, lawyers, and litigants to assist them in determining the length of time it should take to conclude a case in the trial courts:

CIVIL	
District Court	540 days from complaint
Magistrate Court	180 days from complaint
FELONIES	
Magistrate Division	30 days from first appearance to order holding the defendant to answer in the district court or discharging the defendant

District Court	150 days from first appearance in district court
MISDEMEANORS	90 days from first appearance
INFRACTIONS	60 days from first appearance
DOMESTIC RELATIONS AND CHILD SUPPORT ENFORCEMENT	180 days from complaint
JUVENILE	
Juvenile Corrections Act Cases	90 days from admit/deny hearing
Child Protection Act Cases	As provided in the time frames established in the Idaho Juvenile Rules
SMALL CLAIMS	90 days from complaint

(b) In each of the categories of cases in subsection (a), the median length of time taken to resolve all cases should not exceed the time standard prescribed for that category. Trial judges should strive to resolve each individual case within the applicable time standard unless the trial judge determines that exceptional circumstances exist.

(c) No action shall be dismissed for failure to meet these time standards guidelines. (Adopted August 8, 2008, effective August 8, 2008.)

**Rule 58. Assignment of resident chambers [Suspended].**

This rule was suspended, effective September 14, 2011. (Adopted February 26, 2010, effective March 1, 2010.)

**STATUTORY NOTES**

**Compiler’s Note.** This rule was suspended effective immediately, so that the rule may be by court order dated September 14, 2011, further evaluated and reconsidered.

**Rule 59. Vexatious litigation.**

(a) The Court finds that the actions of persons who habitually, persistently, and without reasonable grounds engage in conduct that:



(1) serves merely to harass or maliciously injure another party in a civil action;

(2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; or

(3) is imposed solely for delay, hinder the effective administration of justice, impose an unacceptable burden on judicial personnel and resources, and impede the normal and essential functioning of the judicial process. Therefore, to allow courts to address this impediment to the proper functioning of the courts while protecting the constitutional right of all individuals to access to the courts, the Court adopts the procedures set forth in this rule.

(b) "Litigation," as used in this rule, means any civil action or proceeding, and includes any appeal from an administrative agency, any appeal from the small claims department of the magistrate division, any appeal from the magistrate division to the district court, and any appeal to the Supreme Court.

(c) An administrative judge may enter a prefilng order prohibiting a vexatious litigant from filing any new litigation in the courts of this state pro se without first obtaining leave of a judge of the court where the litigation is proposed to be filed. A district judge or magistrate judge may, on the judge's own motion or the motion of any party, refer the consideration of whether to enter such an order to the administrative judge. The administrative judge may also consider whether to enter such a prefilng order on his or her own motion or the motion of a party if the litigant with respect to whom the prefilng order is to be considered is a party to an action before the administrative judge.

(d) An administrative judge may find a person to be a vexatious litigant based on a finding that a person has done any of the following:

(1) In the immediately preceding seven-year period the person has commenced, prosecuted or maintained pro se at least three litigations, other than in the small claims department of the magistrate division, that have been finally determined adversely to that person.

(2) After a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate, pro se, either (A) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (B) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting pro se, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

(e) If the administrative district judge finds that there is a basis to conclude that a person is a vexatious litigant and that a prefilng order should be issued, the administrative district judge shall issue a proposed prefilng order along with the proposed findings supporting the issuance of the prefilng order. The person who would be designated as a vexatious litigant in the proposed order shall then have fourteen (14) days to file a written response to the proposed order and findings. If a response is filed, the administrative district judge may, in his or her discretion, grant a hearing on the proposed order. If no response is filed within fourteen (14) days, or if the administrative district judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the administrative district judge may issue the prefilng order.

(f) A prefilng order entered by an administrative district judge designating a person as a vexatious litigant may be appealed to the Supreme Court by such person as a matter of right.

(g) The Supreme Court may, on the Court's own motion or the motion of any party to an appeal, enter a prefilng order prohibiting a vexatious litigant from filing any new litigation in the courts of this state pro se without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the Supreme Court finds that there is a basis to conclude that a person is a vexatious litigant and that a prefilng order should be issued, the Court shall issue a proposed prefilng order along with the proposed findings supporting the issuance of the prefilng order. The person who would be designated as a vexatious litigant in the proposed order shall then have fourteen (14) days to file a written response to the proposed order and findings. If no response is filed within fourteen (14) days, or if the Supreme Court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the prefilng order may be issued.

(h) Disobedience of a prefilng order entered pursuant to this rule may be punished as a contempt of court.

(i) A presiding judge shall permit the filing of new litigation by a vexatious litigant subject to a prefilng order only if it appears that the litigation has merit and has not been filed for the purpose of harassment or delay.

(j) If a vexatious litigant subject to a prefilng order files any litigation without first obtaining the required leave of a judge to file the litigation, the court may dismiss the action. In addition, any party named in the litigation may file a notice stating that the plaintiff is a vexatious litigant subject to a prefilng order. The filing of such notice shall stay the litigation. The litigation shall be dismissed by the court unless the plaintiff, within fourteen (14) days of the filing of the notice, obtains an order from the presiding judge permitting the litigation to proceed. If the presiding judge issues an order permitting the litigation to proceed, the time for the defendants to answer or respond to the litigation will begin to run when the defendants are served with the order of the presiding judge.

(k) The clerk of the court shall provide a copy of any prefilng order issued pursuant to this rule to the Administrative Director of the Courts, who shall maintain a list of vexatious litigants subject to prefilng orders. (Adopted April 14, 2011, effective July 1, 2011.)

**Rule 60. [Reserved.]**

**PART VI. JURY SERVICE AND JURY TRIAL PROCEDURES.**

**Rule 61. Credit for jury service.**

Credit for service as a trial juror shall be determined by the administrative judge. Absent a different determination by the administrative judge, credit shall be given in the following manner: If a juror attends court, that is, if the juror actually comes to the courtroom pursuant to call, for prospective service, he or she must receive credit against the ten (10) day statutory limitation, regardless of whether or not the juror is called to serve or is excused from the jury by challenge for cause or peremptory challenge. A juror shall be given credit for service in the same proportion as compensation under section 2-215, Idaho Code, for one-half day or full day credit. (Adopted March 28, 1986, effective July 1, 1986; amended May 1, 2001, effective July 1, 2001.)

**Rule 62. Excuse from jury service.**

Each judicial district shall adopt written guidelines governing excuses and postponements from jury service. At a minimum, written guidelines shall include the following:

- (a) There shall be no automatic excuses from jury service;
- (b) Postponements of jury service are preferred over excuses;
- (c) Any postponement of jury service shall be to a date certain; and
- (d) The court shall be made aware in writing of multiple requests for postponement made by any individual prospective juror. (Adopted March 28, 1986, effective July 1, 1986; amended May 1, 2001, effective July 1, 2001.)

**Rule 63. Summons of jurors — Enforcement.**

(a) After a jury panel has been selected each person on the jury panel shall be served with a summons, issued by the clerk of the court, or the Jury Commissioner, to appear before the court at a time and place certain for jury duty. The jury qualification questionnaire may be sent together with the summons in a single mailing to a prospective juror. The summons may be served upon each juror by regular mail, certified mail, or by personal service by a jury commissioner, the clerk or other person authorized by the court. After the initial appearance of the juror, the juror shall appear for jury service in any court of the county as directed by the judge of any court during the term of jury service of the juror.

(b) No person shall be held in contempt of court nor have other penalty imposed upon the person for failure to appear for jury duty unless the



summons was served upon such juror by certified mail with a return receipt showing service or by personal service upon, or actual notice to, the prospective juror. If the prospective juror fails to respond to the summons, the clerk or jury commissioner or other official authorized by the court shall attempt to contact the prospective juror by telephone to ascertain the prospective juror's correct address and any other necessary information. A second summons shall be mailed by certified mail or personally served on the prospective juror whether or not the clerk or jury commissioner was able to contact the prospective juror by telephone. The second summons should notify the individual that it is a second notice. (Adopted March 28, 1986, effective July 1, 1986; amended May 4, 2001, effective July 1, 2001.)

#### **Rule 64. Orientation of jurors.**

The court shall provide an orientation to persons called for jury service substantially as follows:

(a) Upon initial contact with the court system prior to jury service, in counties which send juror qualification form to prospective jurors separate from a summons to jury service (i.e., the "two-step" qualification method"), a juror orientation pamphlet provided by the Administrative Office of the Courts outlining how a jury is chosen, trial procedure, people involved in a trial and jury fees shall be sent to each prospective juror with the juror qualification form.

(b) Upon first appearance at the courthouse, or earlier as ordered by the administrative district judge, persons called to jury service shall receive a jury orientation consisting of a uniform juror orientation videotape produced by the Administrative Office of the Courts, together with any orientation materials prepared and produced by each county to meet the unique needs of each county. Additionally, in counties using the one-step qualification method, jurors shall receive a juror orientation pamphlet provided by the Administrative Office of the Courts outlining how a jury is chosen, trial procedure, people involved in the trial and jury fees. (Adopted March 28, 1986, effective July 1, 1986.)

#### **Rule 65. Trial interruptions — Jury deliberations schedule.**

(a) The conduct of a jury trial takes precedence over all other proceedings except those of a more urgent nature.

(b) Jury deliberations should normally take place during courthouse hours and should not normally take place after 5:00 p.m. or on Saturday, Sunday or any legal holiday. Exceptions may be made to this rule for one-day trials, deliberations continued with the consent of the jury or other unique circumstances. However, court calendar considerations shall not be a basis to exceed normal hours of operation. (Adopted May 1, 2001, effective July 1, 2001.)



## PART VII. PRESERVATION OF EVIDENCE.

**Rule 71. Physiological evidence.**

Exhibits marked and offered into evidence which contain human or animal body fluids and/or human or animal body fluid stains or parts should be placed in a clear plastic resealable covering or other suitable resealable container to reasonably protect court personnel and litigants from being subjected to communicable diseases. The party offering such evidence shall be responsible to ensure that the evidence is properly packaged prior to being brought into the courtroom. (Adopted March 23, 1990, effective July 1, 1990.)

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# IDAHO RULES OF PROFESSIONAL CONDUCT

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## **PREAMBLE: A LAWYER'S RESPONSIBILITIES**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.2. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal

assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligations, as an advocate, to zealously protect and pursue a client's legitimate interests within the bounds of the law and, as an officer of the court, to preserve the integrity of the legal system's search for the truth while maintaining a professional, courteous and civil attitude toward all persons involved in the process.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

### **SCOPE**

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives; cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer



relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. (Effective July 1, 2004.)



**Rule 1.0: Terminology.**

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render

a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. (Effective July 1, 2004.)

### Commentary

#### Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

#### Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire orga-

nization or different components of it may constitute a firm or firms for purposes of these Rules.

#### Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

#### Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally

and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

#### **Screened**

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential informa-

tion known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

## **CLIENT LAWYER RELATIONSHIP**

### **Rule 1.1: Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. (Effective July 1, 2004.)

#### **Commentary**

#### **Legal Knowledge and Skill**

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with

long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reason-



ably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2

#### **Thoroughness and Preparation**

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The re-

quired attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

#### **Maintaining Competence**

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

### **JUDICIAL DECISIONS**

#### **Competent Representation.**

The trial court properly found that an attorney, representing a wife in a divorce case, was liable for malpractice for failing to investigate, inform, and advise her with respect to the value of the couple's real property, for

failing to ascertain the market value of the property, and for failing to discover an earlier discharge of a lien against the property. *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 248 P.3d 1256 (2011).

#### **Rule 1.2: Scope of representation.**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. (Effective July 1, 2004.)

#### **Commentary**

##### **Allocation of Authority between Client and Lawyer**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the pur-

poses to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as



whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decision. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### **Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of a client's views or activities.

#### **Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because

the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, it is encouraged. See Rule 1.0(e) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

#### **Criminal, Fraudulent and Prohibited Transactions**

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone

might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime of fraud. See Rule 4.1.

[12] Where the client is fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal

defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience to the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

### Rule 1.3: Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client. (Effective July 1, 2004.)

#### Commentary

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated

as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 519 of the Idaho Bar Commission Rules.

**JUDICIAL DECISIONS****Diligent Representation.**

The trial court properly found that an attorney, representing a wife in a divorce case, was liable for malpractice for failing to investigate, inform, and advise her with respect to the value of the couple's real property, for

failing to ascertain the market value of the property, and for failing to discover an earlier discharge of a lien against the property. *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 248 P.3d 1256 (2011).

**Rule 1.4: Communication.**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; including a request for an accounting as required by Rule 1.5(f); and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Effective July 1, 2004.)

**Commentary**

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

**Communicating with Client**

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other cir-

cumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. Regular communication also requires a lawyer to make an accounting for monies received from or on the client's behalf. That duty is more specifically set forth in Rule 1.5(f).



**Explaining Matters**

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e)

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

**Withholding Information**

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

**JUDICIAL DECISIONS****Reasonably Inform.**

The trial court properly found that an attorney, representing a wife in a divorce case, was liable for malpractice for failing to investigate, inform, and advise her with respect to the value of the couple's real property, for

failing to ascertain the market value of the property, and for failing to discover an earlier discharge of a lien against the property. *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 248 P.3d 1256 (2011).

**Rule 1.5: Fees.**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.



(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relation matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) Upon reasonable request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:

(1) Itemization of all hourly charges, costs, interest assessments, and past due balances.

(2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed. (Effective July 1, 2004.)

#### Commentary

##### **Reasonableness of Fee and Expenses**

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the

circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Para-

graph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

#### **Basis or Rate of Fee**

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

#### **Terms of Payment**

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise,

the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

#### **Prohibited Contingent Fees**

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

#### **Division of Fee**

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

#### **Disputes over Fees**

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

#### **Reasonable Request for Accounting**

[10] Rule 1.5(f) requires a lawyer, upon

reasonable request from the client, to provide an accounting to the client for fees and costs claimed or previously collected. The duty is limited to reasonable requests, to prevent the client from unduly burdening the lawyer with duplicative requests or from demanding de-

tail beyond that reasonably calculated to inform the client about the handling and disposition of money. The lawyer is not permitted to charge a fee for the time spent in preparing such a billing statement, although reasonable copying charges may still be appropriate.

### **Rule 1.6: Confidentiality of information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client; or

(6) to comply with other law or a court order. (Effective July 1, 2004.)

### **Commentary**

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject

matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies



not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### **Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

#### **Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes an exception for a client's stated intention to commit a crime. Idaho's rule differs from the ABA Model Rule in that a lawyer may reveal the client's stated intention to commit any crime, not just those involving potential death or potential bodily injury. It is also important to note that this is a permissive rule, in that the lawyer may reveal such confidences but is not required to do so.

[7] Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce

the number of victims.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with



the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be

permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

#### **Withdrawal**

[16] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

#### **Acting Competently to Preserve Confidentiality**

[17] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

#### **Former Client**

[19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

### **Rule 1.7: Conflict of interest: Current clients.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to

another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. (Effective July 1, 2004.)

### Commentary

#### General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation

has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

#### Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is under-



taken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

#### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverse-ness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

#### **Responsibilities to Former Clients and Other Third Persons**

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

#### **Personal Interest Conflicts**

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the

probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood, marriage or other domestic relationship, there may be a significant risk that client confidences will be revealed and that the lawyer's domestic relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or domestic partner, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family or domestic relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

#### **Interest of Person Paying for a Lawyer's Service**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

**Prohibited Representations**

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

**Informed Consent**

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and

[31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

**Consent Confirmed in Writing**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

**Revoking Consent**

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

**Consent to Future Conflict**

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might



arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

#### **Conflicts in Litigation**

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship be-

tween the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

#### **Nonlitigation Conflicts**

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging

a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

#### **Special Considerations in Common Representation**

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to with-

draw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

#### **Organizational Clients**

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve

as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of

director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

**Rule 1.8: Conflict of interest: Current clients: Specific rules.**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and



(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them. (Effective July 1, 2004.)

### Commentary

#### **Business Transactions between Client and Lawyer**

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers pur-

chasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be



reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

#### **Use of Information Related to Representation**

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a

government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

#### **Gifts to Lawyers**

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

#### **Literary Rights**

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

#### **Financial Assistance**

[10] Lawyers may not subsidize lawsuits

or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

#### **Person Paying for a Lawyer's Services**

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

#### **Aggregate Settlements**

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7,

this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

#### **Limiting Liability and Settling Malpractice Claims**

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult



independent counsel.

**Acquiring Proprietary Interest in Litigation**

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

**Client-Lawyer Sexual Relationships**

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of inde-

pendent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

**Imputation of Prohibitions**

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

**Rule 1.9: Duties to former clients.**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. (Effective July 1, 2004.)

### Commentary

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for non-payment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying; nor will government information that the lawyer is impliedly authorized to use or disclose or that is otherwise known to persons outside the government agency involved. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has



confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

#### **Lawyers Moving Between Firms**

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions

on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

### **Rule 1.10: Imputation of conflicts of interest: General rule.**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures

employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. (Effective July 1, 2004; amended May 4, 2010.)

### Commentary

#### Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

#### Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither ques-

tions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k)

and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that even where screening mechanisms have been adopted, tribunals may consider additional fac-

tors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

### **Rule 1.11: Special conflicts of interest for former and current government officers and employees.**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rules 1.9(a) and (b), except that "matter" is defined as in paragraph (e) of this Rule;
- (2) is subject to Rule 1.9(c); and
- (3) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and



(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency. (Effective July 1, 2004.)

### Commentary

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such stat-

utes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward



a former government or private client under Rule 1.9. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(3) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1), (a)(2) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate

need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(1), (a)(3) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

## **Rule 1.12: Former judge, arbitrator, mediator or other third-party neutral.**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party. (Effective July 1, 2004.)

#### Commentary

[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially.

This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.2.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] [Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.]

[5] Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

**Rule 1.13: Organization as client.**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be



represented, or by the shareholders. (Effective July 1, 2004.)

### Commentary

#### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large

volume of information that the lawyer has insufficient time to comprehend fully. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under paragraph (b).

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.



**Relation to Other Rules**

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime by the organization, Rules 1.6(b)(1) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

**Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a

bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

**Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

**Dual Representation**

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7

governs who should represent the directors and the organization.

**Rule 1.14: Client with diminished capacity.**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. (Effective July 1, 2004.)

**Commentary**

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of

such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

**Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: con-



sulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

#### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circum-

stances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

#### **Emergency Legal Assistance**

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

### **Rule 1.15: Safekeeping property.**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account

funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall distribute all portions of the property as to which the interests are not in dispute. (Effective July 1, 2004; amended June 5, 2006; amended March 5, 2012, effective July 1, 2012.)

#### Commentary

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impossible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of

the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] The Client Assistance Fund (Section VI of the Idaho Bar Commission Rules) refers



to the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

[7] Section XIII of the Idaho Bar Commission Rules (Trust Accounts) sets forth provi-

sions relating to licensing requirements and the establishment, maintenance and administration of trust accounts, including Interest on Lawyer Trust Account (IOLTA).

## JUDICIAL DECISIONS

### ANALYSIS

Commingling.

Improper Fee Arrangements.

#### Commingling.

In a bankruptcy case, the proposal of debtor's counsel to deposit the debtors' funds in his general account, and his intention to have free access to those monies was inappropriate under Idaho R. Prof. Conduct 1.16(d) and subsection (b) of this rule. *In re Werry*, — Bankr. —, 2011 Bankr. LEXIS 3292 (Aug. 26, 2011).

#### Improper Fee Arrangements.

Where Chapter 11 debtors wanted to hire a

law firm as their bankruptcy counsel, the bankruptcy court properly denied the request because the fee arrangement the parties negotiated required the debtors to make an "advance payment retainer" to the firm which the firm would place in its general business account and treat as available for use as it saw fit. The arrangement shielded the retainer from the requirements of 11 U.S.C.S. §§ 330 and 331, and appeared to be at odds with I.R.P.C 1.5. *In re Danner*, 68 Collier Bankr. Cas.2d (MB) 34, 2011 Bankr. LEXIS 2077 (2011), *affd*, *Danner v. U.S. Tr.* (In re Danner), 2012 Bankr. LEXIS 3634 (B.A.P. 9th Cir. July 31, 2012).

### Rule 1.16: Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered

to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. (Effective July 1, 2004.)

### Commentary

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

#### Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

#### Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge ap-

pointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

#### Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

#### Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

## JUDICIAL DECISIONS

**Commingleing.**

In a bankruptcy case, the proposal of debtor's counsel to deposit the debtors' funds in his general account, and his intention to have free access to those monies was inappropriate

under Idaho R. Prof. Conduct 1.15(b) and subsection (d) of this rule. In re Werry, — Bankr. —, 2011 Bankr. LEXIS 3292 (Aug. 26, 2011).

**Rule 1.17: Sale of law practice.**

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law or in the substantive practice area subject of the sale in the geographic area in which the practice has been conducted;

(b) The practice or part thereof is sold to other lawyers or law firms;

(c) Actual written notice is given to each of the seller's clients directly affected by the sale regarding:

(1) the proposed sale;

(2) the fees charged clients shall not be increased by reason of the sale;

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a title. (Effective July 1, 2004.)

**Commentary**

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

**Termination of Practice by the Seller**

[2] Idaho's rule on the sale of a law practice differs from the ABA Model Rule, in that it does not require that a lawyer sell the entire practice, nor does it require the lawyer to be retiring or otherwise leaving the practice.

**Client Confidences, Consent and Notice**

[3] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the

confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. The foregoing notice only need be provided to affected clients and not to clients whose legal matters will continue to be handled by the lawyer.

[4] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual



notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

[5] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

#### **Fee Arrangements Between Client and Purchaser**

[6] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

#### **Other Applicable Ethical Standards**

[7] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and

the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[8] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

#### **Applicability of the Rule**

[9] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[10] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[11] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

### **Rule 1.18: Duties to prospective client.**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing. (Effective July 1, 2004.)



### Commentary

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a con-

flict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. While some jurisdictions also permit internal screening within a firm to avoid conflicts, commonly called a "Chinese Wall," Idaho does not recognize such screening.

[8] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

## COUNSELOR

### Rule 2.1: Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. (Effective July 1, 2004.)

### Commentary

#### Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice,

a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting pro-

fession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

#### Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

### Rule 2.2: Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. (Effective July 1, 2004.)

#### Commentary

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-

connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure

required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

### **Rule 2.3: Evaluation for use by third persons.**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6. (Effective July 1, 2004.)

### **Commentary**

#### **Definition**

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's

title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

#### **Duties Owed to Third Person and Client**

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not



arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

#### **Access to and Disclosure of Information**

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the

client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

#### **Obtaining Client's Informed Consent**

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

#### **Financial Auditors' Requests for Information**

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

## **ADVOCATE**

### **Rule 3.1: Meritorious claims and contentions.**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. (Effective July 1, 2004.)

#### **Commentary**

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivo-

lous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is



unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this

Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

### **Rule 3.2: Expediting litigation.**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. (Effective July 1, 2004.)

#### **Commentary**

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain

rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

### **Rule 3.3: Candor toward the tribunal.**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse. (Effective July 1, 2004.)

### Commentary

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

#### Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

#### Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises

properly applicable to the case.

#### Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See *State v. Waggoner*, 124 Idaho 716, 864 P.2d 162 (Ct. App. 1993) (where client insisted on testifying falsely, counsel informed court testimony would be given in narrative form without assistance of counsel, implying a basis for believing the testimony would be false; counsel’s conduct was appropriate, and met his duty of candor to the tribunal while not participating in the presentation of perjured testimony). See also *Nix v. Whiteside*, 475 U.S. 157, 173-4, 106 S. Ct. 988, 89 L. Ed.2d 123 (1986) (criminal defendant has no right to testify falsely; counsel’s duty to disclose client’s intention to commit crime involving fraud on tribunal is the same whether the client intends to bribe a witness or commit perjury). See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence and thus impair the lawyer’s effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does

not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

#### **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

#### **Preserving Integrity of Adjudicative Process**

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communi-

cating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

#### **Duration of Obligation**

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

#### **Ex Parte Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

#### **Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.



**JUDICIAL DECISIONS****Ex Parte Hearing.**

In a hearing on a motion for a default judgment, the attorney for the movant has a duty under subsection (d) of this rule to inform the judge of any information that the

attorney may have that relates to a meritorious defense to the motion. *Maynard v. Nguyen*, 152 Idaho 724, 274 P.3d 589 (2011).

**Rule 3.4: Fairness to opposing party and counsel.**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (Effective July 1, 2004.)

**Commentary**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many

jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not



improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a

contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

## JUDICIAL DECISIONS

### Bolstering

Prosecutor did not improperly bolster a witness's credibility under this rule, where the prosecutor merely argued that the mother's conduct, as shown by the evidence, was

inconsistent with defendant's allegation that the mother had killed the baby. *State v. Carson*, 151 Idaho 713, 264 P.3d 54 (2011).

### Rule 3.5: Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal. (Effective July 1, 2004.)

### Commentary

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with

the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

### Rule 3.6: Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the

lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a). (Effective July 1, 2004.)

### Commentary

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial

proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary

of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal

case or proceeding that could result in incarceration;

(5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

### **Rule 3.7: Lawyer as witness.**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. (Effective July 1, 2004.)

### **Commentary**

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

#### **Advocate-Witness Rule**

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate



and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a

trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

#### **Conflict of Interest**

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

### **Rule 3.8: Special responsibilities of a prosecutor.**

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the



defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) when a prosecutor knows of new, credible material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. (Effective July 1, 2004; amended May 4, 2010.)

#### Commentary

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to rectify the conviction of innocent persons.. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and care-

ful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not

seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are

not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute violation of this Rule.

### **Rule 3.9: Advocate in nonadjudicative proceedings.**

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. (Effective July 1, 2004.)

#### **Commentary**

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and

vance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it

honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental

agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

## TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

### **Rule 4.1: Truthfulness in statements to others.**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. (Effective July 1, 2004.)

### Commentary

#### **Misrepresentation**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

#### **Statements of Fact**

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under

applicable law to avoid criminal and tortious misrepresentation.

#### **Crime by Client**

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime. If the lawyer can avoid assisting a client's crime only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. Rule 1.6 permits a lawyer to disclose information when necessary to prevent or rectify crimes. See Rule 1.6(b). If disclosure is permitted by Rule 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime.



**Rule 4.2: Communication with person represented by counsel.**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. (Effective July 1, 2004.)

**Commentary**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter; interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceed-

ings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.



**Rule 4.3: Dealing with unrepresented person.**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. (Effective July 1, 2004.)

**Commentary**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible

advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations. Similarly, a prosecuting attorney may negotiate with a pro se defendant in an effort to resolve a criminal charge by plea agreement. So long as the prosecutor has explained that the prosecutor is adverse to the defendant and is not representing the defendant's interest, the prosecutor may inform the defendant of the prosecutor's view of the merits of the prosecution and defense, and of the possible outcomes if an agreement is not reached.

**Rule 4.4: Respect for rights of third persons.**

(a) In representing a client, a lawyer shall not:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants;

(2) use methods of obtaining evidence that violate the legal rights of such a person;

(3) present or participate in presenting criminal charges solely to obtain advantage in a civil matter; or

(4) threaten to present criminal charges in order to obtain advantage in a civil matter.

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. (Effective July 1, 2004.)

### Commentary

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (a) contains an anti-bias provision, requiring lawyers to refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories. Nothing in the rule is intended to limit a lawyer's full advocacy on behalf of a client.

[3] Paragraph (a) also maintains Idaho's more traditional view, abandoned in most jurisdictions, prohibiting the threat of or presentation of criminal charges solely to gain advantage in a civil matter.

[4] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reason-

ably should know that a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[5] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

## LAW FIRMS AND ASSOCIATIONS

### Rule 5.1: Responsibilities of partners, managers, and supervisory lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Effective July 1, 2004.)

### Commentary

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with

the firm will inevitably conform to the Rules. [4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

### Rule 5.2: Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. (Effective July 1, 2004.)

### Commentary

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that

the lawyer acted at the direction of a supervisor, that fact may be relevant in determin-



ing whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken.

If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

### **Rule 5.3: Responsibilities regarding nonlawyer assistants.**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Effective July 1, 2004.)

### **Commentary**

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to profes-

sional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.



**Rule 5.4: Professional independence of a lawyer.**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as provided by Idaho Code § 30-1513(d); or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer. (Effective July 1, 2004.)

**Commentary**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's

professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

**Rule 5.5: Unauthorized practice of law.**

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order, including *pro hac vice* admission pursuant to *Idaho Bar Commission Rule 222*, to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;

(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or

(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.

(c) A lawyer shall not assist another person in the unauthorized practice of law. (Effective July 1, 2004.)

#### Commentary

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (b) identifies four situations in which the lawyer may engage in such conduct without fear of violating this Rule. This Rule does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (b)(2)(i), nothing in this Rule is intended to authorize a lawyer to establish an office or other permanent presence in this jurisdiction without being admitted to practice here.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted

pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (b)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (b)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice *pro hac vice*, their conduct is governed by paragraphs (a) and (b)(1) and not by (b)(2). Paragraph (b)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (b)(2)(i) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in

connection with the client's matters. Lawyers authorized to practice under this paragraph may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[5] Paragraph (b)(2)(ii) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted *pro hac vice*.

[6] Paragraph (b)(2)(iii) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must

actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely *pro forma*, then both lawyers are subject to discipline under this Rule.

[7] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[8] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers may assist independent nonlawyers authorized by the law of a jurisdiction to provide particular legal services, for example, paraprofessionals authorized to provide some kinds of legal services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[9] Nothing in this rule is intended to conflict with Idaho Bar Commission Rule 222, which provides for *pro hac vice* admission of lawyers from other jurisdictions.

### **Rule 5.6: Restrictions on right to practice.**

A lawyer shall not participate in offering or making:

(a) an agreement that restricts the rights of a lawyer to practice law after termination of a practice relationship, except agreements concerning benefits upon retirement; and except in situations involving sale of a law practice, or part thereof, as described in Rule 1.17, or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties. (Effective July 1, 2004.)

#### **Commentary**

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

### **Rule 5.7: Responsibilities regarding law-related services.**

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:



(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. (Effective July 1, 2004.)

### Commentary

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer-relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Profes-

sional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to



the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client lawyer-

relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7 and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

## PUBLIC SERVICE

### Rule 6.1: Voluntary *pro bono publico* service.

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. (Effective July 1, 2004.)

### Commentary

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Idaho State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as the Idaho Volunteer Lawyers Program, homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees

to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility

collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addi-

tion to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

### **Rule 6.2: Accepting appointments.**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. (Effective July 1, 2004.)

#### **Commentary**

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

#### **Appointed Counsel**

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter compe-

tently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

### **Rule 6.3: Membership in legal services organization.**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer. (Effective July 1, 2004.)



**Commentary**

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board

of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

**Rule 6.4: Law reform activities affecting client interests.**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client. (Effective July 1, 2004.)

**Commentary**

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules gov-

erning that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

**Rule 6.5: Nonprofit and court-annexed limited legal services programs.**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule. (Effective July 1, 2004.)

**Commentary**

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms

— that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer



relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for

the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

## INFORMATION ABOUT LEGAL SERVICES

### Rule 7.1: Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated. (Effective July 1, 2004.)

### Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without ref-

erence to the specific actual and legal circumstances.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of

clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substan-

tiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

### **Rule 7.2: Advertising.**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. (Effective July 1, 2004.)

### **Commentary**

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's

fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information

that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

#### **Record of Advertising**

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

#### **Paying Others to Recommend a Lawyer**

[6] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[7] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar plan that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public

as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[8] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

### **Rule 7.3: Direct contact with prospective clients.**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person,



telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. (Effective July 1, 2004.)

#### Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to

prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recom-



mending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same

purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

#### **Rule 7.4: Communication of fields of practice and specialization.**

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by the Idaho State Bar; and

(2) the name of the certifying organization is clearly identified in the communication. (Effective July 1, 2004.)

#### **Commentary**

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will

not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a

“specialty,” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by the

Idaho State Bar pursuant to Section X of the Idaho Bar Commission Rules. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer’s recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

### **Rule 7.5: Firm names and letterhead.**

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. (Effective July 1, 2004.)

### **Commentary**

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal

aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.

**Rule 7.6: Political contributions to obtain government legal engagements or appointments by judges.**

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment. (Effective July 1, 2004.)

**Commentary**

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undetermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifica-

tions and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

**MAINTAINING THE INTEGRITY OF THE PROFESSION****Rule 8.1: Bar admission and disciplinary matters.**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a



lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6. (Effective July 1, 2004.)

### Commentary

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirma-

tive clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

### Rule 8.2: Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct. (Effective July 1, 2004.)

### Commentary

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine

public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

### Rule 8.3: Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.



(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program. (Effective July 1, 2004.)

### Commentary

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplin-

ary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

### Rule 8.4: Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. (Effective July 1, 2004; amended March 17, 2005.)

### Commentary

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when

considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### Rule 8.5: Disciplinary authority; choice of law.

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur. (Effective July 1, 2004.)

**Commentary****Disciplinary Authority**

[1] It is longstanding law that conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who render or offer to render legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

**Choice of Law**

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding

pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

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**Cited in:** *Doe v. Idaho Dep't of Health & Welfare (In re Doe)*, 150 Idaho 563, 249 P.3d 362 (2011).



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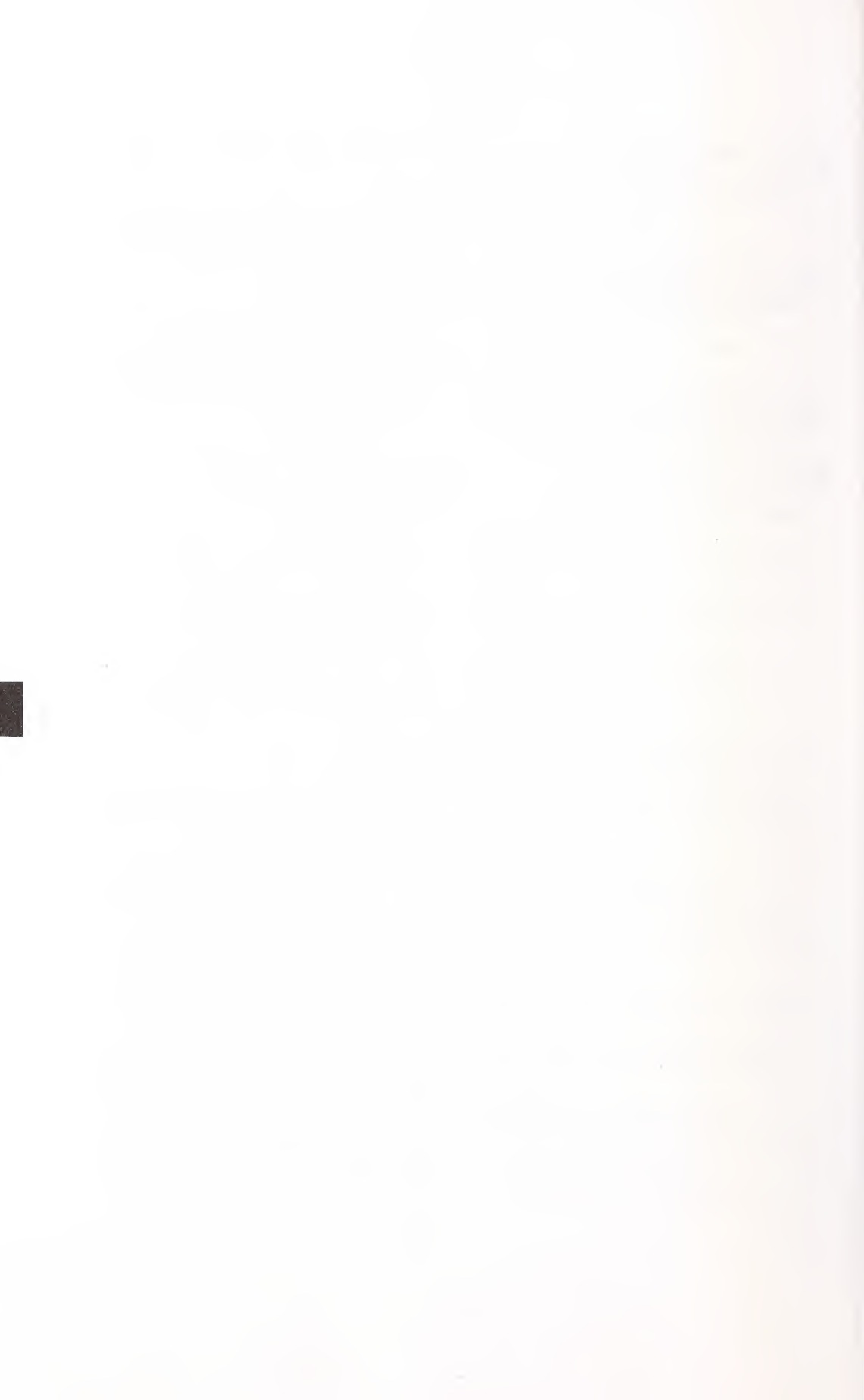
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# IDAHO APPELLATE RULES

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**SRBA ADMINISTRATIVE ORDERS****Rule 1. Title, construction and effective date.**

These rules shall be known and cited as the "Idaho Appellate Rules" (I.A.R.). These rules shall take effect on July 1, 1977, and thereafter all laws and rules of appellate procedure in the Supreme Court in conflict therewith shall be of no further force or effect. These rules shall govern all proceedings pending in the Supreme Court on the effective date or thereafter commenced, but shall not control as to the time for filing a notice of appeal if the judgment or order appealed from was entered before July 1, 1977, in which case the time for appeal shall be as provided by law on June 30, 1977. (Adopted March 25, 1977, effective July 1, 1977; amended June 15, 1987, effective November 1, 1987.)

**STATUTORY NOTES**

**Compiler's Notes.** The order of the Supreme Court adopting the Idaho Appellate Rules read:

"The report of the Appellate Rules Advisory Committee having been submitted to the Court for the amendment of the Appellate Rules of the Supreme Court of Idaho for adoption of new Idaho Supreme Court Appellate Rules and the rescission of the existing Appellate Rules of the Supreme Court of Idaho now in effect, and the Court having reviewed said report, and the Court having determined that said amendments as modified by the Court are in the best interest of the judicial system of the State of Idaho,

"NOW, THEREFORE, IT IS HEREBY ORDERED, that the Appellate Rules of the Supreme Court of Idaho now existing and published in the Idaho State Bar Desk Book be, and the same are hereby, rescinded effective July 1, 1977.

"IT IS FURTHER ORDERED, that the attached copy of the Idaho Supreme Court Appellate Rules, a copy of which is on file with the Clerk of the Court are hereby adopted by the Court as the Idaho Appellate Rules effective July 1, 1977.

"IT IS FURTHER ORDERED, that this Order and the newly adopted rules shall be effective on and after the 1st day of July, 1977.

"IT IS FURTHER ORDERED, that the

Clerk of the Court cause a copy of this Order to be published in two consecutive issues of the Advocate and deliver a copy of the attached new Idaho Supreme Court Appellate Rules to the office of the Idaho State Bar with authorization to publish the same in the Idaho State Bar Desk Book.

"BY ORDER OF THE COURT this 25th day of March, 1977."

The order of the Supreme Court of March 31, 1978 amending the Idaho Appellate Rules read:

"The annual report of the Appellate Rules Advisory Committee of the Supreme Court having been submitted to the Court, and the Court having reviewed and adopted the recommended modifications to the Idaho Appellate Rules (I.A.R.),

"NOW, THEREFORE, IT IS HEREBY ORDERED that the following rules of the I.A.R. be, and the same are hereby amended to read as follows:

"1. That the format of the numbering of the Idaho Appellate Rules (I.A.R.) be the same as other rules, namely, 'Rule 1(a)(1)'.

"2. That the Idaho Appellate Rules (I.A.R.), as amended, be published in the supplement to the Rules volume accompanying the Idaho Code rather than, or in addition to, publishing them in the Idaho State Bar Desk Book....

"IT IS FURTHER ORDERED that this or-

der and the above amendments shall be effective July 1, 1978.

“IT IS FURTHER ORDERED, that the above designation of the striking of words from the rules by lining through them, and the designation of the addition of new portions of the rules by underlining such new portion is for the purpose of information only so as to indicate to the bench and bar only

what portions of the rules were amended, and such lining through and underlining shall not be considered a part of the permanent Idaho Appellate Rules (I.A.R.).

“IT IS FURTHER ORDERED, that the Clerk of the Court cause this to be published in two consecutive issues of The Advocate.

“BY ORDER OF THE COURT this 31st day of March, 1978.”

JUDICIAL DECISIONS

Prerequisites to Appeal.

Since former § 13-203 was repealed and I.A.R. 16(a) was adopted there was no longer a requirement of posting a cost bond on appeal, the doctrine of *Martinson v. Martinson*, 90 Idaho 490, 414 P.2d 204 (1966), that an uncashed check, given as an appeal bond, does not constitute such a bond, has been

eliminated, and where the notice exception to I.A.R. 1 was satisfied, the appeal would be heard. *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1978).

**Cited in:** *State, Dep’t of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979).

Rule 2. Scope and definitions.

(a) **Scope.** These rules shall govern all appeals and petitions for special writs or proceedings in the Supreme Court.

(b) **Definitions.** For purposes of these rules:

(1) “District court” shall include the district courts of all judicial districts but shall not include the magistrates divisions thereof.

(2) “Appellant” shall include “petitioner.”

(3) “Respondent” shall mean the adverse party not initially seeking affirmative relief.

(4) “Petition” shall include “complaint” or “application.”

(5) “Administrative agency” shall include only the Public Utilities Commission and the Industrial Commission.

(6) “Transcript” shall mean the reporter’s transcript.

(7) “Record” shall mean the clerk’s or agency’s record.

(8) “Clerk” shall mean the clerk of the district court, or the secretary or designated clerk, if any, of the Industrial Commission or the Public Utilities Commission. (Adopted March 25, 1977, effective July 1, 1977.)

JUDICIAL DECISIONS

**Cited in:** *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 908 P.2d 1228 (1995); *Bradstreet*, 145 Idaho 670, 183 P.3d 758 (2008); *Losser v.*

Rule 3. Writs of review, bills of exceptions, and writs of certiorari.

Appellate review by bill of exceptions is hereby abolished. Writs of certiorari or writs of review shall be processed in the same manner as writs of prohibition as provided in these rules. (Adopted March 25, 1977, effective July 1, 1977.)

## JUDICIAL DECISIONS

**Writ of Review.****—Review Denied.**

Where state did not appeal from order withholding judgment, it could not appeal from previous order reducing charges from felony to misdemeanor as such order did not fall within the language of I.A.R. 11(c)(3) or (6);

nor would Supreme Court exercise its plenary power to hear such appeal, under Const., Art. 5, § 9, or treat the appeal as a petition for a writ of review under § 7-201 and this rule. (Decided under former Rule 43.) *State v. Molinelli*, 105 Idaho 833, 673 P.2d 433 (1983).

**Rule 4. Persons who may appeal.**

Any party aggrieved by an appealable judgment, order or decree, as defined in these rules, of a district court, the Public Utilities Commission or the Industrial Commission may appeal such decision to the Supreme Court as provided in these rules. (Adopted March 25, 1977, effective July 1, 1977.)

## JUDICIAL DECISIONS

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Party Aggrieved.

Party to Action.

Standing.

**Party Aggrieved.**

Purchasers of real property, who remained primarily liable on a promissory note for the purchase price, were parties aggrieved by, and thus entitled to appeal, a judgment against their assignee, in favor of a lender which had obtained priority lien status pursuant to a subordination agreement with the original vendor. *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988).

Mortgagors' son had standing as a party aggrieved to appeal a foreclosure judgment, even though his only interest in the property was an expectancy, where the bank named him as a defendant in its foreclosure complaint in order to extinguish any possible interest he might have; if the son had an interest that could be extinguished by the judgment, then he also had an interest to assert an appeal. *Federal Land Bank v. Parsons*, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989).

The defendant was not an "aggrieved party" under this Rule where the district court granted his motion to correct time. *Cochran v. State*, 133 Idaho 205, 984 P.2d 128 (Ct. App. 1999).

Finding that the subcontractor had standing was proper where the subcontractor was named in the order for judgment n.o.v. or new

trial, depriving it of a money judgment. The subcontractor was also ordered to pay attorney fees to the contractor; thus, it was an aggrieved party pursuant to Idaho App. R. 4. *Gillingham Constr., Inc. v. Newby-Wiggins Constr., Inc.*, 142 Idaho 15, 121 P.3d 946 (2005).

**Party to Action.**

Where the Department of Employment did not appeal to the Industrial Commission from the decision of the Department appeals examiner, and did not participate in the hearing before the Industrial Commission, it was too late for the Department to claim status as a "party" for the purposes of appeal, particularly where neither the claimant nor the employer had appealed from the ruling of the Industrial Commission. *DiIorio v. Potlatch Corp.*, 107 Idaho 383, 690 P.2d 318 (1984).

While there was no doubt that an attorney was aggrieved by a trial court's refusal to recognize the attorney's claimed lien, the impediment to the attorney's appeal was the attorney's lack of party status. *Kinghorn v. Clay*, — Idaho —, 283 P.3d 779 (2012).

**Standing.**

The holder of a reversionary interest in the property under a sale contract that was extinguished by the judgment of condemnation had standing to raise a jurisdictional question on appeal. *State ex rel. Moore v. Howell*, 111 Idaho 963, 729 P.2d 438 (Ct. App. 1986).

**Cited in:** *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000); *Losser v. Bradstreet*, 145 Idaho 670, 183 P.3d 758 (2008).

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Appeal Statutory.

Party Aggrieved.

—Child Custody.

—Contracts.

—Decedent's Estate.

—Habeas Corpus.

—Partially Successful Plaintiff.

—School Districts.

—Stockholders.

—Taxpayers.

—Trust Mortgage.

Party to Action.

### Appeal Statutory.

The right of appeal is purely statutory. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

### Party Aggrieved.

"Party aggrieved" has been defined by this court as any person injuriously affected by judgment, irrespective of whether he be named as plaintiff, defendant or intervenor. He has to be named neither in the caption, pleadings nor judgment. *State v. Eves*, 6 Idaho 144, 53 P. 543 (1898); *Washington County Abstract Co. v. Stewart*, 9 Idaho 376, 74 P. 955 (1903); *Oatman v. Hampton*, 43 Idaho 675, 256 P. 529 (1927); *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

Record itself must disclose that party taking appeal is aggrieved party. *Rural High Sch. Dist. No. 1 v. School Dist. No. 37*, 32 Idaho 325, 182 P. 859 (1919).

Party not aggrieved by judgment is not entitled to appeal. *Northern Pac. Ry. v. Idaho County*, 34 Idaho 191, 200 P. 128 (1921).

Where the county appealing would not be affected by affirmance or reversal, it is not "aggrieved" by the judgment, the appeal presents a moot question and the appeal must be dismissed. *Kootenai County v. White*, 53 Idaho 804, 27 P.2d 977 (1933).

The test of whether a party is an "aggrieved party" so as to be entitled to appeal is whether the party would have had the thing if the erroneous judgment had not been entered. *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

The term "party aggrieved" mean any person injured or affected by the judgment. *Roosma v. Moots*, 62 Idaho 450, 112 P.2d 1000 (1941).

### —Child Custody.

A divorced wife, filing a petition seeking the custody and control of a minor child jointly with the maternal grandmother, was a "party

aggrieved" by an order denying petition and awarding sole custody to the grandmother. *Roosma v. Moots*, 62 Idaho 450, 112 P.2d 1000 (1941).

### —Contracts.

The state is the aggrieved party to order denying motion for judgment for penalty prescribed in case of usurious contracts, and may appeal from such order. *State v. Eves*, 6 Idaho 144, 53 P. 543 (1898).

### —Decedent's Estate.

The estate of a deceased person was an "aggrieved party," by a judgment for the administratrix, and hence could appeal, since the estate would have to pay the judgment if it were not reversed, vacated, or modified. *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

### —Habeas Corpus.

The officer from whose custody a person has been discharged on habeas corpus is a "party aggrieved" and has such an interest as will authorize him to appeal from, or sue out a writ of error to review, the judgment of discharge applied to warden of state penitentiary. *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

The state itself is a "party aggrieved" under statutes permitting such a party to appeal from a judgment, so that on habeas corpus it may appeal from a judgment discharging a petitioner from custody. *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

### —Partially Successful Plaintiff.

Party who recovers judgment for only part of his claim is aggrieved by such judgment and entitled to appeal therefrom. *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903).

### —School Districts.

Rural high school district is party aggrieved by order of board of county commissioners segregating school district from rural high school district. *Rural High Sch. Dist. No. 1 v. School Dist. No. 37*, 32 Idaho 325, 182 P. 859 (1919).

### —Stockholders.

Stockholder not in privity with corporation is not a party aggrieved by judgment rendered against the corporation. *Eldridge v. Payette-Boise Water Users Ass'n*, 48 Idaho 182, 279 P. 713 (1929).

### —Taxpayers.

School district taxpayer who did not appeal



to district court from order of board of county commissioners affecting his district is not party aggrieved by final judgment of district court. *Rural High Sch. Dist. No. 1 v. School Dist. No. 37*, 32 Idaho 325, 182 P. 859 (1919).

Taxpayers of district who intervened in a proceeding brought by the highway district to determine validity of payments made to highway commissioners were entitled to appeal as aggrieved parties. *Nampa Hwy. Dist. No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956).

—**Trust Mortgage.**

Members of the board of trustees named in a trust mortgage are not aggrieved by a foreclosure of the mortgage. *Poage v. Cooperative Publishing Co.*, 57 Idaho 561, 66 P.2d 1119, 110 A.L.R. 1322 (1937).

**Party to Action.**

It is not necessary for a person to be named

as plaintiff or defendant or intervener in the title to an action, or in the title of judgment entered therein, in order to become party thereto so as to be entitled to appeal. *Washington County Abstract Co. v. Stewart*, 9 Idaho 376, 74 P. 955 (1903).

In action by county to recover road poll tax an appeal from judgment in favor of defendant may be taken by county and in name of county as party in interest; it need not be taken in name of attorney general. *Kootenai County v. Hope Lumber Co.*, 13 Idaho 262, 89 P. 1054 (1907).

Right of nonsubstituted or nonappearing administrator to appeal from decision rendered against his intestate was derived exclusively from former similar provision. *Oatman v. Hampton*, 43 Idaho 675, 256 P. 529 (1927).

## RESEARCH REFERENCES

**A.L.R.** When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 A.L.R.3d 462.

Executor's or administrator's right to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Party's acceptance of remittitur in lower court as affecting his right to complain in appellate court as to amount of damages for personal injury. 16 A.L.R.3d 1327.

Right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor. 22 A.L.R.3d 914.

Remarriage pending appeal as precluding party from attacking property settlement of divorce decree. 55 A.L.R.3d 1299.

## Rule 5. Special writs and original proceedings.

(a) **Special writs.** Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction. Except for petitions for writs filed by incarcerated persons and petitions for writs of habeas corpus, petitions for writs and motions seeking to intervene in such petitions shall contemporaneously be served by mail on all affected parties, including the real party in interest. There shall be no response to applications filed pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same. The Supreme Court shall process petitions for such special writs as are established by law in the manner provided in this rule..

(b) **Challenge to a final redistricting plan.** In accord with Article III, Section 2(5) of the Idaho Constitution, any registered voter, any incorporated city or any county in this state, may file an original action challenging a congressional or legislative redistricting plan adopted by the Commission on Reapportionment. Such challenges shall be filed within 35 days of the filing of the final report with the office of the Secretary of State by the Commission.

(c) **Filing Fee — Briefs — Number.** Special writs shall issue only upon petitions verified by the party beneficially interested therein and upon briefs in support thereof filed with the Clerk of the Supreme Court with payment of the appropriate filing fee. No filing fee shall be required with a petition for writ of habeas corpus which is filed in connection with a criminal case or post-conviction relief proceeding. Petitioner shall file an original and six copies of the petition and brief with the Clerk of the Supreme Court.

(d) **Procedure for Issuance of Writs.** Special writs, except writs of habeas corpus, shall issue as herein provided. The Supreme Court acting through three (3) or more members, or by two (2) or more members when the Court is in recess, may issue a writ directing the respondent to act in accordance with the writ, or to appear or respond at the time fixed in the writ to show cause why the relief requested in the petition should not be granted. The court may enter an order providing for briefing and oral argument prior to issuance of a writ or an order to show cause. If such an order is entered, briefing shall be conducted in the manner outlined in the order as supplemented by these rules. The briefs shall be in the form prescribed by Rule 32(e). A majority of the entire Court, may also direct the respondent to so act, or to refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose. Upon its issuance, a copy of the petition, brief and writ shall immediately be served upon all affected parties including the real party in interest as concerns the requested relief, which real party must be named in the petition and the writ. Service shall be made in the manner and within the time limit set by the Court. Appearance in response to the writ by any interested party shall be by verified answer and by brief. If no appearance is made, the Court may grant any requested relief justified by the petition. If appearance is made, the Court may schedule the matter for oral argument or decide the matter on the record. Issues of fact, if any, shall be determined in the manner ordered by the Court.

(e) **Petitions for Writ of Habeas Corpus.** Petitions for writs of habeas corpus shall be processed as provided by law. (Adopted March 25, 1977, effective July 1, 1977; Amended March 19, 2009, effective July 1, 2009; amended November 20, 2012, effective January 1, 2013.)

STATUTORY NOTES

**Cross References.** Original jurisdiction of Supreme Court, Idaho Const., Art. 5, § 9.

JUDICIAL DECISIONS

ANALYSIS	
Assertion of Jurisdiction.	original jurisdiction, it may issue writs of mandamus and/or prohibition. Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990).
Authority to Issue.	
Litigation Against Judges.	<b>Authority to Issue.</b>
<b>Assertion of Jurisdiction.</b>	Once the Supreme Court has asserted its original jurisdiction, it may issue writs of
Once the Supreme Court has asserted its	

mandamus and/or prohibition. (Decided under former Rule 43). *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990).

#### **Litigation Against Judges.**

Where individual sued all members of Supreme Court, as well as virtually all members of the bench in northern Idaho, manifested a pattern of initiating litigation against any

judge ruling against him and stated and restated his belief that no judge in Idaho could hear his cases, at least until the bar is declared unlawful, Supreme Court would not declare itself disqualified and would enjoin individual from filing pro se actions without court approval and from filing liens without an attorney. *Eismann v. Miller*, 101 Idaho 692, 619 P.2d 1145 (1980).

### **OPINIONS OF ATTORNEY GENERAL**

Should legislation be adopted permitting a public subdivision to voluntarily withdraw from PERSI (Public Employees Retirement System of Idaho), PERSI while not having a fiduciary duty to challenge the legislation, would be charged with the responsibility of allowing political subdivisions to withdraw from the system and would thus have standing to bring a declaratory judgment action or to bring an original action in the Supreme Court seeking a judicial declaration of the

validity of the statute before allowing any withdrawals; thus by obtaining such a declaration prior to actually allowing employers to withdraw, PERSI could avoid the logistical problems that could be created if the statute were declared invalid after a number of employers had already withdrawn and employees brought an action seeking damages for PERSI's breach of its fiduciary duty regarding employee's benefits. OAG 96-1.

#### **Rule 6. Title of appeal and designation of parties and size of paper.**

The original title of an action or proceeding, with the names of the parties in the same order, shall be retained on appeal by adding the designations of "appellant" and "respondent." In special proceedings the party prosecuting shall be designated the "petitioner" and the adverse party, if any, the "respondent." In an appeal in which there is no adverse party named in the title, there shall be added the name of the party prosecuting the appeal designated as "appellant." In an appeal from a decision or order of the Idaho Public Utilities commission filed by an intervenor in the original proceedings, the petitioner or applicant in the original proceedings shall be made a party to the appeal, and designated as a "respondent". The district court or administrative agency may by order correct the title of an appeal or cross-appeal at any time before the clerk's or agency's record is lodged as provided in Rule 29. The Supreme Court may amend a title of an appeal or proceeding before it at any time. All motions, petitions and other documents filed with the court should be typed on 8 ½ x 11 inch paper. Prisoners incarcerated or detained in a state prison or county jail may file documents that are legibly hand-printed in black ink, in whole or in part, that otherwise conform to the requirements of these rules. Once a Supreme Court case number is assigned, all motions, briefs and other documents filed shall specify both the Supreme Court case number and the district court docket number, including county, or agency docket number from which the case originated. The original case number should appear below the Supreme Court case number. (Adopted March 25, 1977, effective July 1, 1977; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended January 30, 2001, effective July 1, 2001; amended November 20, 2012, effective January 1, 2013.)



JUDICIAL DECISIONS

**Cited in:** Security Pac. Bank v. Curtis, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS	
Mandamus. Writ of Review.	should be designated as plaintiff and defendant. Winter v. Davis, 65 Idaho 696, 152 P.2d 249 (1944).
<b>Mandamus.</b>	<b>Writ of Review.</b>
An original proceeding in Supreme Court for writ of mandamus to compel clerk of district court to place plaintiff's name on ballot is a special proceeding and the parties	Application to the Supreme Court for a writ of review (certiorari) is a special proceeding and the parties should be entitled plaintiff and defendant. Shaw v. McDougall, 56 Idaho 697, 58 P.2d 463 (1936).

**Rule 7. Substitution of party.**

Upon the death or disability of a party to a proceeding governed by these rules, or upon the assignment, transfer, or the accession to the interest or office of party to a proceeding governed by these rules by another person, the representative, or successor in interest of such party shall file a notification of substitution of party and serve the same on all parties to the proceeding or appeal. The substitution shall be effective unless an objection thereto is made within fourteen (14) days of service, by a motion to disallow such substitution, in the manner provided for motions under Rule 32. (Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS	
Applicability. Discretion of Court.	merely wished to conclude the criminal proceeding. State v. Korsen, 141 Idaho 445, 111 P.3d 130 (2005).
<b>Applicability.</b>	<b>Discretion of Court.</b>
Shortly after defendant was released from prison, and while his appeal was still pending, he died; substitution under Idaho App. R. 7 was not necessary in the circumstances of the case, where the attorney for the deceased had not been granted leave to withdraw and	Where a party dies while his appeal is pending and no notification of substitution of party is filed, the appellate court has the discretion under this rule either to consider the merits of the appeal or to dismiss the appeal. Dypwick v. Swift Transp. Co., 147 Idaho 347, 209 P.3d 644 (2009).

**Rule 7.1. Intervention.**

Any person or entity who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or proceeding under these rules may file a verified petition with the Supreme Court asking for leave to intervene as a party to the appeal or proceeding and serve a copy thereof upon all parties to the appeal or proceeding. The petition shall be processed as a motion in accordance with Rule 32 of these rules, and if the Supreme Court finds that such petitioning person or entity is a real party in interest or would be



affected by the outcome of the appeal or proceeding, the Court may, in its discretion, grant leave to the petitioning party to intervene as a party appellant or respondent; and if leave is so granted such petitioning party shall thereafter be a party to the appeal or proceedings for all purposes under these rules. (Adopted April 11, 1979, effective July 1, 1979.)

### JUDICIAL DECISIONS

#### **Party Properly Before the Court.**

An appellate court will not grant relief to an appellant as against another party who is not properly brought before the court as a respon-

dent. *Security Pac. Bank v. Curtis*, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993).

**Cited in:** *Kinghorn v. Clay*, — Idaho —, 283 P.3d 779 (2012).

#### **Rule 8. Amicus curiae.**

An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by leave of the Supreme Court upon written application served upon all parties, setting forth the particular employment, if any, the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear. The application shall also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the application in the manner provided for motions under Rule 32. Leave to appear as amicus curiae shall be by written order of the Supreme Court which shall specify the manner of appearance by the amicus curiae attorney and state the time for filing of any amicus curiae brief. (Adopted March 25, 1977, effective July 1, 1977; amended April 18, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990.)

### STATUTORY NOTES

**Cross References.** Extension of time for filing brief, I.A.R., Rule 34(e).

#### **Rule 9. Appearance of attorneys not licensed in Idaho.**

Upon written motion of a licensed Idaho attorney, at least 14 days before a hearing or argument, and upon order of the Supreme Court an attorney not licensed in Idaho may be permitted to appear and argue before the Supreme Court in association with such Idaho licensed attorney. The motion, or a supporting statement, shall certify that the attorney not licensed in Idaho is a licensed attorney in good standing in another specific state or jurisdiction. If an attorney is granted pro hac vice admission pursuant to Idaho Bar Commission Rule to appear in any case, then the attorney may continue to appear in that case before the Supreme Court without obtaining an order pursuant to this rule. (Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986; amended November 20, 2012, effective January 1, 2013.)

**Rule 10. Hearings by the Supreme Court.**

The Supreme Court shall hold terms of Court as provided by the Idaho constitution, the statutes of the state of Idaho and the rules of the Supreme Court, and will hear appeals and petitions in accordance with the following procedure:

(a) **Terms of Court.** The Supreme Court will hold terms of Court as required by the Idaho Constitution and such other terms as may be set by the Court. In addition, the Supreme Court may set cases individually for hearing or argument. Changes in the terms of Court may be made by order of the Supreme Court.

(b) **Hearing Appeals Outside of Terms of Court.** The Court may set and hear appeals and petitions before a quorum of the Court at any time and at any place within the state of Idaho.

(c) **Register of Actions.** The Clerk shall number consecutively and enter all cases in a Register of Actions in the order of the filing with the Supreme Court of the initial document in each proceeding. All cases will be heard in the division and in the order in which they come at issue, unless otherwise ordered. Provided, the Clerk shall, upon order of the Court, transfer the appeal filed in any division to a special calendar of the Court of expedited appeals for hearing in Boise or at such other place as the Court may order.

(d) **Divisions and Calendars.** There shall be five appellate divisions in the state and calendars of appeals as follows:

(1) The Coeur d'Alene division calendars shall contain all appeals filed in the counties of the First Judicial District.

(2) The Lewiston division calendars shall contain all appeals filed in the counties of the Second Judicial District.

(3) The Boise division calendars shall contain all appeals filed in the counties of the Third and Fourth Judicial Districts.

(4) The Twin Falls division calendars shall contain all appeals filed in the counties of the Fifth Judicial District.

(5) The Pocatello division calendars shall contain all appeals filed in the counties of the Sixth and Seventh Judicial District.

(e) **Expedited Calendar.** There shall be an additional calendar of expedited appeals and petitions for hearing in Boise or at such other place as ordered by the Court, and the Clerk shall transfer such appeals and petitions from any of the above divisions to the expedited calendar as directed by the Court. (Adopted March 25, 1977, effective July 1, 1977; amended March 26, 1992, effective July 1, 1992.)

**Rule 11. Appealable judgments and orders.**

An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:

(a) **Civil Actions.** From the following judgments and orders of a district court in a civil action:

(1) Final judgments, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure including judgments of the district court granting or denying peremptory writs of mandate and prohibition.

(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

(6) An order granting or denying a motion for judgment notwithstanding the verdict.

(7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

(8) Any order appealable under the Uniform Arbitration Act, Title Seven, Chapter 9 of the Idaho Code.

(9) A district court order designating a person a vexatious litigant pursuant to Idaho Court Administrative Rule 59, in which case the notice of appeal may be filed with either the district court clerk or the Clerk of the Supreme Court.

(b) **Probate Proceedings.** From any interlocutory or final judgment or order made after final judgment of a district court in a probate proceeding, whether original or appellate, which is or would be appealable from the magistrates division to the district court by statute or these rules.

(c) **Criminal Proceedings.** From the following judgments and orders of the district court in a criminal action, whether or not the trial court retains jurisdiction:

(1) Final judgments of conviction.

(2) An order granting or denying a withheld judgment on a verdict or plea of guilty.

(3) An order granting a motion to dismiss an information or complaint.

(4) Any order or judgment, whenever entered and however denominated, terminating a criminal action, provided that this provision shall not authorize a new trial in any case where the constitutional guarantee against double jeopardy would otherwise prevent a second trial.

(5) Any order, however denominated, reducing a charge of criminal conduct over the objection of the prosecutor.

(6) Any judgment imposing sentence after conviction, except a sentence imposing the death penalty which shall not be appealable until the death warrant is issued as provided by statute.

(7) An order granting a motion to suppress evidence.

(8) An order granting or denying a motion for new trial.

(9) Any order made after judgment affecting the substantial rights of the defendant or the state.

(10) Decisions by the district court on criminal appeals from a magistrate, either dismissing the appeal or affirming, reversing or remanding.

(d) **Administrative Proceedings — Industrial Commission.** From any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency.

(e) **Administrative Proceedings — Public Utilities Commission.** From any decision or order of the Public Utilities Commission which is appealable to the Supreme Court by statute.

(f) **Administrative Proceedings — Judicial Review of Agency Decisions.** From any final decision or order of the district court on judicial review of an agency decision.

(g) **Cross-appeals and additional issues on appeal.** After an appeal has been filed from a judgment or order specified above in this rule, a timely cross-appeal may be filed from any interlocutory or final judgment order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 20, 1991, effective July 1, 1991; amended March 9, 1999, effective July 1, 1999; amended January 30, 2001, effective July 1, 2001; amended March 21, 2007, effective July 1, 2007; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013.)

STATUTORY NOTES

**Cross References.** Appeals from district court to Supreme Court, § 13-201.

JUDICIAL DECISIONS

ANALYSIS	
Additur or New Trial.	Interlocutory Orders.
Ambiguity in Sentence.	Judgment Notwithstanding Verdict.
Appeal by Certification.	Judgment of Conviction.
Appealability.	Jurisdiction of Court.
Attorney's Fees.	Jury Verdict.
Confiscation Order.	Legality of Sentence.
Construction.	Memorandum Decision.
Contempt Order.	Motion to Withdraw Guilty Plea.
Cross-Appeal.	Order Denying Copy of Report.
Default Orders.	Order Denying Leave to Amend.
Denial of Attorney Fees.	Order Denying Transcript.
Denial of Motion to Set Aside.	Order for Trial De Novo.
Determination of Employee's Rights.	Order of Industrial Commission.
Dismissal of Criminal Prosecution.	Order of Probation.
Final Judgment.	Order Revoking Probation.
Industrial Commission Decisions.	Order Suppressing Evidence.
	Partial Summary Judgment.
	Partition Proceedings.



Proper Procedure.  
Reduction of Charge.  
Restitution Order.  
Sanctions.  
Summary Judgment.  
Time for Perfecting Appeal.

### **Additur or New Trial.**

The district court determined that since the total amount the jury was awarded was less than half of what it could have awarded, and the award shocked the district court, it did not abuse its discretion in granting additur or in the alternative a new trial. *Collins v. Jones*, 131 Idaho 556, 961 P.2d 647 (1998).

### **Ambiguity in Sentence.**

Where the trial judge in pronouncing a sentence referred to burglary in the second degree instead of murder in the second degree, his slip of the tongue was not such as to create an ambiguity in sentencing which justified an appeal. *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982).

Where the trial judge in pronouncing a sentence erroneously referred to the "state correctional institution" instead of the "state board of correction" he did not create an ambiguity in the sentence which required appellate interference since no one was misled by the slip of the tongue. *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982).

### **Appeal by Certification.**

It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts; no single factor is controlling in the court's decision of acceptance or rejection of an appeal by certification, but the court intends by I.A.R. 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under this rule. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983).

### **Appealability.**

After July 1, 1977, this rule will govern appealability of an order dismissing an information for lack of a speedy trial. *State v. Daugherty*, 98 Idaho 716, 571 P.2d 777 (1977).

Since an order denying posttrial motions is one made after final judgment, it is appealable, whether or not it is meritorious. *Wheeler*

*v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

Where the judgment provides, among other things, both a finding of no just reason for delay and an order that the judgment be entered, it is held that this language satisfied the requirements of 54(b), I.R.C.P., and consequently was a final appealable judgment as defined by subdivision (a)(2) of this rule. *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979).

An order of a district court upon appeal, remanding the matter to the magistrate division, is appealable to the Supreme Court as a matter of right under subdivision (a)(1) of this rule. *Duff v. Bonner Bldg. Supply, Inc.*, 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982), *aff'd*, 105 Idaho 123, 666 P.2d 650 (1983).

An order denying a motion for reduction of sentence under I.C.R. 35 is appealable under subdivision (c)(6) of this rule, but where the Rule 35 motion had not been made — much less decided — when the notice of appeal was filed, the untimely appeal from the original judgment could not be viewed as appeal from the Rule 35 order. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

Where no appeal was taken from the judgment of conviction but, rather, appeal was from an order revoking probation, the issues on appeal were confined to that order; because defendant did not appeal when the sentences were initially pronounced, he could not later challenge their reasonableness at that time. *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983).

An order is final and appealable when it fully and finally resolves all the issues of a case, and whether an order is final and appealable must be determined by its content and substance, and not by its title. *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 682 P.2d 91 (1984).

An appeal taken from a nonappealable order does not divest the lower court of continuing jurisdiction in the case. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

A district judge's memorandum decision is not appealable unless it disposes of an appeal from the magistrate division; when a district court acts as a trial court, an appeal may be taken only from a final judgment or as otherwise provided in this rule and I.A.R. 12. *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 702 P.2d 922 (Ct. App. 1985).

The amended judgment, which set forth the terms of probation, was a final judgment of conviction and was appealable under subdivision (c)(1) and (6) of this rule. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

An order “remanding an appeal” is appealable to the Supreme Court as a matter of right. *H & V Eng’g, Inc. v. Idaho State Bd. of Professional Eng’rs & Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987).

Under the provisions of this rule, decisions by the district court dismissing, affirming, reversing, or remanding on appeal are appealable. *H & V Eng’g, Inc. v. Idaho State Bd. of Professional Eng’rs & Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987).

An appeal may be taken from a judgment of contempt. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

Where the district court entered an order that appellate fees and costs were not waived, after the Supreme Court had dismissed the original action and entered an order waiving only the filing fee for that appeal, the district court order was deemed to involve a separately appealable order “made after final judgment,” even though an appeal is deemed to include all interlocutory or final orders entered after the order appealed from, as the Supreme Court by its own order, (a) treated the matter as a discrete appeal by giving it a designation and a case number separate from the earlier appeal, (b) assigned the action to the Court of Appeals for determination, and (c) suspended further proceedings in the earlier action until the instant appeal was decided. *Madsen v. Idaho Dep’t of Health & Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

Once the state has taken an appeal from an order granting a motion to suppress under subdivision (c)(7) of this rule and an appellate decision is obtained, then subdivision (c)(10) of this rule is triggered and allows further appellate review. *State v. McAfee*, 116 Idaho 1007, 783 P.2d 874 (Ct. App. 1989).

A summary disposition would not have entitled defendant to appeal under subdivision (c)(9) of this Rule because it would not have been an order entered after judgment affecting substantial rights of the defendant, since defendant had no right to file what was essentially a renewed I.C.R. 35 motion. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

Referee’s order denying motion to compel discovery was not a final decision of the Commission, therefore, there was no right to appeal from the referee’s order. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 812 P.2d 276 (1991).

Where the district court entered no order on the I.C.R. Rule 35 motion, but rather deferred ruling on the matter until it could receive further information concerning the timeliness of the motion, there was no order within the

meaning of subdivision (c) of this rule from which defendant could appeal because there was no order entered on the Rule 35 motion either granting or denying the motion. *State v. Ochoa*, 121 Idaho 536, 826 P.2d 497 (Ct. App. 1992).

A motion for reconsideration of a denial of a motion for a reduction of a sentence is a renewed motion under Rule 35 and is not permitted, but where the court nonetheless entertains such a motion and denies it on its merits, the court’s exercise of discretion in that regard may be asserted as an issue on appeal. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

Defendant’s second motion to reduce his sentence was not an order entered after judgment affecting substantial rights of the defendant, because defendant had no right to file a renewed motion; therefore, defendant was not entitled to appeal the order under this rule. *State v. Atwood*, 122 Idaho 199, 832 P.2d 1134 (Ct. App. 1992).

The order to dismiss charges against defendant was an order terminating a criminal action, which was an appealable order pursuant to this rule. While the state might have objected to the condition of the probation order that defendant could withdraw his guilty plea after completion of probation; the state’s failure to object to this condition at the time of the entry of the probation order did not remove its right to later appeal the order of dismissal. *State v. Funk*, 123 Idaho 967, 855 P.2d 52 (1993).

Where the district court found that defendant’s attorney had fulfilled his obligation to notify defendant of his right to appeal, of the options available, and had candidly discussed the probable results of each course of action, and the court further found that, although defendant may have “wanted to appeal,” he failed to direct his attorney to, so the district court’s findings, made after conducting the evidentiary hearing, are supported by substantial, even if conflicting, evidence. *Fox v. State*, 125 Idaho 672, 873 P.2d 926 (Ct. App. 1994).

The denial of a motion for directed verdict is not a final order independently appealable under this rule; hence a motion for directed verdict which was denied by the district court is reviewable, as are other interlocutory orders, pursuant to the later appealable order. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Order for change of venue issued during a child custody and support modification proceeding was not immediately appealable as an order made after final judgment. *Rake v. Rake*, 142 Idaho 83, 123 P.3d 716 (Ct. App. 2005).

Because motion to confirm and arbitrator's award were filed, and granted, under I.C. § 7-911, they were appealable as a matter of right under Idaho App. R. 11(a)(8) and I.C. § 7-919(a)(3). *Harrison v. Certain Underwriters at Lloyd's*, 149 Idaho 201, 233 P.3d 132 (2010).

#### **Attorney's Fees.**

Separate certification of finality was not required for the order awarding attorney fees to be appealable when entered. *Wilsey v. Fielding*, 115 Idaho 437, 767 P.2d 280 (Ct. App. 1989).

#### **Confiscation Order.**

Where court order allowed confiscation of defendant's firearm, subdivision (c)(6) of this rule authorized an appeal. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

#### **Construction.**

The 1987 amendment of subdivision (a)(5) of this rule to include "such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur" does not describe a new category of orders that are appealable, but only clarifies that an order granting or refusing a new trial is appealable, even when the order includes the condition that the grant or denial is subject to additur or remittitur. *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988).

The reference in subdivision (c)(9) of this rule to "the state" refers to the state as that entity which is the plaintiff in all criminal actions, "the people of the State of Idaho." To hold that any subdivision of state government is provided an independent basis for appeal under subdivision (c)(9) urges a meaning which is contrary to both the plain meaning and intent of this rule. *State v. State, Dep't of Health & Welfare*, 125 Idaho 227, 869 P.2d 227 (1994).

The filing of a notice of appeal which is based upon an appealable order under this rule has the effect of staying the proceedings before the district court. *State v. Schwarz*, 133 Idaho 463, 988 P.2d 689 (1999).

#### **Contempt Order.**

Since there is no appeal as of right from a contempt order, an attempt to appeal from such an order did not divest the jurisdiction of the magistrate under I.A.R. 13(b). *Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983).

District court's order denying contempt motion was an interlocutory order, entered prior to final disposition of an appeal pending in the district court, and interlocutory orders are appealable only if allowed by the Idaho Appel-

late Rules. This rule specifies the judgments, orders and decisions from which appeals can be taken, and this rule does not include, as an appealable item, an order denying a motion for contempt. *Sivak v. State*, 119 Idaho 211, 804 P.2d 940 (Ct. App. 1991).

A contempt order of a magistrate judge that is certified by the magistrate judge to be final as provided by I.R.C.P. 54(b) is appealable to the district judge. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

A writ of review is a proper method to seek a higher court's review of a lower court's jurisdiction to issue a contempt order. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

If a contempt order is properly certified to be final, the party who seeks review of the order must appeal, rather than pursuing a writ of review; however, if a party wishes only to challenge the jurisdiction of the court to issue the contempt order, and if the order has not been properly certified as final pursuant to I.R.C.P. 54(b), the party may pursue a writ of review. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

Where defendant did not request certification of the magistrate judge's finding of contempt and order pursuant to I.R.C.P. 54(b), defendant did not have the right to appeal, but only to challenge, by means of a writ of review, the magistrate judge's jurisdiction to issue a contempt order. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

#### **Cross-Appeal.**

A cross-appeal is required only when the respondent seeks to change or add to the relief afforded below, but not when it merely seeks to sustain a judgment for reasons presented at trial which were not relied upon by the trial judge but should have been. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987).

Where the defendant pleaded the statute of limitations defense to the trial court, and it was only seeking an affirmation of the trial court's granting of summary judgment, the statute of limitations defense was properly before the Supreme Court, and there was no necessity for a cross-appeal in order to preserve that issue. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987).

Owners of a company were not required to file a cross-appeal under Idaho App. R. 11(g) to challenge the district court's denial of their motion to strike the purchaser's motion to vacate or modify an arbitration award on claims against an escrow account arising from the sale of the company as they were not seeking to add to the relief granted in the district court, but were seeking to sustain the



judgment for a reason presented to, but rejected by that court. *Driver v. SI Corp.*, 139 Idaho 423, 80 P.3d 1024 (2003).

The state was not required to file a cross appeal under Idaho App. R. 15(a) or paragraph (g) of this rule, where the state did not seek to reverse, vacate, or modify the district court's denial of the defendant's petition. The state merely urged affirmance of that denial and asserted an alternate basis for upholding the judgment. *Leer v. State*, 148 Idaho 112, 218 P.3d 1173 (2009).

#### **Default Orders.**

Default orders require distinction between entry of default and entry of judgment on the default. Entry of default, or refusal to enter default, are interlocutory. This is in sharp contrast to a default judgment which is a final disposition of the case and an appealable order. *Earth Resources Co. v. Mountain States Mineral Enters., Inc.*, 106 Idaho 864, 683 P.2d 900 (Ct. App. 1984).

#### **Denial of Attorney Fees.**

An order denying attorney fees is appealable and where notice of appeal was filed within 42 days of court's order denying attorney fees, court had jurisdiction to consider the appeal as it related to the order denying attorney fees. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

#### **Denial of Motion to Set Aside.**

An order denying a motion to set aside an earlier order of default is not appealable. *Earth Resources Co. v. Mountain States Mineral Enters., Inc.*, 106 Idaho 864, 683 P.2d 900 (Ct. App. 1984).

#### **Determination of Employee's Rights.**

The trial court's determination of who was liable for payment of workers' compensation benefits to injured employee was not a final determination of employee's rights where the amount of compensation to which employee was entitled had not yet been determined. *Lines v. Idaho Forest Indus.*, 125 Idaho 462, 872 P.2d 725 (1994).

#### **Dismissal of Criminal Prosecution.**

The Supreme Court would not give subdivision (c)(6) of this rule a construction which would allow the state an appeal when a rape prosecution was dismissed subsequent to a guilty verdict but prior to entry of judgment, nor would the court exercise its plenary power to review such a dismissal since nothing in the record or historical Idaho jurisprudence suggested that post guilty verdict dismissals have been frequent or are likely to become frequent, and thus, the case did not present a recurring question, the resolution of which

would be of substantial importance in the administration of justice in this state. *State v. Dennard*, 102 Idaho 824, 642 P.2d 61 (1982).

An order denying a motion to dismiss the information is a nonappealable order under this rule. *State v. Hoffman*, 104 Idaho 510, 660 P.2d 1353 (1983).

#### **Final Judgment.**

If the instrument "ends the suit," "adjudicate[s] the subject matter of the controversy," and represents a "final determination of the rights of the parties," the instrument constitutes a final judgment regardless of its title. *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

The final judgment or decree to which subdivision (a)(1) of this rule refers means a final determination of the rights of the parties. *Nelson v. Whitesides*, 103 Idaho 374, 647 P.2d 1246 (1982).

In a personal injury action arising out of a one-car accident brought by the passenger against the minor driver, in which the minor's father was named as a codefendant on the basis of § 49-313 (now § 49-310), where the plaintiff moved for partial summary judgment against the father and he countered with a pleading denominated a "petition for declaratory judgment," by which he sought determination of the extent of his liability under § 49-313 (now § 49-310), the trial court's order purporting to determine the extent of such liability could not be considered a declaratory order or judgment under § 10-1207, nor was it in the nature of a final judgment or decree subject to review under subdivision (a)(1) of this rule; rather, it remained subject to review and revision in the trial court so long as the jurisdiction of that court continued. *Nelson v. Whitesides*, 103 Idaho 374, 647 P.2d 1246 (1982).

The judgment of conviction which included the sentencing order, was a final judgment for purposes of appeal. Placing defendant on probation did not affect the finality of the judgment of conviction and sentence, for the purpose of appeal. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

An order denying a motion for summary judgment is not a final order and a direct appeal ordinarily cannot be taken from it. Moreover, an order denying a motion for summary judgment is not reviewable on appeal from a final judgment. *Evans v. Jensen*, 103 Idaho 937, 655 P.2d 454 (Ct. App. 1982).

A judgment was final, as required for appealability under this rule, although the judgment adjudicated less than all claims asserted in the lawsuit, it disposed of all remaining claims, leaving none pending; therefore, it was of no consequence that the



judgment was not certified as final under I.R.C.P. 54(b). *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985).

Since order denying worker's motion to reconsider the motion to change caption did not finally dispose of all of worker's claims, and since the Industrial Commission retained jurisdiction in order to determine the amount of benefits to which worker was entitled, order denying the motion to reconsider was not a final decision or order for purposes of subdivision (d) of this rule. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

As a result of the district court vacating its own order, there was no final judgment from which taxpayer could have appealed. Therefore, the Supreme Court of Idaho rejected the State Tax Commission's argument that the district court was precluded from remanding a first notice of tax deficiency back to the Board of Tax Appeals because taxpayer failed to appeal. The law of the case did not preclude the district court from remanding the first notice of deficiency back to the Board of Tax Appeals. *Grand Canyon Dories v. Idaho State Tax Comm'n*, 124 Idaho 1, 855 P.2d 462 (1993).

Claimant could not appeal referee's denial of his request to reopen his workers' compensation case because the Industrial Commission did not approve and confirm the denial and thus order was not appealable because it was not an order of the Commission, but only of the referee. *Wheaton v. Industrial Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

The commission did not adopt, approve, or confirm the referee's ruling on the admissibility of the testimony of the witness and the Findings of Fact, Conclusions of Law, and Proposed Order contained no reference to the referee's decision regarding the testimony of the witness, nor did the record indicate that the plaintiff sought, at any time, to bring the ruling to the Commission's attention, either by filing a motion to reconsider or by arguing the issue in a post-hearing briefing. Thus, since the Commission did not specifically approve or adopt the referee's ruling, and it was not a final appealable order pursuant to subsection (d) of this section. *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

Decision of the Idaho Industrial Commission was not a final appealable order when the commission could not establish from the record the extent of the Industrial Special Indemnity Fund's liability, and retained jurisdiction over the issue to enable the parties to resolve the matter or present additional evidence for consideration; the Commission spe-

cifically declined to consider certain issues and the resolution of these issues was necessary for a "final order" within the meaning of subsection (d) of this rule. *Hartman v. Double L Mfg.*, 141 Idaho 456, 111 P.3d 141 (2005).

Post-conviction petitioner's notice of appeal from a district court's notice of intent to dismiss, though premature and interlocutory in nature, was nevertheless sufficient to effectuate an appeal from a final order dismissing the petition four days after the petitioner's notice of appeal was filed. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

### **Industrial Commission Decisions.**

A decision of the Industrial Commission which does not finally dispose of all of the claimant's claims would not be a final decision subject to appeal pursuant to subsection (d) of this rule, particularly where the Industrial Commission did not rule on the issue of income benefits and expressly retained jurisdiction. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 795 P.2d 309 (1990).

### **Interlocutory Orders.**

In civil actions, except for certain designated orders, interlocutory rulings are not appealable unless certified for appeal as partial judgments; otherwise, only final judgments are appealable. *Valley Bank v. Dalton*, 110 Idaho 87, 714 P.2d 56 (Ct. App. 1985).

Where case came to Court of Appeals from the granting of a motion for a new trial, this was an appealable order under subdivision (a)(5) of this rule, and as such, was deemed also to include and present all interlocutory judgments, orders, and decrees; therefore, the court was free to examine the propriety of the trial court's earlier denials of directed verdict and summary judgment motions filed by the defendants. *Umphenour v. Yokum*, 118 Idaho 102, 794 P.2d 1158 (Ct. App. 1990).

This rule specifically authorizes an interlocutory appeal from "an order granting a motion to suppress." However, such an appeal must have been perfected by filing a notice of appeal within 42 days from the date of the court's order suppressing the evidence obtained during the execution of the search warrant. *Richardson v. \$4,543.00 U.S. Currency*, 120 Idaho 220, 814 P.2d 952 (Ct. App. 1991).

State could not have appealed an order granting an in-camera hearing and concluding that defendant had met the threshold showing and was entitled to a Franks hearing because it was not an appealable order according to I.A.R. 11(c), and the State was not required to cross-appeal the order under I.A.R. 15(a) when defendant appealed his later convictions because the State was not

seeking affirmative relief. *State v. Fisher*, 140 Idaho 365, 93 P.3d 696 (2004).

The general rule is that interlocutory orders are not appealable and the Supreme Court declined to adopt an exception to this rule to allow an appeal of a summary judgment made strictly on a point of law which would preclude the losing party from offering evidence or urging the point at trial. *Garcia v. Windley*, 144 Idaho 539, 164 P.3d 819 (2007).

#### **Judgment Notwithstanding Verdict.**

Upon the filing of a notice of appeal by defendants of an order granting a motion for JNOV, which defendants had the right to file under this rule, the trial court was divested of jurisdiction except for actions under Idaho App. R. 13(b); hence, the trial court did not have the authority to enter a later judgment. *Mosell Equities, LLC v. Berryhill & Co.*, — Idaho —, 297 P.3d 232 (2013).

#### **Judgment of Conviction.**

Where prior to trial the defendant moved to dismiss one of the counts against him on the grounds that the evidence produced at the preliminary hearing did not establish probable cause, the trial court's denial of the motion to dismiss that count was not an appealable order, since as to that count the defendant was not appealing from a judgment of conviction — because the jury failed to reach a verdict on that count — nor was he appealing from any other final order in respect to that count. *State v. Garner*, 103 Idaho 468, 649 P.2d 1224 (Ct. App. 1982).

#### **Jurisdiction of Court.**

Because the question of jurisdiction on appeal from a conviction is fundamental, it must not be ignored when brought to the attention of the Court of Appeals, and should be addressed before considering the merits of the substantive appeal. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

Where, in a criminal case which began in the magistrates division and was appealed from there to the district court, the record as certified by the clerk of the district court did not contain any judgments entered prior to the district court decision, the record did not establish the appellate jurisdiction of the district court and the district court decision on appeal had to be vacated. It necessarily followed that appeal to the Supreme Court as a matter of right on the merits did not exist. *State v. Mason*, 102 Idaho 866, 643 P.2d 78 (1982).

The Court of Appeals lacked jurisdiction, where the default judgment did not resolve all claims asserted by the plaintiffs, it resolved none of the claims against one defendant and

it contained no definitive ruling on either defendant's liability for damages, the judgment was not certified, and claims not resolved by the judgment were still pending in the district court. *Wilson v. Bivins*, 113 Idaho 865, 749 P.2d 4 (Ct. App. 1988).

The Supreme Court declined to exercise its constitutional plenary power to review rulings on motions in limine where the issues of the exclusion of bad acts evidence and the confidentiality and privilege of communications with, and reports from, mental health professionals the defendant had previously consulted were not significant enough to warrant the exercise of such jurisdiction. *State v. Young*, 133 Idaho 177, 983 P.2d 831 (1999).

Trial court properly denied defendant's motion to withdraw his guilty plea because the trial court was without jurisdiction to consider the motion because the motion was untimely, having been filed nearly five months after the entry of the withheld judgment. Because defendant did not appeal the order withholding judgment, although he could have pursuant to Idaho App. R. 11(c)(2), it was final 42 days after entry. *State v. Woodbury*, 141 Idaho 547, 112 P.3d 835 (Ct. App. 2005).

Defendant failed to timely file a notice of appeal from district court's appellate decision affirming magistrate's denial of his motion to suppress, choosing instead to proceed on remand to the magistrate in defense of the underlying charge. Court of appeals therefore lacked subject matter jurisdiction over defendant's appeal of magistrate's order. Because defendant did not assert that he would raise any other issues if provided with the opportunity to appeal to the district court the magistrate's final judgment, remand was inappropriate, and his appeal was dismissed. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

Supreme court had jurisdiction over the appeal of the trial court's granting of defendant's motion to suppress, even though the defendant never filed such a motion; both parties proceeded as if a motion had been filed, both briefed the nonexistent motion, and the trial court granted the motion. *State v. Koivu*, 152 Idaho 511, 272 P.3d 483 (2012).

#### **Jury Verdict.**

A verdict is not the final action which occurs in litigation; in fact verdicts can be set aside for many reasons, before a final judgment, order or decree is entered. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

A "verdict of the jury" is not included in the list of appealable matters contained in subsection (c) of this rule, and it is not a judgment, order or decree of the district court from which an appeal can be taken. A verdict,

as such, is not appealable; only a judgment rendered on the verdict is appealable. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

Where the defendant filed his appeal after the jury verdict but prior to the entry of judgment of conviction and he failed to amend his notice of appeal following entry of the judgment of conviction, the Court of Appeals could not consider the appeal as it had no jurisdiction on an appeal from a mere verdict. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

#### **Legality of Sentence.**

If objection to the illegality of a sentence has not been otherwise raised before the trial court by either the state or the defendant, it may not be raised for the first time on appeal. The state or a defendant may challenge the legality of the sentence in the trial court under I.C.R. 35 and appeal from the trial court's ruling if necessary. *State v. Martin*, 119 Idaho 577, 808 P.2d 1322 (1991).

#### **Memorandum Decision.**

Where a trial court's memorandum decision clearly granted defendant's motion to dismiss an information, it was an appealable order. *State v. Schulz*, 151 Idaho 863, 264 P.3d 970 (2011).

#### **Motion to Withdraw Guilty Plea.**

Where defendant entered plea of guilty pursuant to written plea agreement to charge of second degree murder and after presentence report was received but prior to sentencing she moved to withdraw her guilty plea, where record showed that defendant understood the nature of the charge and the evidence against her, understood that the possible penalty was an indeterminate ten years to life, understood the nature of an Alford plea, had been adequately informed regarding the intent element of second degree murder and entered her guilty plea intelligently and voluntarily, district court did not err in concluding that defendant presented no justifiable reason for granting her motion. *State v. Hansen*, 120 Idaho 286, 815 P.2d 484 (Ct. App. 1991).

#### **Order Denying Copy of Report.**

An order denying defendant's motion for a copy of his presentence investigation report was not a "final" judgment or order from which an appeal may be taken. *State v. Adams*, 115 Idaho 724, 769 P.2d 601 (Ct. App. 1989).

A defendant who had failed to raise objections at his sentencing hearing that certain information in a presentence investigative report was incomplete or inaccurate, and who

did not show he had any right to raise such sentencing issues at a post-conviction relief proceeding, was properly deemed to have shown no genuine need for a copy of his presentence report; district court's order denying defendant's motion for a copy of the report did not effect his "substantial rights" within the meaning of this rule. *State v. Adams*, 115 Idaho 724, 769 P.2d 601 (Ct. App. 1989).

#### **Order Denying Leave to Amend.**

An order denying leave to amend a third party complaint is not an appealable order under this rule. *Mitchell v. Bingham Mechanical & Metal Prods., Inc.*, 99 Idaho 516, 584 P.2d 1241 (1978).

#### **Order Denying Transcript.**

Order denying a transcript was not a final order disposing of a case, where a final and unappealed judgment already had been entered in the criminal prosecution, and no new action was pending when the transcript order was entered. *State v. McRoberts*, 114 Idaho 459, 757 P.2d 722 (Ct. App. 1988).

#### **Order for Trial De Novo.**

Where the district court was to retain jurisdiction and conduct a trial de novo of a divorce action to finally settle a controversy over property which, on the state of the record and in view of the nature of the findings of the court below, was not susceptible of final resolution, the order for a trial de novo, which the district court was empowered to enter, precluded the decision from being appealable; furthermore, the "reversal" of the magistrate did not render the decision appealable. *Winn v. Winn*, 101 Idaho 270, 611 P.2d 1055 (1980).

This rule contains no provision permitting an appeal from an order entered under I.R.C.P. 83(b) through (u), and § 1-2213 for a trial de novo. *Winn v. Winn*, 101 Idaho 270, 611 P.2d 1055 (1980).

Because this rule contains no provision permitting an appeal from an order for a trial de novo, such an order is not appealable. *Latham Motors, Inc. v. Phillips*, 123 Idaho 689, 851 P.2d 985 (Ct. App. 1993).

#### **Order of Industrial Commission.**

An order of the Industrial Commission which stated that the Industrial Commission did not have authority to entertain a class action type proceeding functioned as a dismissal on jurisdictional grounds and therefore was a final order of the Industrial Commission properly appealable to the Supreme Court. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

Where the Industrial Commission failed to resolve all the issues arising from claimants



1987 industrial accident and it specifically declined to consider certain issues stating, “[t]he Commission reserves jurisdiction on the issues of permanent physical impairment and permanent partial disability regarding claimant’s wrist and arm,” the resolution of these issues was necessary for a “final order” within the meaning of this Rule and consequently, the controversy was not presently subject to appeal as a matter of right pursuant to this Rule. *Jensen v. Pillsbury Co.*, 121 Idaho 127, 823 P.2d 161 (1992).

State Industrial Commission’s determination that beauty salon owner was liable for unemployment insurance contributions on wages paid to cosmetologists was not a final order subject to appeal where commission did not determine the period for which contributions were due or the amount of owner’s liability. *State, Dep’t of Emp. v. Hopper*, 126 Idaho 144, 879 P.2d 1077 (1994).

#### **Order of Probation.**

An order of the trial court suspending the execution of sentence and placing the defendant on probation is appealable by the State as a matter of right under subdivision (c)(6) of this rule and § 19-2801, rather than as a matter of discretion. *State v. Greene*, 102 Idaho 897, 643 P.2d 1067 (1982).

Pursuant to Idaho App. R. 11(c)(2), an order withholding judgment is a de facto judgment for purposes of appeal, meaning that the defendant may appeal even though the order is not a final judgment in the usual sense. *State v. Woodbury*, 141 Idaho 547, 112 P.3d 835 (Ct. App. 2005).

#### **Order Revoking Probation.**

An order revoking probation is an order affecting the substantial rights of the defendant. *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983).

#### **Order Suppressing Evidence.**

Subdivision (c)(4) of this rule does not qualify or condition the right of appeal upon a subsequent entry of final judgment of conviction, nor does it state that such an appeal must be taken immediately upon entry of the order granting the motion; accordingly, the state’s appeal was properly taken as to order suppressing evidence, even though the trial court dismissed case with prejudice and acquitted defendant. *State v. Alanis*, 109 Idaho 884, 712 P.2d 585 (1985).

Where the basis for the defendant’s motion in limine was that the statements were extracted by the officers in violation of his constitutional rights, the thrust of the motion was to invoke the exclusionary rule to suppress otherwise admissible evidence, and it

was properly regarded as a suppression motion and appealed under subdivision (c)(4) of this section. *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987).

Appellate court had jurisdiction to hear the State’s appeals of the granting of defendants’ motions to suppress where the orders granting the motions to suppress were interlocutory orders and were not transformed into final judgments because I.A.R. 11(c)(7) and 14(a) granted the State the right to appeal such orders simply by filing a notice of appeal within 42 days; no final judgments had yet been entered in either of the cases, such that the cases did not involve the failure to file a timely notice of appeal from a final judgment. *State v. Bicknell*, 140 Idaho 201, 91 P.3d 1105 (2004).

#### **Partial Summary Judgment.**

An examination of a somewhat confused record shows that the “partial summary judgment” was intended as a final judgment: it disposed of the substantive issues, leaving for determination only the issue of “attorney’s fees and costs of suit,” not only determining that appellant is liable on the dishonored check and establishing the amount of the damages, but also calculating interest on the amount of the liability; if the court had truly granted a partial summary judgment it would not have calculated interest until entry of a subsequent final judgment. *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

If the “partial summary judgment” were only that, the court would not have granted a “stay of execution” pending a ruling on the motion to reconsider the decision; there can be no execution on a money judgment not yet final. *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

In order for the “partial summary judgment” to be appealable, it must come within this rule’s provisions allowing appeals either from “final judgments” or from “[j]udgments made pursuant to a partial summary judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.” *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

Partial summary judgments must be certified in conformance with I.R.C.P. 54(b) in order to be appealable. *Loomis, Inc. v. Cudahy*, 101 Idaho 459, 615 P.2d 128 (1980).

Where first summary judgment did not resolve all substantive issues, it was interlocutory and not immediately appealable; the time for appealing it did not start to run until second summary judgment resolving remaining issues was entered. *IBM Corp. v.*



Lawhorn, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984).

Although the denial of a motion for summary judgment is ordinarily both nonappealable, under subdivision 11(a) of this rule, and nonreviewable, a partial summary judgment certified by the trial court to be final as provided by I.R.C.P. 54(b), such as the partial summary judgment qualifies as an appealable order under subdivision 11(a)(3) of this rule; therefore district court's partial summary judgment, including its findings of: (1) the formation of an agreement; and (2) a material issue of fact precluding summary judgment on defendant's motion, was properly reviewable. *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995).

### **Partition Proceedings.**

An appeal from a judgment which confirmed earlier partition judgments and which finalized the sale and disbursement of proceeds did not act to revive the earlier judgments, and thus the court did not have jurisdiction to again review the merits of all previous judgments in the partition proceedings. *Mendenhall v. Caine*, 101 Idaho 628, 619 P.2d 146 (1980).

### **Proper Procedure.**

Where the state accepted remand by a district court to a magistrate of a magistrate's order denying summary judgment for defendant with orders to the magistrate to dismiss the state's suit if he found delay in prosecution of the suit to have been caused by the court, obtained a final judgment by the magistrate, dismissing the action, again appealed to the district court and then to the Supreme Court, the proper procedural course was taken, and the state would be entitled to challenge the first district court order ordering a remand as well as the order granting dismissal of the state's case. *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011).

Where a district court sits as an appellate court for purposes of reviewing a magistrate's judgment, the district court is required to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and conclusions of law; if those findings are so supported and the conclusions follow therefrom, and if correct legal principles have been applied, then a district court's decision affirming a magistrate's judgment will be upheld on further appeal. The judgment of the magistrate, as well as the decision of the district court af-

firming that judgment, are reviewable by the higher appellate court under a substantial evidence standard. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

The court will not address on appeal, a challenge to the legality of a sentence where the trial court was not given an opportunity to consider the issue. *State v. Martin*, 119 Idaho 577, 808 P.2d 1322 (1991).

Where there are two motions, one for directed verdict and the other for judgment n.o.v., the court need make only one ruling because both are governed by the same standard; however, despite the existence of the same standard, if the directed verdict at the close of plaintiff's case, and a motion for j.n.o.v. after the deliberations of the jury were to be considered on the basis of evidence before the trial court at the time the motions were made, separate rulings would still be required; thus a motion for directed verdict made at the close of plaintiff's case in chief is to be considered in conjunction with and in the light of the full record, rather than that evidence presented only during the plaintiff's case. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

### **Reduction of Charge.**

Where the district court did not grant defendant's motion to dismiss the information, but simply reduced the charge against him, the reduction was not in the nature of the dismissal of the information so as to render the court's action appealable as a matter of right pursuant to subdivision (c)(3) of this rule. *State v. Molinelli*, 105 Idaho 833, 673 P.2d 433 (1983).

Where state did not appeal from order withholding judgment, it could not appeal from previous order reducing charges from felony to misdemeanor as such order did not fall within the language of I.A.R. 11(c)(3) or (6); nor would Supreme Court exercise its plenary power to hear such appeal, under Const., Art. 5, § 9, or treat the appeal as a petition for a writ of review under § 7-201 and I.A.R. 43. *State v. Molinelli*, 105 Idaho 833, 673 P.2d 433 (1983).

### **Restitution Order.**

An appeal for relief of a restitution order was considered by appellate court, even though the motion was pursued under I.C.R. 35 instead of I.C. § 19-5304(10), since the state raised no issue regarding the procedural error and the appeal was timely filed. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

### **Sanctions.**

Because the claimant, by and through her

attorney, made a good faith argument for the modification of the law governing the deference accorded to the Industrial Commission's credibility determinations in a worker's compensation case, the Superior Court of Idaho declined to impose sanctions. *Ross v. Tupperware Mfg. Company/Premark*, 122 Idaho 641, 837 P.2d 316 (1992).

Court imposed sanctions on the attorney for claimant, personally and individually, in a sum equal to reasonable attorney fees incurred by respondent on appeal were warranted, where attorney admitted during oral argument before court, that substantial and competent evidence in the record supported the commission's finding that the preponderance of the medical evidence established that the September 1991 incident did not cause an injury nor did it cause or aggravate the condition for which claimant sought worker's compensation. *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995).

Sanctions against the developers under Idaho App. R. 11. 1 were merited where the developers appealed a case in which they previously engaged in a fraud upon the court and the district court had the inherent power to set aside the confirmed arbitration award; the filing of the appeal on the issues related to the Ada County Code was a continuation of the sanctionable conduct, inviting further sanctions against the parties (not the attorneys) on appeal. *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005).

### Summary Judgment.

The district court's summary judgment granted in favor of the plaintiff in its action to foreclose a mechanic's lien was final and appealable where the judgment resolved all substantive issues, awarded a money judgment, awarded interest and attorney fees, and the court issued a stay of execution and vacated a trial setting for the resolution of the issues raised by the defendant's counterclaim against the plaintiff and the defendant's third-party complaint pending the resolution of the appeal from the summary judgment. *Loomis, Inc. v. Cudahy*, 101 Idaho 459, 615 P.2d 128 (1980).

A denial of a summary judgment motion is not appealable when a district court is not acting as an appellate court. However, when a district court is acting as an appellate court, subdivision (a)(1) of this rule allows a party to appeal when the district court reverses a granting of the summary judgment motion. *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982).

A summary judgment ruling which ends the suit, adjudicates the subject matter of the controversy, and represents a final determi-

nation of the rights of the parties is a final judgment and appealable. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987).

A grant of partial summary judgment may be certified by the district court as a final judgment, and thus appealable, when the trial judge makes the determination that there is no just reason for delay. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987).

It is well settled in Idaho that an order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken. This rule is not altered by the entry of an appealable final judgment. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009).

An order denying summary judgment was neither a final order that could be directly appealed, nor was it an order that could be reviewed on an appeal from a final judgment in the action. *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146 (2010).

### Time for Perfecting Appeal.

The requirement of perfecting an appeal within the time period allowed by this Rule and I.A.R. Rule 14, is jurisdictional. An appeal taken after expiration of the filing period will be dismissed. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

The defendant's appeal was timely as to both contempt orders identical except for the award of costs and attorney fees, because the appeal included both judgments within its scope. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

Idaho Appellate Rule 14 provides that the time for appeal from a "criminal judgment, order or sentence" can be extended by the filing of a motion within 14 days of the judgment; however, there is no similar provision, permitting an extension of the time to appeal, applicable with respect to appellate review of a post-judgment order revoking probation once the 14 days following the judgment has expired. Any order thereafter entered, including the revocation of probation, is simply an "order made after judgment" which is appealable under subdivision (c) (9) of this rule, but the appeal must be filed within 42 days of that order; under these rules, defendant's motion to reconsider the probation revocation which was filed seven days after the entry of the order revoking probation did not extend the time within which to appeal from that order and because the appeal was taken untimely with respect to the order revoking probation, the court was without jurisdiction to review the merits of that order. *State v. Yeaton*, 121 Idaho 1018, 829 P.2d 1367 (Ct. App. 1992).

Noncustodial father's right to appeal from

an order of restitution included in conviction and sentencing for interference with child custody, accrued as of the date of the entry of conviction. *State v. Levick*, 131 Idaho 130, 953 P.2d 214 (1998).

State's motion to dismiss charges against the defendant, without prejudice, was a final, appealable order under this rule, even though the prosecution intended to immediately refile identical charges, and defendant's failure to file an appeal within 42 days under I.A.R. 14 deprived the appellate court of jurisdiction to review the denial of the motion, pursuant to I.A.R. 21. *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (2008).

**Cited in:** *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978); *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978); *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978); *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979); *State v. Martin*, 99 Idaho 781, 589 P.2d 116 (1979); *State v. Griffith*, 101 Idaho 315, 612 P.2d 552 (1980); *State v. Carlson*, 101 Idaho 598, 618 P.2d 776 (1980); *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983); *Schwilling v. Horne*, 105 Idaho 294, 669 P.2d 183 (1983); *Spencer v. Idaho First Nat'l Bank* (In re Estate of Spencer), 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984); *Keeven v. Wakley* (In re Estate of Keeven), 110 Idaho 452, 716 P.2d 1224 (1986); *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986); *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987); *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987); *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988); *State v. Harrison*, 115 Idaho 329, 766 P.2d 799 (Ct. App. 1988); *Roll v. City of Middleton*, 115 Idaho

833, 771 P.2d 54 (Ct. App. 1989); *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989); *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989); *Beard v. Hannay*, 120 Idaho 689, 819 P.2d 107 (1991); *State v. Gallegos*, 120 Idaho 894, 821 P.2d 949 (1991); *Law v. Omark Indus.*, 121 Idaho 128, 823 P.2d 162 (1992); *Ziemann v. Creed*, 121 Idaho 259, 824 P.2d 190 (Ct. App. 1992); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992); *Harten Aluminum Co. v. State, Dep't of Emp.*, 126 Idaho 139, 879 P.2d 602 (1994); *State v. Durst*, 126 Idaho 140, 879 P.2d 603 (Ct. App. 1994); *State v. Wilson*, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995); *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 908 P.2d 1228 (1995); *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996); *Ratliff v. Ratliff*, 129 Idaho 422, 925 P.2d 1121 (1996); *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998); *Castle v. Hays*, 131 Idaho 373, 957 P.2d 351 (1998); *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999); *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000); *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001); *Floyd v. Bd. of Comm'rs*, 137 Idaho 718, 52 P.3d 863 (2002); *Hoskinson v. Hoskinson*, 139 Idaho 448, 80 P.3d 1049 (2003); *Homestead Farms, Inc. v. Bd. of Comm'rs*, 141 Idaho 855, 119 P.3d 630 (2005); *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005); *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008); *Cecil v. Gagnebin*, 146 Idaho 714, 202 P.3d 1 (2009); *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 226 P.3d 1263 (2010); *Schroeder v. Partin*, 151 Idaho 471, 259 P.3d 617 (2011).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Appeal After Death.  
Appeal by Partially Successful Plaintiff.  
Appeal from Part of Judgment.  
Appeal Statutory.  
Appealable Judgments or Orders.  
Entry of Judgment.  
Failure to Appeal.  
Final Judgments and Orders.  
Jurisdiction of Court.  
Motion for New Trial.  
Nonappealable Orders and Judgments.  
Order Made After Appeal.  
Party to Action.  
Review of Evidence.  
Review of Nonappealable Orders.  
Scope of Supreme Court Review.  
Sufficiency of Evidence.

Writ of Assistance.

##### Appeal After Death.

Supreme Court has no jurisdiction to entertain appeal, all proceedings in which were taken subsequent to the death of one of the parties and before any substitution of said party's representatives was made. *Coffin v. Edgington*, 2 Idaho 627, 23 P. 80 (1890).

##### Appeal by Partially Successful Plaintiff.

Where party recovers judgment and collects the same and prosecutes an appeal in hope of gaining a larger judgment, but thereby incurs hazard of recovering a less judgment, his appeal will be dismissed; but if appeal is from such order or judgment that he can in no event recover a less favorable judgment than that which he has collected, the appeal will be



sustained. *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212 (1904).

### **Appeal from Part of Judgment.**

Right to appeal from specific part of a judgment lies without appealing from the entire judgment. *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909).

An appeal from an order denying a motion for new trial is a separate and distinct proceeding from an appeal from the judgment. The two are independent remedies. In the absence of an appeal from the order denying motion for new trial, this (Supreme) court cannot consider such order and pass upon its correctness. *State ex rel. Rich v. Hansen*, 80 Idaho 201, 327 P.2d 366 (1958).

An appeal taken only from that portion of the divorce decree requiring appellant to dismiss proceedings brought by her against her husband and others in Arizona, enjoining her from maintaining, prosecuting or instituting any action against her husband and others affecting the Arizona property, is severable from the remainder of the judgment although it is closely related to the trial court's division of the community property, and motion to dismiss such appeal would be denied. *Porter v. Porter*, 84 Idaho 400, 373 P.2d 327 (1962).

Where after appeals were perfected, two motions were filed under I.R.C.P. rule 59(e) to amend judgment, and were directed to a certain gratuitous portion thereof, having no effect on the rights of the parties, that portion of the judgment from which appeals were taken was final and appeals not premature. *Coeur d'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 461 P.2d 107 (1969).

Under the former section, a partial decree of partition of real property, while it was an appealable interlocutory judgment, was nonetheless subject to revision under I.R.C.P. rule 54(b) until final judgment was entered on all of the claims between the parties. *Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179 (1977).

### **Appeal Statutory.**

The right of appeal is purely statutory. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

### **Appealable Judgments or Orders.**

The following judgments or orders are appealable:

**Assignee of judgment:** Order, after judgment, decreeing certain person to be assignee of the judgment and declaring his claim to be a lien thereon. *Dahlstrom v. Portland Mining Co.*, 12 Idaho 87, 85 P. 916 (1906).

**Attachment:** Order made after judgment refusing to release attached property claimed

to be exempt. *Coe v. Cleghorn*, 10 Idaho 162, 77 P. 331 (1904).

**Attachment:** Appellant was entitled to absolute right of appeal from an order dissolving or refusing to dissolve attachment, irrespective of whether appellant gave a supersedeas bond. *Citizens Auto. Inter-Insurance Exch. v. Andrus*, 70 Idaho 114, 212 P.2d 406 (1949).

**Attorneys:** Order changing. *Curtis v. Richards*, 4 Idaho 434, 40 P. 57 (1895).

**Change of venue:** Order ruling upon motion for. *Boise Ass'n of Credit Men v. United States Fire Ins. Co.*, 44 Idaho 249, 256 P. 523 (1927).

**Condemnation proceeding:** Order or judgment allowing commissioners to be appointed and authorizing taking of land. *McLean v. District Court*, 24 Idaho 441, 134 P. 536 (1913).

**Costs:** Action of trial court in taxing costs is subject to review in appellate court, where the matter is covered in the clerk's transcript in response to appellant's praecipe. *Erickson v. Edward Rutledge Timber Co.*, 34 Idaho 754, 203 P. 1078 (1921).

**Costs:** Order after final judgment taxing costs. *Keane v. Pittsburg Lead Mining Co.*, 17 Idaho 179, 105 P. 60 (1909); *Webster-Soule Farm v. Woodmansee's Adm'r*, 36 Idaho 520, 211 P. 1090 (1922).

**County commissioners:** Judgment of district court on an appeal from order of county commissioners. *Foresman v. Board of County Comm'rs*, 11 Idaho 11, 80 P. 1131 (1905); *Rhea v. Board of County Comm'rs*, 12 Idaho 455, 88 P. 89 (1906).

**Decedent's estate:** Order of judge allowing or disallowing claims against estate, and directing receiver to pay out of funds in his hands such claims as judge has allowed. *Canadian Bank of Commerce v. Wood*, 13 Idaho 794, 93 P. 257 (1907).

**Decedent's estate:** A judgment of the district court on verdict for the administratrix in an action by the administratrix on a claim against the estate was a "final judgment" and appealable. *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

**Defaults:** Judgments entered by default by the clerk of the court are appealable. *Hardiman v. South Chariot Mining Co.*, 1 Idaho 704 (1878).

**Dismissal:** Order dismissing intervenor's complaint is final judgment and is appealable. *Walker Bank & Trust Co. v. Steely*, 54 Idaho 591, 34 P.2d 56 (1934).

**Dismissal:** Order dismissing case on motion of plaintiff before completing his case without providing that dismissal was "with prejudice" is an appealable order. *Molen v. Denning & Clark Livestock Co.*, 56 Idaho 57, 50 P.2d 9 (1935).



Dismissal: Where case was dismissed under court rule for want of prosecution, the proper remedy was an appeal and mandamus would not lie to compel district judge to reinstate the case. *Donaldson v. Buckner*, 66 Idaho 183, 157 P.2d 84 (1945).

Dismissal: Where a counterclaim had been interposed by defendant to plaintiff's claim for damages due to crop loss, but the district judge, pursuant to I.R.C.P. rule 54(b), made an express determination that there was no reason for delay in entering judgment upon plaintiff's claim regardless of outcome of defendant's counterclaim, judge's dismissal of plaintiff's claim was properly appealable to Supreme Court pursuant to this section. *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 465 P.2d 107 (1970).

Divorce: Order made after appeal in divorce case directing further payment of suit money. *Roby v. Roby*, 9 Idaho 371, 74 P. 957 (1903).

Divorce: Order of trial court for allowance of fees, costs, and support is an appealable order. *Gapsch v. Gapsch*, 76 Idaho 44, 277 P.2d 278 (1954).

Election of directors: Order of court which ordered new election of corporate directors, with reservation of jurisdiction to court for appropriate relief, pending the calling and holding of the reconvened meeting and election, was not a final order, and was not appealable. *Hunter v. Merger Mines Corp.*, 66 Idaho 438, 160 P.2d 455 (1945).

Election of directors: Order of trial court upholding validity of election of directors of a corporation though retaining "continuous jurisdiction herein" was a final appealable order. *Doolittle v. Morley*, 76 Idaho 138, 278 P.2d 998 (1955).

Execution: Denial of motion for order for issuance of writ of execution for judgment creditor, in a case where proration of a fund of debtor among his creditors was sought. *Pond v. Babcock*, 50 Idaho 400, 296 P. 596 (1931).

Forfeiture of bond: in appeal from conviction for burglary the defendant could not content that action of trial court in ordering forfeiture on bond for failure of defendant to appear on date set for trial was error, since defendant should have appealed from the order forfeiting the bond, as the order forfeiting the bond was a final appealable order. *State v. Fedder*, 76 Idaho 535, 285 P.2d 802 (1955).

Habeas corpus: Judgment of district court. *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917); *In re Jennings*, 46 Idaho 142, 267 P. 227 (1928); *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

Habeas corpus: A denial of release from prison on petition for writ of habeas corpus is

an appealable judgment. *In re Haney*, 77 Idaho 166, 289 P.2d 945 (1955).

Industrial accident board: Judgment affirming or reversing award. *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921).

Industrial accident board: Unless the industrial accident board or a majority thereof hears and sees witnesses testify, its findings are not conclusive on the Supreme Court, even under the constitutional amendment providing that on appeal from orders of the board, the court shall be limited to review of questions of law. *Phipps v. Boise St. Car Co.*, 61 Idaho 740, 107 P.2d 148 (1940).

Injunctions: Order dissolving a temporary injunction is appealable. *Dougal v. Eby*, 11 Idaho 789, 85 P. 102 (1906).

Injunctions: Order granting or denying injunction is appealable. *La Veine v. Stack-Gibbs Lumber Co.*, 17 Idaho 51, 104 P. 666 (1909).

Injunctions: Order restraining party from alienating, encumbering or disposing of his property is appealable. *Hay v. Hay*, 40 Idaho 159, 232 P. 895 (1924).

Injunctions: Former section permitted appeals to the Supreme Court from an order refusing to grant an injunction. Cases construing such section assumed, without deciding, that the term "injunction" included both temporary and permanent injunctions. *Unity Light & Power Co. v. City of Burley*, 83 Idaho 285, 361 P.2d 788 (1961).

Injunctions: In a suit to establish a right-of-way across defendants' property, the trial court's order on the last day of hearing and his statement in his written memorandum opinion constituted issuance of an injunction restraining defendants from blocking plaintiff's right of way during pendency of the action and thus was an appealable order. *Valley View Farms v. Westover*, 96 Idaho 615, 533 P.2d 736 (1974).

Motion to strike: The ruling of a trial court on a motion to strike from the complaint is subject to review on appeal without a certificate showing papers used at trial. *Maxwell v. Twin Falls Canal Co.*, 49 Idaho 806, 292 P. 232 (1930).

Motion to strike: Where the trial court struck from the complaint two elements of appellants' cause of action, leaving one element upon which the trial proceeded, the effect of filing the second amended complaint was to allege only the third remaining element, the order of the trial court granting motion to strike portions of appellants' second amended complaint being a matter deemed excepted to an appearing in the record may be reviewed upon appeal from the final judg-

ment, as against contention that upon filing of amended complaint all prior complaints became functus officio. *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958).

**Nonsuit:** Judgment of. *Lalande v. McDonald*, 2 Idaho 307, 13 P. 347 (1887); *Spongberg v. First Nat'l Bank*, 15 Idaho 671, 99 P. 712 (1909); *Miller v. Gooding Hwy. Dist.*, 54 Idaho 154, 30 P.2d 1074 (1934).

**Order vacating judgment:** Order made after judgment vacating such judgment is appealable. *Shumake v. Shumake*, 17 Idaho 649, 107 P. 42 (1910).

**Order vacating judgment:** Where trial judge abused discretion in denying motion to vacate judgment of dismissal for want of prosecution, such action was subject to review on appeal and mandamus would not lie to compel court to reinstate case. *Donaldson v. Buckner*, 66 Idaho 183, 157 P.2d 84 (1945).

**Order vacating judgment:** An order made after judgment refusing to vacate such judgment is an appealable order. *Cain v. C.C. Anderson Co.*, 67 Idaho 1, 169 P.2d 505 (1946).

**Public officer:** Judgment removing from office. *Miller v. Smith*, 7 Idaho 204, 61 P. 824 (1900); *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900); *Worthman v. Shane*, 31 Idaho 433, 173 P. 750 (1918).

**Receiver's sale:** Order confirming receiver's sale which constitutes final disposition of the assets of an insolvent estate. *First Nat'l Bank v. C. Bunting & Co.*, 7 Idaho 387, 63 P. 694 (1900).

**Reclamation commissioner:** judgment of district court on appeal from order. *State v. Adair*, 49 Idaho 271, 287 P. 950 (1930).

**Reinstatement of case:** Where judge had jurisdiction of the parties and the subject-matter he had jurisdiction to rule on a motion to reinstate case dismissed for want of prosecution. *Donaldson v. Buckner*, 66 Idaho 183, 157 P.2d 84 (1945).

**Removal of county seat:** Judgment ordering an election on question. *Wilson v. Bartlett*, 7 Idaho 269, 62 P. 415 (1900).

**Setting aside judgment:** Order refusing to set aside. *Oliver v. Kootenai County*, 13 Idaho 281, 90 P. 107 (1907); *Duffield v. Ohnewein*, 32 Idaho 732, 187 P. 541 (1920); *Central Deep Creek Orchard Co. v. C.C. Taft Co.*, 34 Idaho 458, 202 P. 1062 (1921).

**Supplemental decree:** Appeal may be taken from a supplemental decree modifying a judgment. *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1933).

**Transcript:** Order of trial judge settling or refusing to settle. *Bergh v. Pennington*, 33 Idaho 198, 191 P. 204 (1920).

### **Entry of Judgment.**

No appeal can be taken from a judgment

until judgment has been entered, and if clerk neglects to enter same either party may compel him to do so by writ of mandate. *Oliver v. Kootenai County*, 13 Idaho 281, 90 P. 107 (1907); *Santti v. Hartman*, 29 Idaho 490, 161 P. 249 (1916).

Unless final judgment has been signed, filed, and entered. Supreme Court is without jurisdiction and no appeal can be taken. *Santti v. Hartman*, 29 Idaho 490, 161 P. 249 (1916).

Appeal taken before entry of judgment in judgment book is premature, and the Supreme Court is without jurisdiction. *Yeomans v. Lamberton*, 29 Idaho 801, 162 P. 674 (1917).

Entry on judgment docket raises prima facie presumption that clerk has done his duty and that judgment has actually been entered. *Athey v. Oregon S. L. R.R.*, 30 Idaho 318, 165 P. 1116 (1917).

An entry of findings of fact and conclusions of law at the conclusion of which the court ordered, "Let judgment be entered accordingly," was not a judgment and, therefore, not appealable. *Hamblen v. Goff*, 90 Idaho 180, 409 P.2d 429 (1965).

### **Failure to Appeal.**

The question whether or not trial court was right or wrong in disposition of motion for change of venue, when not presented or considered on appeal to district court, will not be reviewed by Supreme Court. *Joslin v. Union Grain & Elevator Co.*, 46 Idaho 697, 270 P. 1056 (1928).

Where no appeal has been taken from the order granting a new trial, Supreme Court can not go back of that order. *Evans v. Davidson*, 57 Idaho 548, 67 P.2d 83 (1937).

Denial by trial court of motion by plaintiff for return of plaintiff's exhibits was not before the Supreme Court where no appeal was taken from the order. *Papineau v. Idaho First Nat'l Bank*, 74 Idaho 145, 258 P.2d 755 (1953).

Mortgagor was entitled to a joint release of mortgages where the trial court entered an order that the clerk should enter of record satisfaction of the mortgages from which order the mortgagee made no appeal. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

Where no appeal was taken from an order denying a motion for a change of venue within the time required by this statute, the Supreme Court could not review the matter on appeal. *State v. Sweet*, 82 Idaho 191, 351 P.2d 230 (1960).

Defendants waived error of the court in denying their motion to dissolve an attachment by not appealing from such order and such error could not be reviewed on appeal from final judgment in the main action. *Hessing v. Drake*, 90 Idaho 67, 408 P.2d 180 (1965).

**Final Judgments and Orders.**

Fact that judgment contains an unfilled blank for insertion of costs which were never taxed does not make said judgment any the less a final judgment from which an appeal may be taken. *Cantwell v. McPherson*, 3 Idaho 321, 29 P. 102 (1892).

When it appears from record that no final judgment was rendered, attempted appeal should be dismissed. *Thiessen v. Riggs*, 5 Idaho 21, 46 P. 829 (1896); *Continental & Com. Trust Sav. Bank v. Werner*, 33 Idaho 764, 198 P. 471 (1921); *Blaine County Nat'l Bank v. Jones*, 45 Idaho 358, 262 P. 509 (1927).

An order vacating satisfaction of judgment and adjudging plaintiff's attorney entitled to execution to enforce his interest in the judgment is a final judgment within the purview of the statute. *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 P. 243 (1910).

Real character of order is to be judged by its contents and substance and, when it is in fact a judgment, it is appealable although otherwise entitled. *Swinehart v. Turner*, 36 Idaho 450, 211 P. 558 (1922).

Appeal from order or judgment not final will be dismissed. *Witty v. Wells*, 39 Idaho 20, 225 P. 1020 (1924).

Formal order dismissing action is in effect final judgment within contemplation of statute and will be so considered notwithstanding its designation. *Marshall v. Enns*, 39 Idaho 744, 230 P. 46 (1924).

Under statutes and constitution of this state, appeals can only be taken from judgments that are final or those from which appeals are specifically provided. *Blaine County Nat'l Bank v. Jones*, 45 Idaho 358, 262 P. 509 (1927).

Test of finality for purpose of appeal therefore is not necessarily whether whole matter involved in action is concluded, but whether particular proceeding or action is terminated by judgment. *In re Jennings*, 46 Idaho 142, 267 P. 227 (1928).

Findings and conclusions constitute the "decision" of the court and are not the final judgment, from which appeal lies. *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1933).

Though the judgment had become final by lapse of the 60-day appeal period, appellants were not thereby prejudiced since their right to test the validity of the order made after judgment fixing judgment creditor's attorneys' fees and directing the clerk of the court to tax certain costs as shown by judgment creditor's cross bill together with the attorneys' fees fixed by such order, was duly preserved by the remedy of appeal therefrom

which they duly pursued. *St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958).

Where the record showed that neither counsel for plaintiffs nor the district judge intended or regarded the minute entry dates Feb. 2, 1961, as a final judgment but rather regarded it as an order for a judgment, the minute entry was not a final judgment and the order vacating the default judgment made by the court on Feb. 9, 1961, was not a special order made as final judgment. *McPheters v. Central Mut. Ins. Co.*, 83 Idaho 472, 365 P.2d 47 (1961).

Where judgment was not a final determination of the rights of the parties in the case, but an intermediate determination of a portion of the controversy, it was not a final judgment authorizing an appeal to the Supreme Court from a final judgment in a district court. *Gerry v. Johnston*, 85 Idaho 226, 378 P.2d 198 (1963).

The appellant has the election to treat the trial court's order of dismissal of his complaint, for failure to state a cause of action upon which relief can be granted, as a final judgment from which an appeal may be made rather than seeking leave to amend his original complaint. *McKenney v. Anselmo*, 88 Idaho 197, 398 P.2d 226 (1965).

Where a judgment fully and finally settles all the issues in a case, and jurisdiction is retained only to assure compliance with its terms, it is a "final judgment." *Coeur d'Alene v. Ochs*, 96 Idaho 268, 526 P.2d 1104 (1974).

Where a foreclosure action and an interpleader action were dismissed by the same court order but had never been consolidated, an I.R.C.P. rule 59(e) motion to set aside and reinstate the foreclosure action tolled the appeal time on the order only insofar as it affected the foreclosure action and had no effect on the finality of the interpleader action. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

**Jurisdiction of Court.**

When order attempted to be appealed from is not appealable, court has no jurisdiction and appeal should be dismissed of court's own motion. *White v. Stiner*, 36 Idaho 129, 209 P. 598 (1922).

Once proceedings are stayed by appeal, the district court is ordinarily divested of jurisdiction to act in any manner (with relation to the rights and liabilities of an appellant) except to act in aid of and not inconsistent with the appeal. *Coeur d'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 461 P.2d 107 (1969).

**Motion for New Trial.**

An appeal from an order denying a motion for new trial is a separate and distinct pro-



ceeding from an appeal from the judgment. The two are independent remedies. In the absence of an appeal from the order denying motion for new trial, this (Supreme) court cannot consider such order and pass upon its correctness. *State ex rel. Rich v. Hansen*, 80 Idaho 201, 327 P.2d 366 (1958).

The appeals from the judgment and the order denying motion for new trial would be considered as timely where the judgment was entered June 19, 1957, the motion for new trial was filed June 27, 1957, notice of appeal and appeal bond were filed December 11, 1957, in view of the amendment of this section effective as of September 2, 1957, which provided that the running of time for appeal was terminated by a timely motion for a new trial, it governing the appeal time in this instance. *Hall v. Bannock County*, 81 Idaho 256, 340 P.2d 855 (1959).

An order denying a motion for a new trial, being an order made after judgment, is not included within the purview of an appeal from the judgment, and being an appealable order the Supreme Court cannot review it upon an appeal from the judgment. *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959).

The trial court was in error in refusing to pass upon the motion for a new trial on the ground that the appeal from the judgment divested it of jurisdiction to consider the motion. *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962).

### **Nonappealable Orders and Judgments.**

The following orders are nonappealable:

**Accounting:** Where the district court initially heard the objection by children of intestate to the classification of a motel as community property in the administratrix's proposed final accounting, the district court's order declaring the motel to be community property was not an appealable order. In *re Estate of Freeburn*, 97 Idaho 845, 555 P.2d 385 (1976).

**Accounting:** Order of reference requiring accounts to be stated in accordance with principles therein fixed. *State v. Bruce*, 17 Idaho 1, 102 P. 831 (1909).

**Additional parties:** Order refusing to bring in. *Weiser Irrigation Dist. v. Middle Valley Irrigation Ditch Co.*, 28 Idaho 548, 155 P. 484 (1916).

**Alimony pendente lite:** Order awarding. *Wyatt v. Wyatt*, 2 Idaho 236, 10 P. 228 (1886); *Seelig v. Seelig*, 60 Idaho 137, 89 P.2d 552 (1939).

**Attachment:** Order of court denying motion to dissolve an attachment could not be reviewed on appeal from the final judgment. *Hessing v. Drake*, 90 Idaho 67, 408 P.2d 180 (1965).

**Clerk's fees:** Judgment determining the law

applicable but failing to fix the amount of the judgment. *Potter v. Talkington*, 5 Idaho 317, 49 P. 14 (1897).

**County commissioners:** Judgment rendered on appeal from order of county commissioners declaring the result of an election. *Rupert v. Board County Comm'rs*, 2 Idaho 19, 2 P. 718 (1882) (decided prior to 1911 amendment).

**Dismissal:** Order directing entry of judgment of dismissal. *Durant v. Comegys*, 3 Idaho 67, 26 P. 755 (1891); *Bissing v. Bissing*, 19 Idaho 777, 115 P. 827 (1911); *La Salle Extension Univ. v. District Court*, 52 Idaho 559, 16 P.2d 1064 (1932).

**Dismissal:** One of two separate causes of action. *Salchert v. Rice*, 47 Idaho 422, 276 P. 305 (1929).

**Dismissal:** In action involving five separate claims and sixteen parties, an order granting cross-defendant's motion to dismiss a cross complaint was not a final judgment from which an appeal could be taken, where the trial court did not direct entry of judgment and where there was no express determination finding no just reason for delaying entry of judgment. *Merchants, Inc. v. Intermountain Indus., Inc.*, 97 Idaho 890, 556 P.2d 366 (1976).

**Drainage district:** Order of district court declaring proposed drainage district duly organized. In *re Organization of Drainage Dist. No. 1*, 30 Idaho 351, 164 P. 1018 (1917).

**Drainage district:** Order disallowing certain items in cost bill, after hearing at which drainage district was organized, the drainage district law making no provision for allowance of costs upon an order organizing a district, nor for an appeal. *Rhodenbaugh v. Stigel*, 31 Idaho 594, 174 P. 604 (1918).

**Evidence:** Order sustaining introduction of. *Marshall v. Enns*, 39 Idaho 744, 230 P. 46 (1924).

**Execution:** Order refusing to dismiss appeal from order denying motion to quash execution. *Connell v. Warren*, 3 Idaho 117, 27 P. 730 (1891).

**Injunctions:** In action for injunction and payment over to plaintiff of amount found due on accounting, judgment enjoining defendant and ordering accounting is not final and is not appealable. *Winters v. Ethell*, 132 U.S. 207, 10 S. Ct. 56, 33 L. Ed. 339 (1889).

**Injunctions:** Order granting an injunction in futuro is nonappealable. *Porter v. Speno*, 13 Idaho 600, 92 P. 367 (1907).

**Injunctions:** Order granting injunction pendente lite is not appealable. *Ferrell v. Coeur d'Alene & St. Joe Transp. Co.*, 29 Idaho 118, 157 P. 946 (1916).

**Injunctions:** An order dissolving a portion of temporary restraining order is non-appeal-



able. *Wood v. Wood*, 96 Idaho 100, 524 P.2d 1072 (1974).

**Interlocutory judgment:** On appeal taken upon a determination that a child's death was the result of gross negligence on the part of defendant, defendant being liable as a matter of law and the only issue remaining to be resolved being the amount of damages, such judgment while having the character of finality was declared by rule to be interlocutory in character due to the amount of damages not being determined, and while the negligence of defendant could be determined upon appeal from a final judgment, it could not be upon the attempted appeal from the interlocutory judgment. *Clear v. Marvin*, 83 Idaho 399, 363 P.2d 355 (1961).

**Intermediate orders:** In an action to require city officials to pay additional funds into the policemen's retirement fund, a court order directing the city to make an actuarial study and increase its tax levy for such fund and the deductions from policemen's salaries sufficiently to maintain the fund in actuarially sound condition and retaining jurisdiction to make such further orders as might be required between the parties was not a final judgment from which the plaintiffs could appeal. *Perkins v. Pocatello*, 92 Idaho 636, 448 P.2d 250 (1968).

**Judgment:** Order for. *Hodgins v. Harris*, 4 Idaho 517, 43 P. 72 (1895); *Santti v. Hartman*, 29 Idaho 490, 161 P. 249 (1916); *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1933).

**Judgment notwithstanding verdict:** Order denying motion for. *Cady v. Keller*, 28 Idaho 368, 154 P. 629 (1916); *Snyder v. Utah Constr. Co.*, 55 Idaho 31, 38 P.2d 1004 (1934).

**Judgment notwithstanding verdict:** An appeal from an order denying motion for judgment notwithstanding verdict would be considered an appeal from the judgment alone, since the order is not appealable. *Anderson v. Ruberg*, 66 Idaho 417, 160 P.2d 456 (1945).

**Memorandum decision:** A memorandum decision authorizing cross defendant and respondent to prepare an order to quash service of the summons upon respondent, and no such order having been entered in the case, is not a final judgment from which an appeal may be taken. *Farmers Equip. Co. v. Clinger*, 70 Idaho 501, 222 P.2d 1077 (1950).

**Motion to strike:** Order sustaining motion. *White v. Stiner*, 36 Idaho 129, 209 P. 598 (1922).

**Nonsuit:** Where motion is made for nonsuit at the close of evidence on the part of plaintiff upon the ground that the evidence is insufficient to warrant the submission of the cause to a jury, and the motion is denied, and

evidence is thereafter ordered by defendant, the ruling of a trial court upon the motion is not reviewable upon appeal from the judgment or from the order overruling the motion for new trial. *Rippetoe v. Feely*, 20 Idaho 619, 119 P. 465 (1911); *Knauf v. Dover Lumber Co.*, 20 Idaho 773, 120 P. 157 (1911); *Smith v. Potlach Lumber Co.*, 22 Idaho 782, 128 P. 546 (1912); *Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho 304, 133 P. 669 (1913); *Groefsema v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 86, 190 P. 356 (1920).

**Nonsuit:** Order of trial court denying motion for nonsuit will not be reviewed on appeal where, subsequent to order, evidence is offered by and admitted on behalf of party who made motion. *Palcher v. Oregon Short Line R.R.*, 31 Idaho 93, 169 P. 298 (1917); *Groefsema v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 86, 190 P. 356 (1920); *Bevercombe v. Denney & Co.*, 40 Idaho 34, 231 P. 427 (1924).

**Nonsuit:** Order sustaining motion for. *Reberger v. Johanson*, 38 Idaho 618, 223 P. 1079 (1924); *Young v. Washington Water Power Co.*, 39 Idaho 539, 228 P. 323 (1924).

**Nonsuit:** Minute entry showing that motion for nonsuit was granted, not followed by entry of judgment of dismissal. *First Trust & Sav. Bank v. Randall*, 57 Idaho 126, 63 P.2d 157 (1936).

**Oral orders:** Notes of official report do not constitute court minutes proper, and appeal will not ordinarily lie from ruling or order orally made and found only in reporter's transcript. *First Nat'l Bank v. Poling*, 42 Idaho 636, 248 P. 19 (1926).

**Partial summary judgment:** A partial summary judgment which leaves certain issues for trial is not an appealable final judgment since it does not require a final determination of the rights of the parties, and thus is an intermediate order or decision subject to review under § 13-219 (repealed). *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1972), overruled on other grounds, *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 565 P.2d 564 (1977).

**Partial summary judgment:** In plaintiff's action to impose joint and several liability against five defendants resulting from a sale of potatoes, a partial summary judgment rendered in favor of three of the defendants, not being a final determination of the rights of all parties, was not a "final judgment" and thus was not appealable. *Southland Produce Co. v. Belson*, 96 Idaho 776, 536 P.2d 1126 (1975).

**Partition:** Where several issues were to be determined, court's decision on issue of economic feasibility of partitioning the assets of corporation was an intermediate decision and not a final judgment and hence not appeal-

able. *Oneida v. Oneida*, 95 Idaho 105, 503 P.2d 305 (1972).

Post-conviction relief: A court order, that unless a petitioner for post-conviction relief presented new and additional grounds for such relief within twenty days his petition would be dismissed was neither a final judgment and, as such, appealable nor one of the appealable interlocutory judgments specified under former section. *Pulver v. State*, 92 Idaho 627, 448 P.2d 241 (1968).

Quashing service: Order of the trial court denying defendant's motion to quash the service on its special limited appearance challenging jurisdiction. *Venus Foods v. District Court*, 67 Idaho 390, 181 P.2d 775 (1947).

Quashing service: An order quashing service of summons was not an appealable order under former section. *Silver Sage Ranch, Inc. v. Lawson*, 98 Idaho 707, 571 P.2d 768 (1977).

Receiver: Order granting or refusing appointment. *Chemung Mining Co. v. Hanley*, 11 Idaho 302, 81 P. 619 (1905).

Receiver: Order granting or denying appointment. *Beus v. Terrell*, 46 Idaho 635, 269 P. 593 (1928).

Receiver: Order appointing receiver of mortgaged property, order denying motion to vacate receivership, or order authorizing sale of property. *Evans State Bank v. Skeen*, 30 Idaho 703, 167 P. 1165 (1917).

Removal of county officers: Order quashing an information in a proceeding to remove county officers. *Mahoney v. Elliott*, 8 Idaho 356, 69 P. 108 (1902).

Setting aside defaults: An order made by the district court, setting aside a default entered by the clerk of said court and granting leave to the defendant to answer or otherwise plead, is not an appealable order. *Omaha Structural Steel Works v. Lemon*, 30 Idaho 363, 164 P. 1011 (1917); *Sweeney v. American Nat'l Bank*, 64 Idaho 695, 136 P.2d 973 (1943); *Shumake v. Shumake*, 17 Idaho 649, 107 P. 42 (1910).

Setting aside defaults: Order of district court directing probate court to open default and set aside judgment rendered thereon is not appealable. *Soderman v. Peterson*, 36 Idaho 414, 211 P. 448 (1922).

Special order: Interlocutory order made on trial of application for special order after final judgment. *Connell v. Warren*, 3 Idaho 117, 27 P. 730 (1891).

Special order: An appeal would not lie in an action to recover against a foreign insurance company where summons had been served on the state insurance commissioner in behalf of the defendant insurance company by registered mail as provided in § 41-608, and service was completed on that day where a

minute entry considered an order for judgment was later vacated by order of court, such order not being considered a special order made as final judgment. *McPheters v. Central Mut. Ins. Co.*, 83 Idaho 472, 365 P.2d 47 (1961).

Staying proceedings: Order or judgment for. *Blaine County Nat'l Bank v. Jones*, 45 Idaho 358, 262 P. 509 (1927).

Summary judgment: Appeal attempted to be taken to Supreme Court from an order denying defendant's motion for summary judgment is not authorized by the legislature, which, in turn, is constitutionally authorized to prescribe the system of appeals and therefore such order was not appealable. *Wilson v. DeBoard*, 94 Idaho 562, 494 P.2d 566 (1972).

Summary judgment: An interlocutory summary judgment entered pursuant to I.R.C.P. Rule 56(c) is not appealable. *Lloyd v. Lloyd*, 95 Idaho 108, 503 P.2d 308 (1972).

Where the judgment in an action to adjudicate water rights upheld the claim of the United States to reserved nonconsumptive water rights to the entire natural flow of several streams, but did not adjudicate the water rights of private parties who had requested additional time to submit material for incorporation in a stipulation, the judgment was not final and therefore not appealable. *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 577 P.2d 9 (1978).

### Order Made After Appeal.

Supreme Court would not enforce order of district court requiring husband to pay costs and expenditures on appeal, where order was entered some months after the appeal was taken. *Brashear v. Brashear*, 71 Idaho 158, 228 P.2d 243 (1951).

A motion to amend and alter the findings of fact and conclusions of law and vacate the judgment filed after the opposing party had perfected an appeal was not a motion timely filed and the trial court had no jurisdiction to entertain such a motion. *Dolbeer v. Harten*, 91 Idaho 141, 417 P.2d 407 (1965).

A timely appeal must be taken from a final judgment even when that judgment is followed by a post-judgment order. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

### Party to Action.

A special prosecuting attorney did not become a party to civil action involving party seeking discovery by petitioning district court for protective order to prevent inquiry into certain aspects of criminal investigation during taking of depositions; therefore, a writ of prohibition rather than an appeal was the

proper remedy to prevent enforcement of district court's assessment of discovery costs against special prosecuting attorney. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

### **Review of Evidence.**

Evidence will not be reviewed in order to determine its sufficiency to sustain verdict on appeal from judgment, where such appeal is not taken within sixty days after rendition of judgment. *Holt v. Spokane & P. R. R.*, 3 Idaho 703, 35 P. 39 (1893); *Brady v. Linehan*, 5 Idaho 732, 51 P. 761 (1898); *Moe v. Harger*, 10 Idaho 194, 77 P. 645 (1904); *Cunningham v. Stoner*, 10 Idaho 549, 79 P. 228 (1904); *Walker v. Elmore County*, 16 Idaho 696, 102 P. 389 (1909); *Haas v. Teters*, 19 Idaho 182, 113 P. 96 (1911).

Evidence will not be considered in order to determine whether verdict is in accordance with instructions. *Trull v. Modern Woodmen of Am.*, 12 Idaho 318, 85 P. 1081 (1906).

Where appeal is taken from judgment within sixty days from rendition thereof, to authorize Supreme Court to examine evidence for purpose of determining whether evidence supports judgment, it is necessary that appellant specify the particulars in which it is alleged that the evidence fails to support the judgment. *Later v. Haywood*, 14 Idaho 45, 93 P. 374 (1908).

An appeal may be taken from order denying new trial within sixty days after entry of filing of order, and on such appeal sufficiency of evidence to support verdict may be considered, although appeal from judgment is not taken within sixty days after its rendition. *White v. Whitcomb*, 13 Idaho 490, 90 P. 1080 (1907), *aff'd*, 214 U.S. 15, 29 S. Ct. 599, 53 L. Ed. 889 (1909).

### **Review of Nonappealable Orders.**

Where statutes fail to provide for appeal from final judgment of district court to Supreme Court, the Supreme Court will entertain writ of error or other proper writ to bring such judgment before it for review, under Const., art. 5, § 9. *State v. Reed*, 3 Idaho 554, 32 P. 202 (1893).

All orders or decisions of district court or judges thereof that are not final judgments or orders or decisions specifically provided for by statute from which a direct appeal may be taken prior to final judgment, if duly excepted to or deemed to be excepted to as provided by law, will be reviewed by the Supreme Court on appeal from final judgment, or from an order granting or denying new trial. *Maple v. Williams*, 15 Idaho 642, 98 P. 848 (1908);

*Richards v. Richards*, 24 Idaho 87, 132 P. 576 (1913); *Weiser Irrigation Dist. v. Middle Valley Irrigation Ditch Co.*, 28 Idaho 548, 155 P. 484 (1916).

Supreme Court has no jurisdiction of separate appeals from nonappealable orders made before entry of final judgment. Orders denying motion to strike, vacating setting for trial and the like are reviewable on appeal from judgment without being specified in notice of appeal when they appear in the record. *Aumock v. Kilborn*, 52 Idaho 438, 16 P.2d 975 (1932).

### **Scope of Supreme Court Review.**

Where trial is de novo in district court, the Supreme Court can not, on appeal from that court, consider any proceedings anterior to those in district court. *Chase v. Hagood*, 3 Idaho 682, 34 P. 811 (1893); *Elliott v. Rising*, 36 Idaho 137, 209 P. 887 (1922).

### **Sufficiency of Evidence.**

Appellant may question the sufficiency of the evidence to sustain the verdict though no motion for directed verdict or new trial was made. *Herrick v. Breier*, 59 Idaho 171, 82 P.2d 90 (1938).

### **Writ of Assistance.**

Where writ of assistance is issued, party to suit at time of its issuance must appeal direct from order of issuance if he desires to contest same, but one who is not a party at such time and whose interests are affected by order, may appear and move to set same aside, and in case of refusal, may appeal from the order denying his motion. *Mills v. Smiley*, 9 Idaho 317, 76 P. 783 (1903).

Under the statute making a homestead subject to execution in satisfaction of a judgment obtained on a debt secured by a materialmen's lien, the court, in decreeing the foreclosure of such lien and in issuing a writ of assistance directing the sheriff to place the holder of sheriff's deed in possession, did not proceed in excess of its jurisdiction, and the former owner of the land who was a party to the proceeding for the issuance of a writ of assistance had a plain, speedy, and adequate remedy in the ordinary course of law, by way of appeal from the order issuing the writ of assistance, and hence was not entitled to a writ of prohibition. *Roark v. Koelsch*, 62 Idaho 626, 115 P.2d 95 (1941).

A party to a suit at the time of the issuance of a writ of assistance in order to contest the order issuing same, must appeal directly from such order. *Roark v. Koelsch*, 62 Idaho 626, 115 P.2d 95 (1941).



**RESEARCH REFERENCES**

**A.L.R.** Appealability of order setting aside, or refusing to set aside, default judgment. 8 A.L.R.3d 1272.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 A.L.R.3d 462.

Appealability of order directing payment of money into court. 15 A.L.R.3d 568.

Reviewability of order denying motion for summary judgment. 15 A.L.R.3d 899.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency. 16 A.L.R.3d 714.

Appealability of order staying, or refusing to stay, action because of pendency of another action. 18 A.L.R.3d 400.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 A.L.R.3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order. 19 A.L.R.3d 459.

Court review of bar examiners' decision on applicant's examination. 39 A.L.R.3d 719.

Appealability of order denying right to proceed in form of class action — state cases. 54 A.L.R.3d 595.

Appealability of state court order granting or denying consolidation, severance, or separate trials. 77 A.L.R.3d 1082.

**Rule 11.1. Appealable judgments from the magistrate court.**

An appeal as a matter of right may be taken to the Supreme Court from any final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure, granting or denying a petition for termination of parental rights or granting or denying a petition for adoption. All time frames for such appeals, including the time for filing a notice of appeal, shall proceed in an expedited manner pursuant to Rule 12.2. (Adopted March 19, 2009, effective July 1, 2009; amended March 29, 2010, effective July 1, 2010.)

**ANALYSIS**

**Attorney's Fees.**  
**Sanctions.**

**Attorney's Fees.**

Appeal was brought for an improper purpose and attorney fees were awarded to the employer and insurer on appeal against the employee's attorney, personally, pursuant to this rule; the employee did little more than ask the supreme court to reweigh the evidence presented to the Industrial Commission and, implicitly, to substitute the supreme court's view of the evidence for that of the Commission. *Gibson v. Ada County Sheriff's Office*, 147 Idaho 491, 211 P.3d 100 (2009).

As appellant raised legal and factual issues for the first time on appeal and her request for relief was without a foundation in law or fact,

the appellate court concluded that the appeal was brought to harass the respondents, to cause unnecessary delay, or to needlessly increase the cost of litigation. The appellate court, on its own initiative, awarded the respondents attorney's fees, pursuant to this rule, to be paid by the appellant's attorney. *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009).

**Sanctions.**

Sanctions will be awarded under this rule if: (1) the other party's arguments are not well grounded in fact, warranted by existing law, or made in good faith, and (2) the claims were brought for an improper purpose, such as unnecessary delay or increase in the costs of litigation *Davidson v. Riverland Excavating, Inc.*, 147 Idaho 339, 209 P.3d 636 (2009).

**Rule 11.2. Signing of notice of appeals, petitions, motions, briefs and other papers; sanctions.**

(a) Every notice of appeal, petition, motion, brief and other document of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the notice of appeal,



petition, motion, brief or other document and state the party's address. The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee.

(b) The court may declare a party a vexatious litigant pursuant to Idaho Court Administrative Rule 59. (Adopted June 15, 1987, effective November 1, 1987; redesignated from I.A.R. 11.1, March 19, 2009, effective July 1, 2009; amended November 20, 2012, effective January 1, 2013.)

## JUDICIAL DECISIONS

### ANALYSIS

Attorney's Fees.

Award Denied.

New Issues on Appeal.

Sanctions.

Sexual Harassment Action.

### Attorney's Fees.

Although denial of unemployment benefits was affirmed on appeal, case where aviation worker was discharged for misconduct due to failure to get tower clearance before crossing runways presented legitimate issues of the basis of discharge and proper standards for determining employment discharge and employer's claim for attorney fees was denied. *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 914 P.2d 564 (1996).

The court does not award attorney fees in appeals by claimants from decisions of the Industrial Commission, unless the court determines that the proceedings have been instituted or continued without reasonable ground. *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000).

Personal liability for State's attorney's fees on appeal was imposed on attorney who failed to assure that disabled client's notice of tort claim was timely filed and yet thereafter persisted in appealing dismissal of his client's second attempt at filing lawsuit that was barred on its face for failure to provide timely

notice of claim. *Rodriguez v. Department of Corr.*, 136 Idaho 90, 29 P.3d 401 (2001).

An award of attorney fees on appeal in favor of the insurer was proper where the attorney failed to conduct a reasonable inquiry that the appeal was well grounded in fact and warranted by existing law. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004).

Attorney fees for prosecuting an appeal of a summary judgment award on an attractive nuisance claim were appropriate where the case lacked any reasonable basis in fact or clearly defined law and improper purpose was properly inferred, particularly in light of the district court's repeated explanations of the lawsuit's failings. *Doe v. City of Elk River*, 144 Idaho 337, 160 P.3d 1272 (2007).

In a quiet title action against a title insurer, the insurer as a prevailing party was entitled to an award of attorney fees on appeal under Idaho Code § 12-121 against the party who filed the action and against her counsel under Idaho App. R. 11.1. The pursuit of the appeal was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008).

When an appeal was not timely filed, and it was not well-grounded in fact or warranted by existing law, attorney fees were awarded to a respondent. *Goodman Oil Co. v. Scotty's Duro-*

Bilt Generator, Inc., 147 Idaho 56, 205 P.3d 1192 (2009).

A buyer of property at a foreclosure sale was not entitled to attorney fees under I.C. § 12-120(3) because the ejectment action was not an action to recover on a commercial transaction; the buyer was, however, entitled to receive attorney fees under Idaho App. R. 11.2 because the lawsuit was frivolous in that the mortgagor's counsel framed the issue as questioning what notice was required for a postponed sale, and the law on that issue was clearly stated in I.C. § 45-1506(8). *Black Diamond Alliance, LLC v. Kimball*, 148 Idaho 798, 229 P.3d 1160 (2010).

### **Award Denied.**

Because teacher did not include argument that she should be awarded sanctions under this rule in her briefs submitted to Supreme Court or cite supporting authority, Court declined to award attorney's fees under this rule. *Folks v. Moscow Sch. Dist. # 281*, 129 Idaho 833, 933 P.2d 642 (1997).

In a case where attorney fees were awarded to respondents, sanctions were not imposed where the record lacked a sufficient indication that an appeal was interposed for an improper purpose. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999).

Court had no basis to award attorney fees where employee presented good faith arguments concerning the standards to be applied when the Industrial Commission made determinations contrary to the referee when the referee was put in the position to observe demeanor and decide credibility. *Seufert v. Larson*, 137 Idaho 589, 51 P.3d 403 (2002).

Where the appeal did not appear to have been brought for an improper purpose the appellate court refused to award sanctions against appellate counsel under I.A.R. 11.1 where the appellate court had rejected plaintiff's claims for the issuance of writs and concluded the arguments were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law but the second prong of Rule 11.1 required finding that the appeal was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

Citizen lacked standing to challenge the cigarette tax since he had a "generalized grievance" shared by a large class of citizens, and his remedy was through the political process. Further, the sales and use tax bill originated in the Idaho House and although substantially amended in the Idaho Senate, it was constitutionally enacted; although the

law was well settled that the Senate could amend a revenue bill, the appeal was not frivolous, so as to have justified an award of attorney fees for the State. *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005).

Landowner's appeal was well grounded in fact and law, and sanctions against the landowner were unwarranted. *Tungsten Holdings v. Drake*, 143 Idaho 69, 137 P.3d 456 (2006).

Mother was not entitled to an award of fees because she failed to present any facts indicating that the father brought the appeal from an award of custody for an improper purpose. *Danti v. Danti*, 146 Idaho 929, 204 P.3d 1140 (2009).

Idaho industrial special indemnity account was not entitled to appellate attorney fees under the rule, because an employer's appeal of a determination that it was liable for an employee's permanent total disability benefits was not brought for an improper purpose. *Tarbet v. J.R. Simplot Co.*, 151 Idaho 755, 264 P.3d 394 (2011).

Property owner acted reasonably on appeal in a zoning case, conceding arguments where a decision unfavorable to him was *res judicata* and by not making frivolous arguments. Thus, although the owner lacked standing under § 10-1202 because the zoning of his land had not been changed, the county was not entitled to attorney fees on appeal. *Martin v. Smith*, — Idaho —, 296 P.3d 367 (2013).

### **New Issues on Appeal.**

This rule does not permit the introduction on appeal of matters which should have been brought before the trial court. *Campbell v. Campbell*, 120 Idaho 394, 816 P.2d 350 (Ct. App. 1991).

### **Sanctions.**

In compensation case in view of the court's partial reversal, and because court perceived good faith arguments undergirding claimant's positions on appeal, court declined to consider availability of Appellate Rule 11.1 sanctions. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

Where appellee asked the Court of Appeals to award attorney fees on appeal under § 12-121 and I.R.C.P. 54 (e) due to her claim that the appeal was brought "frivolously, unreasonably, and without foundation," the Court of Appeal noted that, under this rule, it could award fees against a party or the party's attorney involved in the appeal of its own motion. The Court of Appeals held that by failing to appeal an I.R.C.P. 9(b) dismissal, the appellant could not have prevailed under any circumstances and so it awarded costs and attorney fees against appellant's counsel, as it was the responsibility of the attorney, not

the client, to recognize the legal basis upon which an order was granted and to properly evaluate whether or not good faith grounds existed for an appeal. *MacLeod v. Reed*, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995).

Sanctions under this rule were appropriate with respect to portion of appeal challenging dismissal of plaintiff's claim against defendant in suit to recover for personal injuries as a result of injuries sustained at concert, where argument of plaintiff's counsel that a jury question was presented as to whether defendant was an actual organizer or sponsor of the concert was utterly without support in evidence and while there was no reason to believe that the appeal was taken in bad faith or for any improper purpose, an excess zeal in the well-intended pursuit of their clients' interest led counsel beyond the bounds of legitimate appellate advocacy. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Denial of a motion to sanction the employee's attorney in a workers' compensation action was proper where there was no indication that he interposed the appeal for an improper purpose. *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003).

In a workers' compensation case, attorney fees were not awarded on appeal because, despite the fact that an issue was rejected, there was no evidence that the appeal was filed for an improper purpose; the lack of a legal or factual basis alone was not enough. *Shriner v. Rausch*, 141 Idaho 228, 108 P.3d 375 (2005).

In a case involving the proposed enlargement of water rights by an irrigation district, attorney fees were not awarded as a sanction because the claim was not frivolous, unreasonable, or un-meritorious. *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.* (In re SRBA Case No. 39576), 141 Idaho 746, 118 P.3d 78 (2005).

Where the workers' compensation claimant's attorney unnecessarily and needlessly increased the costs of the litigation, under Idaho R. App. P. 11.1, the appellate court imposed sanctions on him, personally, in the amount of the employer's reasonable attorney fees incurred on appeal. *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 118 P.3d 133 (2005).

Where a legitimate issue as to whether maximum medical improvement was properly before the workers' compensation referee, the employer was not entitled to its attorney fees

under Idaho R. App. P. 11.1. *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005).

In a case involving the alleged sexual molestation of children by their father, sanctions were awarded against daughters' attorney since the case was not factually or legally grounded. The daughters' counsel failed to comply with basic requirements for pleading and offered, at best, implausible theories for the court to consider. *Glaze v. Deffenbaugh*, 144 Idaho 829, 172 P.3d 1104 (2007).

Father was not entitled to sanctions in a mother's appeal of a child custody order because, while the mother failed to comply with a myriad of procedural rules, she did not act with an improper purpose by harassing the father, but rather was motivated by a desire to regain custody of her child. *Woods v. Sanders*, 150 Idaho 53, 244 P.3d 197 (2010).

Where an irrigation district claimed attorney fees under § 12-121, which was inapplicable, rather than under § 12-117, which applied to it as a government taxing entity, the district was not awarded fees under either section; however, the district was entitled to fees under this rule because the appeal was without merit and appeared to be primarily for the purpose of harassment and annoyance. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

#### **Sexual Harassment Action.**

While there were compelling arguments for awarding fees to employer whose favorable directed verdict in quid pro quo sexual harassment action was upheld on appeal, due to the sparse case law in Idaho involving sexual discrimination issues, court could not say that appeal was brought for improper purposes or in bad faith. *De Los Santos v. J.R. Simplot Co.*, 126 Idaho 963, 895 P.2d 564 (1995).

**Cited in:** *Challis v. Louisiana-Pacific Corp.*, 126 Idaho 134, 879 P.2d 597 (1994); *Crown v. Hawkins Co.*, 128 Idaho 114, 910 P.2d 786 (Ct. App. 1996); *Teevan v. Office of Att'y Gen.*, 130 Idaho 79, 936 P.2d 1321 (1997); *Tupper v. State Farm Ins.*, 131 Idaho 724, 963 P.2d 1161 (1998); *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000); *Perkins v. Croman, Inc.*, 134 Idaho 721, 9 P.3d 524 (2000); *Curzon v. Hansen*, 137 Idaho 420, 49 P.3d 1270 (Ct. App. 2002); *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009); *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009); *Funes v. Aardema Dairy*, 150 Idaho 7, 244 P.3d 151 (2010); *Giltner Dairy, LLC v. Jerome County*, 150 Idaho 559, 249 P.3d 358 (2011); *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 254 P.3d 36 (2011).



**Rule 12. Appeal by permission.**

(a) **Criteria for permission to appeal.** Permission may be granted by the Supreme Court to appeal from an interlocutory order or judgment of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

(b) **Motion to District Court or Administrative Agency — Order.** A motion for permission to appeal from an interlocutory order or judgment, upon the grounds set forth in subdivision (a) of this rule, shall be filed with the district court or administrative agency within fourteen (14) days from date of entry of the order or judgment. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited. In criminal actions a motion filed by the defendant shall be served upon the prosecuting attorney of the county. The court or agency shall, within fourteen (14) days after the hearing, enter an order setting forth its reasoning for approving or disapproving the motion.

(c) **Motion to Supreme Court for Permission to Appeal.**

(1) **Motion of a party.** Within fourteen (14) days from entry by the district court or administrative agency of an order approving or disapproving a motion for permission to appeal under subdivision (b) of this rule, any party may file a motion with the Supreme Court requesting acceptance of the appeal by permission. A copy of the interlocutory order or judgment being appealed shall be attached to the motion, along with a copy of the order of the district court or administrative agency approving or disapproving the permission to appeal. If the district court or administrative agency fails to rule upon a motion for permission to appeal within twenty-one (21) days from the date of the filing of the motion, any party may file a motion with the Supreme Court for permission to appeal without any order of the district court or administrative agency.

(2) **Motion by order of court or agency.** A district court or administrative agency may enter, on its own initiative, an order recommending permission to appeal from an interlocutory order or judgment. The court or agency shall file a certified copy of its order with the Supreme Court and serve copies on all parties. The order recommending permission to appeal shall constitute and be treated as a motion for permission to appeal from the interlocutory order or judgment under this rule.

(3) **Procedure.** A motion to the Supreme Court for permission to appeal under this rule shall be filed, served, and processed in the same manner as any other motion under Rule 32 of these rules. In criminal actions a motion filed by the defendant shall be served upon the prosecuting attorney of the county and the attorney general of the state of Idaho.

(d) **Acceptance by Supreme Court.** Any appeal by permission of an interlocutory order or judgment under this rule shall not be valid and



effective unless and until the Supreme Court shall enter an order accepting such interlocutory order or judgment as appealable and granting leave to a party to file a notice of appeal within a time certain. Unless otherwise ordered by the Supreme Court in its order of acceptance, such appeal shall thereafter proceed in the same manner as an appeal as a matter of right, except that it shall be retained by the Supreme Court. The clerk of the Supreme Court shall file with the district court or administrative agency a copy of the order of the Supreme Court granting or denying acceptance, and shall mail copies to all parties to the action or proceeding. (Adopted March 24, 1982, effective July 1, 1982; amended April 18, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990; amended January 28, 1997, effective July 1, 1997; amended March 18, 1998, effective July 1, 1998; amended March 22, 2002, effective July 1, 2002; amended March 24, 2005, effective July 1, 2005; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013.)

### STATUTORY NOTES

**Compiler's Notes.** By order of March 24, 1982, the Supreme Court of Idaho rescinded I.A.R. 12 as it appears in the bound volume and replaced it with the present rule.

By Supreme Court Order of January 28, 1997, effective July 1, 1997, subsection (d) of this Rule — Acceptance by Supreme Court —

was amended to be subsection (e) and a new subsection (d) was adopted — Permissive appeal from the Magistrate's Division of the District Court.

**Cross References.** 28 U.S.C. § 1292(b); Rule 5 of Federal Rules of Appellate Procedure; Idaho Const., Art. 5, § 9.

### JUDICIAL DECISIONS

#### ANALYSIS

Abuse of Discretion.  
Appeal by Permission.  
Certification of Interlocutory Orders.  
Denial of Summary Judgment.  
Expedited Appeal.  
Intent of Rule.  
Jurisdiction.  
Motion for Acceptance.  
Questions of Law.

#### Abuse of Discretion.

The trial court abused its discretion in considering motion to suppress evidence which was not timely filed, when neither "good cause" nor "excusable neglect" was shown. *State v. Alanis*, 109 Idaho 884, 712 P.2d 585 (1985).

#### Appeal by Permission.

Where appellant sought and obtained certification from a magistrate to file an interlocutory appeal, albeit an oral certification, appellant thereafter filed his notice of appeal, and the district court heard the appeal and rendered a decision, without the state ever raising the issue of perfection of the appeal,

the failure to obtain the permission of the district court did not deprive the district court of jurisdiction. The state's failure to raise the procedural objection in the district court waived the issue and the appeal will be treated as an appeal by permission under this rule. *State v. Doe (In re Doe)*, — Idaho —, — P.3d — (Mar. 31, 2009).

#### Certification of Interlocutory Orders.

Until the magistrate approves the administration, distribution and closing of the estate, the approval of accountings by the magistrate is not ripe for review; however, there is no impediment to special review of interlocutory orders approving interim accountings by certification under I.R.C.P. 54(b), concerning the appeal from the magistrate division to the district court, and under I.R.C.P. 54(b) or this rule concerning the appeal from the district court to the Supreme Court. *Spencer v. Idaho First Nat'l Bank (In re Estate of Spencer)*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

#### Denial of Summary Judgment.

Where the legal issue that would be raised by an appeal by certification from an order denying a motion for summary judgment was

whether a prior judgment in favor of the defendant in a small claim action for property damage to a vehicle in an accident barred an action for personal injury under the doctrine of res judicata, collateral estoppel, or the single cause of action rule, motion to appeal by certification was denied. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983).

A denial of summary judgment by a district judge is not appealable unless the district judge was acting as an appellate court or unless the Supreme Court granted permission. *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997).

Where permission to appeal from denial of summary judgment was not sought because the trial court's decision involved a controlling question of law as to where there was substantial grounds for difference of opinion and because an immediate appeal may materially advance the orderly resolution of the litigation, the Supreme Court would consider and treat the appeal as an appeal by permission. *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997).

#### **Expedited Appeal.**

Father was granted a permissive expedited appeal of the decision of the magistrate judge granting the mother's motion for a modification of child custody. *McGriff v. McGriff*, 140 Idaho 642, 99 P.3d 111 (2004).

#### **Intent of Rule.**

It was the intent of this rule to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts; no single factor is controlling in the court's decision of acceptance or rejection of an appeal by certification, but the court intends by this rule to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983).

Under this rule, appeals are only accepted in the most exceptional cases, with the intent to resolve substantial legal issues of great public interest or legal questions of first impression. *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785, 215 P.3d 505 (2009).

#### **Jurisdiction.**

Because the Supreme Court of Idaho

granted the motion of the employer's workers' compensation surety for appeal by permission pursuant to subsection (a) of this rule, surety's appeal of Industrial Commission's decision was properly before the court, despite Commission's retention of jurisdiction over future medical benefits. *Dohl v. PSF Indus., Inc.*, 127 Idaho 232, 899 P.2d 445 (1995).

Appellate court exercised its discretion to grant the State's request to appeal the orders granting defendants' motions to suppress pursuant to I.A.R. 12 because the cases presented a significant issue, the resolution of which would be of practical importance in the administration of the criminal justice system, and defendants did not convince the appellate court that it erred in the exercise of that discretion. *State v. Bicknell*, 140 Idaho 201, 91 P.3d 1105 (2004).

#### **Motion for Acceptance.**

Although the defendant complied with the appellate rules by obtaining an order from the magistrate authorizing an appeal, his failure to file a further motion with the district court for acceptance of the appeal fell short of satisfying subsection (c) of this rule. *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999).

Because Idaho Appellate Rule 21 provides that "any other step" in the appellate process is not jurisdictional, the absence of a motion for acceptance of an appeal did not deprive the district court of jurisdiction. *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999).

#### **Questions of Law.**

Generally, an appeal under this rule will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and where an immediate appeal may materially advance the orderly resolution of the litigation. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 795 P.2d 309 (1990); *Bishop v. Owens*, 152 Idaho 617, 272 P.3d 1247 (2012).

**Cited in:** *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978); *Schiess v. Bates*, 107 Idaho 794, 693 P.2d 440 (1984); *Evans v. Galloway*, 108 Idaho 711, 701 P.2d 659 (1985); *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 702 P.2d 922 (Ct. App. 1985); *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985); *State v. Groves*, 109 Idaho 1006, 712 P.2d 707 (Ct. App. 1985); *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 718 P.2d 1129 (1986); *Murgoitio v. Murgoitio*, 111 Idaho 573, 726 P.2d 685 (1986); *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986); *Barringer v. State*, 111 Idaho 794, 727 P.2d 1222

(1986); *Crawford v. Pacific Car & Foundry Co.*, 112 Idaho 820, 736 P.2d 872 (Ct. App. 1987); *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 739 P.2d 301 (1987); *Merritt v. State*, 113 Idaho 142, 742 P.2d 397 (1986); *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987); *Fairway Dev. Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988); *Winn v.*

*Frasher*, 116 Idaho 500, 777 P.2d 722 (1989); *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989); *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994); *State v. Clifford*, 130 Idaho 259, 939 P.2d 578 (Ct. App. 1997); *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001); *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004); *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008); *Rountree v. Boise Baseball, LLC*, — Idaho —, 296 P.3d 373 (2013).

### **Rule 12.1. Permissive appeal in custody cases.**

(a) Whenever the best interest of a child would be served by an immediate appeal to the Supreme Court, any party or the magistrate hearing a case may petition the Supreme Court to accept a direct permissive appeal of a final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure or order made after final judgment, involving the custody of a minor, or a Child Protective Act proceeding, without first appealing to the district court. The filing of a motion for permissive appeal shall stay the time for appealing to the district court until the Supreme Court enters an order granting or denying the appeal. In the event a notice of appeal to the district court is filed prior to the motion for permissive appeal, the magistrate shall retain jurisdiction to rule on the motion and, in the event the motion is granted by the Supreme Court, the appeal to the district court shall be dismissed.

(b) **Motion to magistrate court.** In any case in which it is a party seeking the permissive appeal, a motion for permission to appeal must first be filed with the magistrate court within fourteen days from the date of entry of the final judgment or order. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited. The magistrate court shall, within fourteen (14) days after the hearing, enter an order approving or disapproving the motion.

#### **(c) Motion to Supreme Court for permission to appeal.**

(1) **Motion of a party.** Within fourteen (14) days from entry by the magistrate court of an order approving or disapproving a motion for permission to appeal under this rule, any party may file a motion with the Supreme Court requesting acceptance of the appeal by permission. A copy of the order of the magistrate court approving or disapproving the permission to appeal shall be attached to the motion. If the magistrate court fails to rule upon a motion for permission to appeal within twenty-one (21) days from the date of the filing of the motion, any party may file a motion with the Supreme Court for permission to appeal without any order of the magistrate court.

(2) **Motion by order of court.** A magistrate court may enter, on its own initiative, an order recommending permission to appeal directly to the Supreme Court. The magistrate court shall file a certified copy of its order with the Supreme Court and serve copies on all parties. The order



recommending permission to appeal shall constitute and be treated as a motion for permission to appeal under this rule.

(3) **Procedure.** A motion to the Supreme Court for permission to appeal under this rule shall be filed, served, and processed in the same manner as any other motion under Rule 32 of these rules.

(d) **Acceptance by Supreme Court.** Any appeal by permission of a judgment or order of a magistrate under this rule shall not be valid and effective unless and until the Supreme Court shall enter an order accepting such judgment or order of a magistrate, as appealable and granting leave to a party to file a notice of appeal, which must be filed within 14 days from the date of issuance of the Supreme Court order. Such appeal shall thereafter proceed in an expedited manner pursuant to Rule 12.2. The clerk of the Supreme Court shall file with the magistrate court a copy of the order of the Supreme Court granting or denying acceptance, and shall send copies to all parties to the action or proceeding. (Adopted March 22, 2002, effective July 1, 2002; amended March 21, 2007, effective July 1, 2007; amended January 3, 2008, effective March 1, 2008; amended March 19, 2009, effective July 1, 2009; amended January 4, 2010, effective February 1, 2010; amended March 29, 2010, effective July 1, 2010.)

#### ANALYSIS

Permissive Appeal.  
Scope of Rule.

#### Permissive Appeal.

Pursuant to Idaho R. Civ. P. 83(u)(1), when an appeal is taken from a magistrate court to a district court, the magistrate court retains the same powers, enumerated in I.A.R. 13(b), that a district court retains upon an appeal to the supreme court. Recommending a direct permissive appeal pursuant to this rule is not one of the powers enumerated in I.A.R. 13(b). Therefore, a magistrate court's recommendation of a direct permissive appeal in a custody

case, after an appeal has been filed with the district court, has no force or effect. *Dep't of Health & Welfare v. Doe (In re Doe)*, 147 Idaho 314, 208 P.3d 296 (2009).

#### Scope of Rule.

Because the magistrate's order denying the mother's request for attorney fees in a custody proceeding did not fall within the scope of this rule, her only appellate recourse was an appeal to the district court pursuant to Idaho R. Civ. P. 83; therefore, the appellate court possessed no jurisdiction to hear her attempted appeal and it had to be dismissed. *Olson v. Montoya*, 147 Idaho 833, 215 P.3d 553 (2009).

### **Rule 12.2. Expedited review for appeals in custody cases brought pursuant to Rule 11.1 or Rule 12.1.**

This rule governs procedures for an expedited review of an appeal brought as a matter of right pursuant to Rule 11.1 or a permissive appeal granted pursuant to Rule 12.1.

#### (a) **Notice of appeal.**

(1) An appeal from any final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure, granting or denying a petition for termination of parental rights or granting or denying a petition for adoption shall be made only by physically filing a notice of appeal with the clerk of the district court within fourteen (14) days from the date of issuance of the judgment. A notice of cross appeal must be filed within seven (7) days from the notice of appeal.



(2) An appeal filed pursuant to order of the Supreme Court granting a motion for permissive appeals pursuant to Rule 12.1 shall be made only by physically filing a notice of appeal with the clerk of the district court within fourteen (14) days from the date of issuance of the order granting the appeal. A notice of cross appeal must be filed within seven (7) days from the notice of appeal.

(b) **Preparation and filing of clerk's record.** The official court file, including any minute entries or orders together with the exhibits offered or admitted, shall constitute the clerk's record in such appeal. The record shall be prepared in accord with Rule 27 (a) and (b) as to number, use and fee, and Rule 28 (d) (e) and (f) and (g) as to preparation. The clerk shall prepare the record and have it ready for service on the parties within twenty one (21) days of the date of the filing of the notice of appeal. Clerks shall give priority to preparation of the record in these cases. The payment of the clerk's record fee as required by this rule may be waived by the magistrate court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court.

(c) **Preparation and filing of transcript.** Upon the filing of the notice of appeal the clerk of the district court shall forward the notice to the Trial Court Administrator, who shall be responsible for assigning preparation of the transcript. Unless otherwise ordered by the magistrate court, the appellant shall pay the estimated fee for preparation of the transcript as determined by the transcriber within the time set by the Trial Court Administrator and transcriptionist. The payment of the transcript fee may be waived by the magistrate court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court. The transcript shall be prepared in accord with Rule 24 (a) and (b) as to number, use and format, and in accord with Rules 25 and 26. The transcript shall be prepared and ready for service on the parties within twenty one (21) days of the date of the filing of the notice of appeal.

(d) **Briefing.** The time prescribed in Rule 34 for filing of briefs shall be reduced such that the appellant's brief is due within twenty-one (21) days of the date that the clerk's record and transcript are filed with the Supreme Court. The respondent's and cross-appellant's brief, if any, shall be joined in one brief, and shall be filed within twenty-one (21) days after service of the appellant's brief. The reply brief and cross-respondent's brief, if any, shall be combined and shall be filed within fourteen (14) days of service of any respondent's brief. If there is no cross-respondent's brief then the reply brief shall be filed within seven (7) days after service of the respondent's brief.

(e) **Extensions.** Each case subject to this rule shall be given the highest priority at all stages of the appellate process, and the clerk, transcriptionist or court reporter, and litigants will not be given extensions of time in which to comply with the expedited docketing and briefing schedules except upon a verified showing of the most unusual and compelling circumstances.

(f) **Oral argument.** Oral argument, if requested, shall be held within one hundred twenty (120) days from the filing of the notice of appeal.

(g) **Petitions for rehearing and review.** Any petition for rehearing or review shall be accompanied by the brief in support of the petition or the petition shall be summarily dismissed. (Adopted March 19, 2009, effective July 1, 2009; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013.)

**Rule 12.3. Certification of a question of law from a United States court.**

(a) **Certification of a Question of Law.** The Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court may certify in writing to the Idaho Supreme Court a question of law asking for a declaratory judgment or decree adjudicating the Idaho law on such question if such court, on the court's own motion or upon the motion of any party, finds in a pending action that:

(1) The question of law certified is a controlling question of law in the pending action in the United States court as to which there is no controlling precedent in the decisions of the Idaho Supreme Court, and

(2) An immediate determination of the Idaho law with regard to the certified question would materially advance the orderly resolution of the litigation in the United States court.

(b) **Filing with Idaho Supreme Court.** Upon the certification of a question of law to the Idaho Supreme Court under this rule, the United States court or any party in the action pending in that court, may file a certified copy of its order of certification with the Idaho Supreme Court without the payment of any filing fee. Any party to the action pending in the United States court may file a statement or brief in support of, or in opposition to, the certification of the question of law to the Idaho Supreme Court within fourteen (14) days from the date of filing of the Order of Certification.

(c) **Acceptance by the Idaho Supreme Court.** The Idaho Supreme Court may in its discretion accept the question of law certified by the United States court under this rule unless it finds that it appears that there is another ground for determination of the case pending in the United States court, or that the question certified for adjudication under this rule is not clearly defined in the Order of Certification, or that there is not an adequate showing that the question of law qualifies for determination under subsection (a) of this rule. The Idaho Supreme Court will enter an order either accepting or rejecting the question certified to it by the United States court and serve copies of such order upon the United States court and all parties to that pending action. If the Idaho Supreme Court accepts the certified question of law for adjudication, the Idaho Supreme Court will, in its order of acceptance, set forth the procedure to be followed in the adjudication proceeding including the sequence and time for the filing of briefs by the parties to the pending action in the United States court. The Idaho Supreme Court may, in its discretion, also require copies of all or any portion of the clerk's record or reporter's transcript before the United States court to be

filed with the Court, if in the opinion of the Court such documents are necessary in the determination of the question certified.

(d) **Argument on Certified Question Before the Idaho Supreme Court.** Upon acceptance of a question of law for adjudication under this rule, the Idaho Supreme Court will at that time, or at such later time as the Court deems appropriate, determine whether oral argument is required on the certified question of law and will advise the parties to the pending action in the United States court as to the time, place and procedure for presenting oral arguments to the Court.

(e) **Adjudication of Certified Question of Law.** Upon adjudication of a question of law certified under this rule, the Idaho Supreme Court will issue a written opinion in the same manner as an opinion in an appeal to the Idaho Supreme Court and such opinion shall be distributed, published and reported in the same manner as an opinion in an appeal. (Adopted April 3, 1981, effective July 1, 1981; renumbered from 12.1 March 22, 2002, effective July 1, 2002.)

## JUDICIAL DECISIONS

### ANALYSIS

Constitutionality.  
Controlling Precedent.  
Properly Certified.

#### Constitutionality.

This rule, permitting certification of questions of law from United States courts to the Idaho Supreme Court, is constitutional and the certification procedure established therein is valid. *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 105 Idaho 133, 666 P.2d 1144 (1983).

#### Controlling Precedent.

In a wrongful discharge case in which an employee claimed he was fired for petitioning to exercise stock options granted to him by the employer, because the United States Court of Appeals for the Ninth Circuit found no controlling precedent in the decisions of the Idaho courts, pursuant to Idaho App. R. 12.2, it requested the Idaho Supreme Court to exercise its discretion to accept certification of two legal questions. *Paolini v. Albertson's Inc.*, 418 F.3d 1023 (9th Cir. 2005).

#### Properly Certified.

Case concerning the assignability of a legal

malpractice claim to a client's successor was properly certified from a federal district court because there was no controlling precedent to resolve the question, and there were public policy issues on both sides of the legal question presented. *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani* (In re Order Certifying Question to Idaho Supreme Court), \_\_\_ Idaho \_\_\_, 293 P.3d 661 (2013).

**Cited in:** *Meckert v. Transamerica Ins. Co.*, 742 F.2d 505 (9th Cir. 1984); *Aetna Ins. Co. v. Craftwall of Idaho, Inc.*, 757 F.2d 1030 (9th Cir. 1985); *Meckert v. Transamerica Ins. Co.*, 108 Idaho 597, 701 P.2d 217 (1985); *Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir. 1985); *Toner v. Lederle Lab.*, 779 F.2d 1429 (9th Cir. 1986); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P.2d 1014 (1986); *Toner v. Lederle Labs.*, 112 Idaho 328, 732 P.2d 297 (1987); *Peone v. Regulus Stud Mills, Inc.*, 113 Idaho 374, 744 P.2d 102 (1987); *Sherrard v. City of Rexburg*, 113 Idaho 815, 748 P.2d 399 (1988); *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988); *Morrell Constr., Inc. v. Home Ins. Co.*, 920 F.2d 576 (9th Cir. 1990); *Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991); *Santana v. Zilog, Inc.*, 878 F. Supp. 1373 (D. Idaho 1995).

## RESEARCH REFERENCES

**A.L.R.** Construction and application of Uniform Certification of Questions of Law Act. 69 A.L.R.6th 415.



**Rule 13. Stay of proceedings upon appeal or certification.**

(a) **Temporary Stay in Civil Actions Upon Filing a Notice of Appeal or Notice of Cross-Appeal.** Unless otherwise ordered by the district court, upon the filing of a notice of appeal or notice of cross-appeal all proceedings and execution of all judgments or orders in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days. Any further stay shall be only by order of the district court or the Supreme Court. Any stay of orders or proceedings in the Industrial Commission or the Public Utilities Commission shall be as provided in Rule 13(d) and (e).

(b) **Stay Upon Appeal — Powers of District Court — Civil Actions.** In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal;

- (1) Settle the transcript on appeal.
- (2) Rule upon any motion for new trial.
- (3) Rule on any motion to amend findings of fact or conclusions of law.
- (4) Rule on any motion to amend the judgment.
- (5) Rule upon any motion for judgment notwithstanding the verdict.
- (6) Rule on any motion under Rule 60(a) or (b), I.R.C.P.
- (7) Rule upon any motion for reconsideration filed pursuant to Rule 11(a)(2)(B), I.R.C.P.
- (8) Enter a stay of execution or enforcement of any injunction or mandatory order entered by the court upon such conditions and upon the posting of such security as the court determines in its discretion.
- (9) Make any order regarding the taxing of costs or determination of attorneys fees incurred in the trial of the action.
- (10) Make any order regarding the use, preservation or possession of any property which is the subject of the action on appeal.
- (11) Take any action or enter any order deemed advisable in the discretion of the court with regard to the custody or support of children pending any appeal involving the custody or support of such children, and to amend or modify such order from time to time, during the pendency of the appeal, by reason of changes of circumstances of the parties.
- (12) Make any order which the district court deems appropriate in its discretion for the payment or advancement of attorneys fees and/or anticipated costs on appeal by one party to the other, subject to the order of the Supreme Court determining the right to, and amount of, attorneys fees on appeal.
- (13) Take any action or enter any order required for the enforcement of any judgment or order.
- (14) Stay execution or enforcement of any judgment, order or decree appealed from, other than a money judgment, upon the posting of such security and upon such conditions as the district court shall determine.
- (15) Stay execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond by a fidelity, surety, guaranty, title or trust company authorized to do business in the state and



to be a surety on undertakings and bonds, either of which must be in the amount of the judgment or order, plus 36% of such amount. Provided, an agreement not to execute on the judgment made pursuant to Rule 16(b) may be filed in lieu of such bond or cash deposit. Any bond filed pursuant to this rule shall state that the company issuing or executing the same agrees to pay on behalf of the appellant all sums found to be due and owing by the appellant by reason of the outcome of the appeal, within 30 days of the filing of the remittitur from the Supreme Court, up to the full amount of the bond or undertaking. A copy of the bond, agreement not to execute, or notification of a cash deposit shall be served upon all parties to the appeal at the time of the application for the stay of execution. Any objection to the sufficiency of a cash deposit or bond posted under this rule shall be waived unless a written objection is made in the form of a motion and filed with the district court within 21 days of the filing of such bond or cash deposit. The district court shall rule upon such objection in the same manner as any other motion under the I.R.C.P. If the district court stays execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond, the court may, upon motion or application, cause or direct any judgment lien filed to be released. If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal. Any cash deposit may be applied to the judgment upon filing of the remittitur from the Supreme Court. If a party obtains a judgment for punitive damages, the supersedeas bond or cash deposit requirements shall be waived as to that portion of the punitive damages that exceeds one million dollars (\$1,000,000) if the party or parties found liable seek a stay of enforcement of the judgment during the appeal. In addition, the supersedeas bond or cash deposit requirements may be waived in any action for good cause shown. However, if the judgment creditor proves by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond or cash deposit requirement has been waived, is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts, waiver may be rescinded and the bond or cash deposit requirements may be reinstated for the full amount of the judgment.

(16) Any order of the Supreme Court as to whether or not a judgment, order, decree or proceeding shall be stayed shall take precedence over any order entered by the district court.

(17) Rule on any motion or application for the issuance of a Rule 54(b) I.R.C.P. certificate making a partial judgment final and appealable.

(18) Take any action and rule upon all matters, including conduct of a trial, during a permissive appeal under Rule 12 I.A.R. or during an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., if approved by the Supreme Court under Rule 13.4.

(19) Rule upon any application for court appointed counsel in a civil case, including a petition for habeas corpus or a petition for post-conviction relief.

(20) Rule upon any motion pertaining to the taking of depositions pursuant to Rule 27(b), I.R.C.P.

**(c) Stay Upon Appeal — Powers of District Court — Criminal Action.** In criminal actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal:

(1) Settle the transcript on appeal.

(2) Rule upon any motion for a new trial.

(3) Rule upon any motion for arrest of judgment.

(4) Conduct any hearing, and make any order, decision or judgment allowed or permitted by § 19-2601, Idaho Code.

(5) Conduct any hearing and make any order, decision or judgment with regard to an originally withheld judgment upon a plea or verdict of guilty.

(6) Place a defendant upon probation, modify or revoke such probation, or sentence a defendant upon revocation of probation.

(7) Determine and order whether there shall be a stay of execution of a judgment of conviction upon an appeal to the Supreme Court, except where the sentence is capital punishment, in which case execution of the sentence shall be automatically stayed pending appeal.

(8) Determine whether the defendant should be allowed bail, and if the defendant is allowed bail:

(i) Determine the amount of bail;

(ii) Modify the amount of bail from time to time;

(iii) Forfeit bail for violation of any of its conditions;

(iv) Issue a warrant for the arrest of the defendant for violation of bail.

(9) Determine whether the defendant is entitled to a transcript and court appointed attorney on appeal at public expense, and if so, appoint an attorney for the defendant and upon the filing of a notice of appeal, order the preparation of the transcript and record at county expense.

(10) Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law.

(11) Rule upon a motion to correct or reduce a sentence under Rule 35 I.C.R.

(12) Sentence a defendant for a crime for which the defendant had been found guilty and which has been appealed.

**(d) Stay Upon Appeal From the Industrial Commission.** In administrative appeals from the Industrial Commission the order or award shall be stayed as provided by statute during the pendency of the appeal, unless otherwise ordered by the Industrial Commission or the Supreme Court.

**(e) Stay Upon Appeal From the Public Utilities Commission.** In administrative appeals from the Public Utilities Commission, unless stayed

by the Supreme Court, the administrative agency shall have continued jurisdiction of the matter and the parties consistent with the provisions of applicable statutes including the power to settle the transcript and record on appeal.

**(f) Stay Upon Permissive Appeal.**

**(1) Stay during processing of motion for permission to appeal.**

The filing of a motion for permission to appeal under Rule 12 shall not automatically stay the action or proceeding nor the enforcement of the interlocutory judgment, order or decree. After a motion for permission to appeal has been filed, the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

**(2) Stay after a motion for permission to appeal has been granted.**

The granting of a motion for permission to appeal under Rule 12 by the Supreme Court automatically stays the entire action or proceeding until the appeal has terminated, and during that time the district court or administrative agency shall have no power or authority over the action or proceeding, except as provided in subsections (a), (b), (c), (d) and (e) of this Rule. Provided, the granting of the motion for permission to appeal does not stay the enforcement of any judgment, order or decree, but the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

**(g) Stay by Supreme Court.** The Supreme Court may also, in its discretion, enter an order staying a proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree, including but not limited to an injunction, writ of mandamus or prohibition, at any time during the pendency of an original application or petition for any extraordinary writ, or during the pendency of any appeal or a motion for certification of appeal. Any order of the Supreme Court shall take precedence over any order entered by the district court or administrative agency. Provided, in any appeal from the district court or an administrative agency, a party desiring to obtain any such stay must first make application to the district court or administrative agency before making application to the Supreme Court. If a district court or administrative agency denies an application for stay, or fails to act upon the application within fourteen (14) days after the filing of the application, any party may apply to the Supreme Court for a stay. If a district court or administrative agency grants a stay, any party may apply to the Supreme Court to modify or vacate the stay. (Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended March 24, 1982, effective July 1, 1982; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective July 1, 1990; amended February 10, 1993, effective July 1, 1993; amended March 18, 1998, effective July 1, 1998; amended March 19, 2009, effective July 1, 2009; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013.)



# STATUTORY NOTES

**Cross References.** Stay pending appeal,  
§ 13-202.

## JUDICIAL DECISIONS

### ANALYSIS

Appeal from Industrial Commission.  
Authority of Magistrate.  
Catchall Provision.  
Child Support Modification.  
Construction with Other Rules.  
Costs and Attorney Fees.  
Criminal Action.  
—Completion of Record.  
—Omitted Issue.  
Jurisdiction.  
Motion to Disqualify Judge.  
Motions No Longer Pending.  
Motions Pending.  
No Order Staying Enforcement.  
Order Lifting Stay.  
Permissive Appeal.  
Posting of Security.  
Rule 35 Motion.  
Stay upon Appeal.  
—New Trial.

### Appeal from Industrial Commission.

Both § 72-731 and subsection (d) of this rule provide that upon an appeal to the Supreme Court from the Industrial Commission, the award is stayed; therefore, the commission's order denying the claimant's motion to permit collection of judgment pending appeal was proper. *Nielson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

### Authority of Magistrate.

During the pendency of the appeal, the district court's authority is limited to the extent set out in subsection (b) of this rule. The same powers and authority granted to a district judge by subsection (b) of this rule are conferred on a magistrate during the pendency of an appeal. The district court is empowered to take any action or enter any order required for the enforcement of any judgment, order or decree. *DesFosses v. DesFosses*, 120 Idaho 27, 813 P.2d 366 (Ct. App. 1991), *aff'd*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

Where the advancement of attorney fees was within the discretion of the magistrate, and no argument or authority was presented to the appellate court in support of the cross-claimant's contention that the advancement was in error, the order advancing fees for appeal was affirmed. *Peasley Transfer & Stor-*

*age Co. v. Smith*, 132 Idaho 732, 979 P.2d 605 (1999).

### Catchall Provision.

Trial court did not lack jurisdiction to rule on defendant's motion to withdraw his guilty plea during the pendency of his appeal because the catchall provision in subdivision (c)(10) allowed the court to hear the motion. *State v. Wilson*, 136 Idaho 771, 40 P.3d 129 (Ct. App. 2001).

### Child Support Modification.

Where there was substantial, competent evidence in the record to support the magistrate's finding that a father's reduced gross income combined with the birth of another child by his current wife and that child's need for support constituted a permanent, material, and substantial change of circumstances since the last order modifying the divorce decree, there was no error in the magistrate's granting the father's petition for modification, despite the fact that the parties' divorce decree was contemporaneously the subject of an appeal before the Idaho Court of Appeals. *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996).

### Construction with Other Rules.

The filing of a notice of appeal which is based upon an appealable order under Idaho Appellate Rule 11 has the effect of staying the proceedings before the district court. *State v. Schwarz*, 133 Idaho 463, 988 P.2d 689 (1999).

### Costs and Attorney Fees.

Idaho App. R. 13(b)(9) provided that the district court retained jurisdiction to make any order regarding the taxing of costs or determination of attorneys fees incurred in the trial of the action; thus, the district court had jurisdiction to award costs, including attorney fees. *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d. 972 (2010)

### Criminal Action.

#### —Completion of Record.

After an appeal is filed, a district court in a criminal proceeding may enter an order on a motion filed prior to the appeal where such ruling merely completes the record and does not in any way alter an order or judgment from which the appeal has been taken. *State*



v. Wade, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994).

#### **—Omitted Issue.**

Where the district court was presented with three motions: one requesting a reduction of sentence pursuant to Rule 35, one requesting a progress report, and one requesting appointed counsel, and where the district court initially denied two of these requests but omitted to rule on the third, after defendant appealed, the district court retained jurisdiction to rule upon the omitted issue of appointed counsel in conjunction with its denial of defendant's motion for reconsideration of the Rule 35 motion. *State v. Wade*, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994).

#### **Jurisdiction.**

Once proceedings are stayed by appeal, the district court ordinarily is divested of jurisdiction to act in any manner with relation to the rights and liabilities of an appellant except to act in aid of and not inconsistent with the appeal. *H & V Eng'g, Inc. v. Idaho State Bd. of Professional Eng'rs & Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987).

The district court was without jurisdiction to affirm the disciplinary order imposed by the Board of Professional Engineers and Land Surveyors after having initially ordered a remand, from which order the engineers perfected their appeal, and jurisdiction was vested in the Supreme Court. *H & V Eng'g, Inc. v. Idaho State Bd. of Professional Eng'rs & Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987).

#### **Motion to Disqualify Judge.**

This rule does not provide the District Court with the authority to rule on a motion to disqualify a judge after an appeal has been filed. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

#### **Motions No Longer Pending.**

The district court had no power or authority — because it lacked jurisdiction — to reconsider its earlier decision and to enter a different ruling in respect to the defendant's motions for judgment notwithstanding the verdict or for a new trial after the defendant's notice of appeal was filed, because those motions were no longer pending and the subsequent notice of appeal transferred jurisdiction of the case from the district court to the appellate court. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

#### **Motions Pending.**

This rule does not authorize the district court during the pendency of appeal to rule on

a motion to amend a party's pleadings or a motion to compel production of documents. *First Sec. Bank v. Webster*, 119 Idaho 262, 805 P.2d 468 (1991).

#### **No Order Staying Enforcement.**

Where the record did not contain any order staying enforcement of the divorce judgment entered by the magistrate following the husband's appeal to the district court, the judgment therefore remained enforceable in the magistrate division while the appeal was pending in the district court, and since the district court judge refused to process the case as a trial de novo, the district court did not have jurisdiction to entertain or to dispose of issues relating to the enforcement of the magistrate's judgment. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

#### **Order Lifting Stay.**

Order lifting a seven-day automatic stay in a foreclosure action was upheld due to purchaser's failure to show they were prejudiced by the order. *Markham v. Anderton*, 118 Idaho 856, 801 P.2d 565 (Ct. App. 1990).

#### **Permissive Appeal.**

Pursuant to Idaho R. Civ. P. 83(u)(1), when an appeal is taken from a magistrate court to a district court, the magistrate court retains the same powers, enumerated in paragraph (b) of this rule, that a district court retains upon an appeal to the supreme court. Recommending a direct permissive appeal pursuant to I.A.R. 12.1 is not one of the powers enumerated in paragraph (b). Therefore, a magistrate court's recommendation of a direct permissive appeal in a custody case, after an appeal has been filed with the district court, has no force or effect. *Dep't of Health & Welfare v. Doe (In re Doe)*, 147 Idaho 314, 208 P.3d 296 (2009).

#### **Posting of Security.**

Posting the letter of irrevocable credit was substantially equivalent to posting a supersedeas bond where no objection to the form of the security was made at the time of its posting; accordingly, this cost was allowable under subdivision (b)(5) of I.A.R. 40. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

#### **Rule 35 Motion.**

Defendant's I.C.R., Rule 35 motion for reduction of sentence had to be filed within 120 days after the judgment of conviction was entered. But defendant also desired to appeal from the judgment of conviction and, under the provisions of Rule 35 then in force (after the 1986 change to the rule), he could not file a Rule 35 motion for reduction after completion of the anticipated appeal. Notwithstanding

ing the joint action by the attorneys for the parties, the district court was not bound to delay a decision on the Rule 35 motion. Under this Rule, the district court had the authority to decide the motion while the appeal from the judgment was pending. Nevertheless, the court cooperatively acceded to the parties' desire not to have the motion determined until after the appeal was resolved and the court's action was not a violation of the provisions of Rule 35 which would have deprived the district court of jurisdiction to decide defendant's motion. *State v. Nickerson*, 123 Idaho 971, 855 P.2d 56 (Ct. App. 1993).

#### **Stay upon Appeal.**

Since there is no appeal as of right from a contempt order, an attempt to appeal from such an order did not divest the jurisdiction of the magistrate under subsection (b) of this rule. *Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983).

The district court did not ignore a request by the claimant to hold certain persons in contempt of court where his motion was filed simultaneously with his notice of appeal from the order of the District Court upholding administrative decision of the Department of Health and Welfare because the notice of appeal deprived the court of authority to proceed on the motion filed by the claimant. *Madsen v. State, Dep't of Health & Welfare*, 114 Idaho 182, 755 P.2d 479 (Ct. App. 1988).

Upon the filing of a notice of appeal by defendants of an order granting a motion for JNOV, the trial court was divested of jurisdiction except to take the actions in Idaho App. R. 13(b); hence, the trial court did not have the authority to enter a later judgment. *Mosell Equities, LLC v. Berryhill & Co.*, — Idaho —, 297 P.3d 232 (2013).

#### **—New Trial.**

There is no exception in subsection (b) of this rule granting the district court power to entertain its own motion to reconsider an order granting a new trial and this is particularly the case given the prohibition in I.R.C.P. 11(a)(2)(B), which specifically provides that "there shall be no motion for reconsideration of an order of the trial court entered on any motion [granting a new trial] filed under Rules ...59(a)....," whether it be the party's motion or the trial court's "own motion." *Syth v. Parke*, 121 Idaho 156, 823 P.2d 760 (1991).

**Cited in:** *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981); *Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986); *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995); *Bettinger v. Idaho Auto Auction, Inc.*, 128 Idaho 327, 912 P.2d 695 (Ct. App. 1996); *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 917 P.2d 737 (1996); *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004); *Johnson v. Johnson*, 147 Idaho 912, 216 P.3d 1284 (2009).

### DECISIONS UNDER PRIOR RULE OR STATUTE

#### ANALYSIS

Condemnation.  
Custodial Modification.  
Foreign Attachment.  
Jurisdiction Retained by District Court.  
Land Sale Contract.  
Motion for Change of Venue.  
Preservation of Attachment.  
Proceedings After Appeal.  
Receivership.

#### **Condemnation.**

Perfecting of an appeal from a judgment in the matter of condemning land for a railway stays all proceedings in district court upon judgment and order appealed from, and pending appeal, commissioners have no jurisdiction to act. *McLean v. District Court*, 24 Idaho 441, 134 P. 536 (1913).

#### **Custodial Modification.**

Where a former husband took custody of his children subsequent to a custodial modification order and before the mother perfected her appeal of the modification order, the

change in physical custody had occurred before the appeal was taken and was not a further proceeding which could be stayed, so that the court did not err in failing to restore custody to the mother during her appeal. *Prescott v. Prescott*, 97 Idaho 257, 542 P.2d 1176 (1975).

#### **Foreign Attachment.**

The fact that an appeal was taken from an Idaho judgment which was subsequently affirmed, did not affect the validity of an attachment of the judgment in New York during the pendency of the appeal, since the appeal did not change the nature of the debt evidenced by the judgment. *Lincoln Mines Operating Co. v. Huron Holding Corp.*, 27 F. Supp. 720 (D. Idaho 1939), *aff'd*, 312 U.S. 183, 61 S. Ct. 513, 85 L. Ed. 725 (1941).

#### **Jurisdiction Retained by District Court.**

The contention, that the appeal transfers the entire jurisdiction of the case from the district court to the supreme court, is unsound since, in some instances where an appeal is taken, it will be necessary for the trial

court to retain and exercise its jurisdiction. *Sherwood v. Porter*, 58 Idaho 523, 76 P.2d 928 (1938).

District court retains jurisdiction after appeal and supersedes for the purpose of preserving attachment lien and protecting the property held. *Sherwood v. Porter*, 58 Idaho 523, 76 P.2d 928 (1938).

#### **Land Sale Contract.**

Where the lower court found no default by the purchasers on the land sale contract for the property, the judgment required no further process by the lower court for its enforcement, thus the operation of the escrow contract was not stayed by the appeal perfected by the vendors since the judgment of the trial court was self-executing, and upon completion of the terms of the escrow contract the purchasers had a right to the escrowed documents, notwithstanding the appeal. *Suitts v. First Sec. Bank*, 100 Idaho 555, 602 P.2d 53 (1979).

#### **Motion for Change of Venue.**

An appeal from an order denying a motion for change of venue does not stay proceedings

in the case. *Bentley v. Lucky Friday Extension Mining Co.*, 70 Idaho 511, 223 P.2d 947 (1950).

#### **Preservation of Attachment.**

While judgment in favor of defendant dissolves attachment, if appeal be perfected within time prescribed, attachment may be continued in force. *Washington County v. Weiser Nat'l Bank*, 43 Idaho 618, 253 P. 838 (1927).

#### **Proceedings After Appeal.**

The trial court had no authority to pass upon a motion to amend and alter the findings of fact and conclusions of law and vacate the judgment filed by defendants after plaintiffs had perfected an appeal. *Dolbeer v. Harten*, 91 Idaho 141, 417 P.2d 407 (1965).

#### **Receivership.**

Appeal taken from judgment directing execution of certain conveyances by defendant does not prevent appointment of a receiver under § 8-601, subdivisions 3 and 4, where the defendant has failed to execute and deliver such conveyances. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

### **Rule 13.1. Ex parte temporary stay.**

(a) **Application.** A party may file in the Supreme Court an application for an ex parte temporary stay of execution of an order or judgment pending the determination of an application made to the Supreme Court under Rule 13(g) for stay during the appeal. Such application shall be made by verified petition, motion or application which shall certify what efforts, if any, have been made to give notice of the application to the adverse party or shall state the reasons supporting the claim that notice should not be required.

(b) **Ex parte temporary stay.** The Supreme Court, acting through three or more members, may issue an ex parte temporary stay of execution pending the determination of an application for stay during the appeal. An ex parte temporary stay may be granted only if it appears from the specific facts shown by the verified petition, motion or application that immediate and irreparable injury, loss, or damage will result to the applicant before a ruling can be had upon the application for stay during the appeal. An ex parte stay may issue with or without security, in the discretion of the Supreme Court, and will state the duration and any conditions of the temporary stay.

(c) **Motion to dissolve temporary stay.** Any party affected by an ex parte temporary stay under this rule may file a motion with the Supreme Court to dissolve such temporary stay and shall serve the motion on all parties to the appeal. The motion shall be processed by the Supreme Court in such manner as it deems appropriate under the circumstances. (Adopted March 24, 1982, effective July 1, 1982; amended March 27, 1989, effective July 1, 1989; amended February 10, 1993, effective July 1, 1993.)



**Rule 13.2. Suspension of appeal.**

Proceedings in an appeal before the Supreme Court may be suspended only by order of the Supreme Court on motion showing good cause. An order suspending an appeal will state the duration and any conditions of such suspension, which may be terminated or extended by further order of the court upon application of any party or upon the initiative of the Court. (Adopted March 24, 1982, effective July 1, 1982.)

**JUDICIAL DECISIONS****Effect of Clerk's Suspension Order.**

Clerk of court's stay of the processing of appeal, i.e., the preparation of the clerk's and reporter's transcripts, and the briefing by the parties, did not remand the case to the District Court "to fulfill the requirements of the

order of remand," and therefore, the order issued by the clerk of the court did not reinvest the trial court with jurisdiction to rule upon its own sua sponte motion to reconsider its prior order granting a new trial. *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991).

**Rule 13.3. Temporary remand to district court or administrative agency.**

(a) **Remand by the Court.** At any time before the issuance of an opinion, the Supreme Court may on its own motion, or on motion of any party showing good cause, order a case to be remanded to the district court or to the administrative agency to take further action as designated in the order of remand.

(b) **Effect of Remand.** During a remand to the district court or administrative agency the appeal shall remain pending in the Supreme Court, but the district court or administrative agency shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand. (Adopted March 28, 1986, effective July 1, 1986.)

**JUDICIAL DECISIONS****ANALYSIS**

Administrative Remand.

Effect of Clerk's Suspension Order.

Review of District Court's Order upon Remand.

**Administrative Remand.**

Petition for judicial review of a decision of a county board of commissioners, denying an application of medical indigency benefits on the ground that the applicant was not a resident of the County because she was an undocumented alien, was remanded to the board, pursuant to an appellate court's discretion under Idaho App. R. 13.3(a), because the board failed to make findings on critical factors of eligibility including indigency and medical necessity. *Mercy Med. Ctr. v. Ada County*, 146 Idaho 226, 192 P.3d 1050 (2008).

**Effect of Clerk's Suspension Order.**

Clerk of court's stay of the processing of

appeal, i.e., the preparation of the clerk's and reporter's transcripts, and the briefing by the parties, did not remand the case to the District Court "to fulfill the requirements of the order of remand," and therefore, the order issued by the clerk of the court did not reinvest the trial court with jurisdiction to rule upon its own sua sponte motion to reconsider its prior order granting a new trial. *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991).

**Review of District Court's Order upon Remand.**

Although a district court's order upon remand which dismissed one defendant in a two-defendant case, ordinarily would have required a certificate of finality for appellate review of the dismissal, the Supreme Court deemed the district court's order as functionally equivalent to a certificate of finality because appellate jurisdiction was fully vested when the appeal was initially filed and the



court perceived no just reason to delay consideration on appeal of the dismissal order. *Madison v. Idaho Dep't of Health & Welfare*, 116 Idaho 758, 779 P.2d 433 (Ct. App. 1989).

#### **Rule 13.4. Delegation of jurisdiction to district court during an appeal.**

During a permissive appeal under Rule 12 I.A.R. or an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., the Supreme Court may, by order, delegate jurisdiction to the district court to take specific actions and rule upon specific matters, which may include jurisdiction to conduct a trial of issues. A motion for an order under this rule may be filed with the Supreme Court by any party in the district court action or the administrative proceeding. (Adopted March 27, 1989, effective July 1, 1989; amended March 9, 1999, effective July 1, 1999.)

#### **Rule 13.5. Stipulation for vacation, reversal or modification of judgment.**

Upon stipulation of all affected parties that a criminal or civil judgment of the trial court or administrative agency may be vacated, reversed, modified or remanded for further hearings, the court may enter an order accomplishing the stipulated result without briefs, oral argument, or an opinion of the court. An order entered by the court pursuant to such a stipulation shall not be considered as precedent for any purpose other than a resolution of that appeal. The clerk of the court shall issue a remittitur for the order under Rule 38 in the same manner as a remittitur on an opinion of the court. (Adopted March 23, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1991.)

### **STATUTORY NOTES**

**Compiler's Notes.** The Supreme Court 1991 renumbered former Rule 33.1 as Rule Order of March 20, 1991, effective July 1, 13.5.

#### **Rule 14. Time for filing appeals.**

All appeals permitted or authorized by these rules, except as provided in Rule 12, shall be taken and made in the manner and within the time limits as follows:

(a) **Appeals From the District Court.** Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment or order of the district court appealable as a matter of right in any civil or criminal action. The time for an appeal from any civil judgment or order in an action is terminated by the filing of a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action (except motions under Rule 60 of the Idaho Rules of Civil Procedure or motions regarding costs or attorneys fees), in which case the appeal period for all judgments or orders commences to run upon the date of the clerk's filing stamp on the order deciding such motion. The time for an

appeal from any criminal judgment, order or sentence in an action is terminated by the filing of a motion within fourteen (14) days of the entry of the judgment which, if granted, could affect the judgment, order or sentence in the action, in which case the appeal period for the judgment and sentence commences to run upon the date of the clerk's filing stamp on the order deciding such motion. If, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code § 19-2601(4), the length of time to file an appeal from the sentence contained in the criminal judgment shall be enlarged by the length of time between entry of the judgment of conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided, however, that all other appeals challenging the judgment must be brought within 42 days of that judgment. Provided, if a criminal judgment imposes the sentence of death, the time within which to file a notice of appeal does not commence to run until the death warrant is signed and filed by the court.

(b) **Appeals From an Administrative Agency.** An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. The time for an appeal from such decision, order or award of the industrial commission is terminated by a timely motion for rehearing or reconsideration of the decision or order which, if granted, could affect the decision, order or award (except motions regarding costs or attorneys fees), in which case the appeal period commences to run upon the date of the filing stamp on the order or decision denying such motion or the decision on rehearing or reconsideration. The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 3, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 21, 2007, effective July 1, 2007; amended March 29, 2010, effective July 1, 2010; amended March 18, 2011, effective July 1, 2011.)

#### STATUTORY NOTES

**Compiler's Notes.** The words in parentheses so appeared in the rule as promulgated.

## JUDICIAL DECISIONS

## ANALYSIS

Amended Judgment.  
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**Amended Judgment.**

When an amended judgment alters content other than the material terms from which a party may appeal, its entry does not serve to enlarge the time for appeal. *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010).

Amendment of judgment to correct an obvious error in the clerk's stamp on the judgment does not trigger a new period during which an appeal may be taken. *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010).

**Appeal by Inmate.**

The issue of timeliness of an appeal, done pro se by inmate which was received by court clerk 45 days after the entry of the order from which the appeal was taken, was implicitly resolved by a Supreme Court order reinstating the appeal after lower courts had dismissed it. *State v. Lee*, 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990).

**Constitutionality.**

Where post-conviction petitioner's judgment of conviction was filed on October 4, 2005 and on March 22, 2006, the district court relinquished jurisdiction over him, petitioner had one year and 42 days from March 22, 2006, in which to file his petition for relief. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

**Counsel's Failure to Advise Regarding Time.**

An attorney's failure to notify a defendant of the time limit within which to file did not abridge that defendant's right to appeal where just after defendant's incarceration, his attorney wrote to him regarding the pos-

sibility of appeal, the letter informed defendant that the attorney would await further instructions from him as to whether he wished to appeal, and defendant did not respond to his attorney's request at all. *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

**Date of Judgment.**

Where a sentencing hearing was held on June 7 and the district court judge signed the judgment the same day, but the judgment was inadvertently dated May 7 on the filing stamp and the court, on June 21, amended the judgment to correct the date to June 7, a notice of appeal of the judgment must be filed within 42 days of the June 7 judgment, not the June 21 corrective order. *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010).

**Divorce Decrees.**

Once a divorce decree becomes final, it is res judicata with respect to all issues which were or could have been litigated. However, there exists various avenues for directly attacking a divorce decree. For example, a party may move the district court to amend the decree, or for a new trial, within 14 days of the decree's entry. The decree is also subject to appeal within 42 days. Moreover, where a party seeks to avoid the operation of a judgment on the basis of fraud, mistake, or other justifiable reason, I.R.C.P. 60(b) permits the court to set aside the judgment upon timely motion. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

**Effect of Criminal Rules Motion.**

An I.C.R., Rule 35 motion extends the time for filing an appeal only if it is filed within 14 days of the entry of judgment, which if granted, could affect the judgment, order or sentence. *State v. Repici*, 122 Idaho 538, 835 P.2d 1349 (Ct. App. 1992).

**Enlargement of Time to File.**

The filing of an I.C.R., Rule 35 motion more than fourteen days after the entry of a judgment did not serve to enlarge the time to file an appeal from the judgment of conviction and sentence. *State v. Mosqueda*, 123 Idaho 858, 853 P.2d 603 (Ct. App. 1993).

**Extension Not Permitted.**

The time for appealing from the denial of I.C.R. 35 motion is not extended under this rule by the filing of a motion to alter or amend. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

**Filing Timely.**

Where plaintiff obtained default judgment



against entity of first title company for transaction that took place prior to sale of entity to second title company and where on December 4, 1979 court denied motion to vacate judgment of second title company that was not a party to the transaction stating that the second company had not been authorized to intervene and thus had no standing to make motion to vacate, whereupon second company filed motion to intervene which was granted on February 12, 1980 and on March 7, 1980 second company renewed its motion to vacate which was denied on June 26, 1980, appeal from denial of June 26, 1980 being the first order addressing the merits of second company's motion to vacate the judgment was an appealable order made after final judgment and thus an appeal from that order was timely and appropriate. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Where the defendant filed his notice of appeal from the trial court's order denying post-conviction relief 49 days after the filing of the court's order, such filing was timely under the former provisions of § 19-4909, which allowed 60 days for filing, although untimely under I.A.R. 14, which allows 42 days for filing; since these filing provisions were inconsistent at the time of this filing, dismissal of the appeal was not required. *Carter v. State*, 108 Idaho 788, 702 P.2d 826 (1985) (decision prior to 1985 amendment of § 19-4909).

Where the defendant filed his notice of appeal 59 days after the judgment, the notice was within the 60-day filing requirement of former § 19-4909, but not within the 42-day requirement of this rule; however, in the interest of justice and because of the conflict between this rule and former § 19-4909, the appeal was not dismissed. *Baruth v. Gardner*, 110 Idaho 156, 715 P.2d 369 (Ct. App. 1986) (decision prior to 1985 amendment of § 19-4909).

Where the plaintiff filed the motion to vacate the I.R.C.P. 54(b) certificate on the fortieth day of the appeal period, but the judge granted the motion to vacate the certificate after the end of the 42-day period, the motion to vacate was still timely; as with other post-judgment motions, the applicant need only file the motion during the stated period following the judgment. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Where the defendant's notice of appeal was filed within 42 days after his Rule 35 motion was denied by the district court, the order denying the motion to modify was properly before the Court of Appeals. *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988).

Where imprisoned defendant alleged a delay in mailing his notice of appeal and an accompanying affidavit on the part of the penitentiary, although defendant's notice of appeal was received forty-three days after the district court's order was filed the Court of Appeals had jurisdiction to entertain defendant's appeal. *State v. Rodriguez*, 119 Idaho 895, 811 P.2d 505 (Ct. App. 1991).

Although defendant's motion to reduce sentence was not timely filed following an order revoking probation, the court of appeals deemed it to be timely because the trial court might have misled defendant as to time for filing such a motion. *State v. Joyner*, 121 Idaho 376, 825 P.2d 99 (Ct. App. 1992).

The notice of appeal from the district court's order dismissing the defendant's petition as untimely was filed on February 4, 1992, which was beyond the 42 day time limit within which to file an appeal from a final order. The time for filing the appeal, however, was extended by the filing of defendant's motion to reconsider the dismissal which was timely filed within 14 days of the order to be reconsidered. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992).

Since order denying worker's motion to reconsider the motion to change caption did not finally dispose of all of worker's claims, and since the Industrial Commission retained jurisdiction in order to determine the amount of benefits to which worker was entitled, order denying the motion to reconsider was not a final decision or order for purposes of I.A.R. 11(d). The appeal was timely because it was filed within 42 days after the issuance of the Commission's decision awarding benefits. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

When the County Board of Commissioners issued its decision denying a request for reconsideration on August 30, 1990, the time for appeal commenced to run. The September 7, 1990, filing of the notice of appeal was well within the 20 day time limit. *Eastern Idaho Health Servs., Inc. v. Burtenshaw*, 122 Idaho 904, 841 P.2d 434 (1992).

Because an appeal was timely, it was timely as to all issues from which an appeal could be taken, not just those mentioned in the motion to alter or amend. The interests of efficient case management would not be served by interpreting rules to require that a party must appeal from each issue as it is decided or risk losing the right to appeal once the case has been concluded. *Idaho Dep't of Health & Welfare v. Southfork Lumber Co.*, 123 Idaho 146, 845 P.2d 564 (1993).

The Department of Health and Welfare served an I.R.C.P., Rule 59(e) motion within



14 days of the August 10, 1989 order. This was timely for purposes of I.R.C.P., Rule 59(e) motion on January 2, 1990, and the department appealed within 42 days thereafter as required by this Rule. Therefore, the department's appeal was timely and should not have been dismissed. *Idaho Dep't of Health & Welfare v. Southfork Lumber Co.*, 123 Idaho 146, 845 P.2d 564 (1993).

Inmate's appeal of the district court's denial of his petition for post-conviction relief was timely, even though his original notice of appeal was not physically received by the clerk of the court within 42 days of the district court's dismissal order, because, under the mail box rule, the inmate provided ample evidence that he did in fact present a notice of appeal for mailing on August 3, nine days before the August 12 deadline. *Hayes v. State*, 143 Idaho 88, 137 P.3d 475 (Ct. App. 2006).

Post-conviction petitioner's notice of appeal from a district court's notice of intent to dismiss, though premature and interlocutory in nature, was nevertheless sufficient to effectuate an appeal from a final order dismissing the petition four days after the petitioner's notice of appeal was filed. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

Defendants timely appealed from a verdict based upon the doctrine of boundary by agreement. *Cecil v. Gagnebin*, 146 Idaho 714, 202 P.3d 1 (2009).

#### **Filing Untimely.**

Where the defendants' final partial summary judgment was filed April 19, and plaintiff's appeal was not filed until June 28, 70 days later, it was not timely filed and defendant-respondents' motion for dismissal of plaintiff's appeal would have to be granted. *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979).

Although there was no showing in the court records of a mailing of notice of entry of judgment, where appellants' counsel had actual notice of entry of judgment 13 days prior to expiration of the time for filing an appeal, appellants' notice of appeal filed 44 days after the entry of judgment was not timely. *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984 (1980).

The requirement of perfecting an appeal within the time period allowed by I.A.R. Rules 11 and 14, is jurisdictional. An appeal taken after expiration of the filing period will be dismissed. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Where the notice of appeal was filed after the order revoking probation was entered and more than one year from the date of the original sentence, the appellate court was without jurisdiction to entertain the question

of whether the district court lawfully could enhance the sentence under § 19-2520. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Since there is no rule of criminal procedure which permits a party to file a motion for reconsideration of an order granting a motion to suppress evidence, such a motion does not terminate the time for filing notice of appeal under subdivision (a) of this rule. Accordingly, where state filed motion for reconsideration of an order granting a motion to suppress but did not file timely notice of appeal from such order, the appeal must be dismissed. *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983).

Appeal filed 43 days after entry of judgment of conviction was untimely under this rule where no intervening motion was made in the case, and the failure to file timely notice was a jurisdictional defect requiring dismissal of the appeal under I.A.R. 21. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

Because the filing by the state of its objection and motion concerning costs and attorney fees did not extend the time to appeal the judgment, the time for appeal had expired when the landowners filed their appeal over three months after entry of judgment in condemnation action; hence the appeal must be dismissed, as to the judgment. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

Where the time within which defendant could have appealed from the sentence had expired at least three weeks before he filed his motion for reduction of sentence, the court was without jurisdiction to entertain the question of whether the judge abused his discretion by imposing the sentence. *State v. Hirshbrunner*, 105 Idaho 168, 667 P.2d 271 (Ct. App. 1983).

Where no appeal was taken from the judgment of conviction but, rather, appeal was from an order revoking probation, the issues on appeal were confined to that order; because defendant did not appeal when the sentences were initially pronounced, he could not later challenge their reasonableness at that time. *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983).

Where the final judgment was filed June 17, the motion to amend or alter the judgment was denied on November 3, and plaintiff filed its notice of appeal on January 17, the notice was not timely filed and there could be no appeal from the judgment. *Equal Water Rights Ass'n v. Coeur D'Alene*, 110 Idaho 247, 715 P.2d 917 (1985).

Where judgment was entered against the defendant on June 26, the defendant's motion

for a new trial was denied on September 27, and his motion for reconsideration was denied on October 23, the defendant's notice of appeal, which was filed on December 5, was untimely, as the denial of the motion for a new trial reinstated the 42-day period within which an appeal should have been filed, and the motion for reconsideration was not filed within ten days of the motion for a new trial and was filed approximately 90 days after the entry of judgment. *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986).

Where the appeal from the original and amended judgments was filed after 42 days had elapsed from the amended judgment, the appeal was untimely under this rule. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Where the notice of appeal was filed more than 42 days after the court released its jurisdiction, and no timely appeal was taken from the judgment of conviction, from the order revoking probation, or from the order relinquishing jurisdiction, the Court of Appeals was without jurisdiction to address the issues raised by the defendant concerning the district court's discretion in revoking probation or relinquishing jurisdiction. *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988).

A motion filed under I.C.R. 35 to modify sentences did not preserve the right to appellate review of conviction and sentences, because that motion was filed more than 14 days after the entry of the judgment. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990).

Defendant's notice of appeal was not filed within 42 days of the judgment, nor was any motion filed within 14 days of the judgment so as to enlarge the time for an appeal pursuant to this Rule, rendering the appeal untimely insofar as it was taken from the judgment and sentence; therefore the Court of Appeals was without jurisdiction to consider any challenge to the entry of the judgment or to the district court's decision imposing the sentence. *State v. Prieto*, 120 Idaho 884, 820 P.2d 1241 (Ct. App. 1991).

Where defendant's appeal, filed on January 15, 1991, was not timely with respect to the judgment of conviction entered May 22, 1990, and defendant's Rule 35 motion was filed more than 14 days after the entry of the judgment, because the issue of the voluntariness of defendant's guilty plea was never presented in a timely appeal, the court lacked appellate authority to consider it. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

Defendant's notice of appeal was not filed

within 42 days of the judgment, nor was any motion filed within 14 days of the judgment so as to enlarge the time for an appeal pursuant to this Rule, rendering the appeal untimely insofar as it was taken from the judgment and sentence; such being the case, the court without jurisdiction to consider any challenge to the entry of the judgment or to the District Court's decision imposing the sentence. *State v. McGonigal*, 121 Idaho 123, 822 P.2d 1020 (Ct. App. 1991).

Where the second notice of appeal was not timely under this Rule and nearly two years elapsed from the filing of the order granting a new trial on August 1, 1989, to the filing of the notice of appeal, accordingly, the notice of appeal was dismissed because it was not timely filed since the timely filing of a notice of appeal is jurisdictional. *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991).

Where notice of appeal was filed more than forty-two days after the order to quash jurisdiction, all issues with respect to the judgment of conviction, sentence and retention of jurisdiction were not properly raised. *State v. Sapp*, 124 Idaho 17, 855 P.2d 478 (Ct. App. 1993).

Where defendant's notice of appeal was filed more than forty-two days after order relinquishing jurisdiction was entered, following a period of retained jurisdiction under § 19-2601(4), and no motion to extend the deadline to appeal was filed, defendant's appeal was not timely under I.A.R. 14 and the Court of Appeals did not have jurisdiction to entertain a direct challenge to the order relinquishing jurisdiction. *State v. Roberts*, 126 Idaho 920, 894 P.2d 153 (Ct. App. 1995).

Where defendant filed his appeal challenging the relinquishment of jurisdiction more than 42 days after the entry of the court's order, and filed his motion to correct or reduce his sentence under I.C.R. 35, more than 14 days after entry, the appellate court was without jurisdiction to consider the merits of the claim. *State v. Alvarado*, 132 Idaho 248, 970 P.2d 516 (Ct. App. 1998).

Where a court order settling costs did not extend the time to file an appeal from a prior final judgment because it merely designated the award of costs and attorney fees, the plaintiff's filing of its appeal on the issue of damages 62 days after the judgment was untimely, and the appellate court was without jurisdiction to hear the appeal. *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

Defendant's notice of appeal, filed after the order revoking his probation, was not timely to raise a double jeopardy challenge to his sentences; therefore, the trial court lacked

appellate jurisdiction to consider defendant's double jeopardy claim. *State v. Jensen*, 138 Idaho 941, 71 P.3d 1088 (Ct. App. 2003).

Question presented was whether the petition for post-conviction relief was timely, because it was filed within one year after the conclusion of petitioner's appeal from the probation revocation order. The appellate court concluded that the petition was not timely, because petitioner's post-conviction petition did not challenge the probation revocation order or proceedings leading up to it, in 2000; rather, the petition challenged only the validity of the judgment of conviction and sentence, imposed in January 1990. *Gonzalez v. State*, 139 Idaho 384, 79 P.3d 743 (Ct. App. 2003).

Farmer raised various arguments attacking the judgment for the county in receiving a portion of the proceeds in reimbursement of its care of the cattle, but the trial court noted that the farmer filed his notice of appeal well past the 42-day time limit for filing an appeal under Idaho App. R. 14; therefore, it would not consider the arguments. *Twin Falls County v. Coates*, 139 Idaho 442, 80 P.3d 1043 (2003).

Since there were no issues left after the trial court's denied attorney fees, the insureds were required to appeal the final judgment within 42 days; when they failed to do so, the court did not have jurisdiction to change its original decision. *Scaggs v. Mut. of Enumclaw Ins. Co.*, 141 Idaho 114, 106 P.3d 440 (2005).

Where defendant did not timely file his notice of appeal of the order revoking his probation within 42 days of the order, the untimely filing of a motion for a reduction of sentence did not terminate the running of the time for appeal. The Supreme Court of Idaho could not hear defendant's untimely appeal of the order revoking his probation. *State v. Thomas*, 146 Idaho 592, 199 P.3d 769 (2008).

State's motion to dismiss charges against the defendant, without prejudice, was a final, appealable order under I.A.R. 11, even though the prosecution intended to immediately re-file identical charges, and defendant's failure to file an appeal within 42 days under this rule deprived the appellate court of jurisdiction to review the denial of the motion, pursuant to I.A.R. 21. *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (2008).

Under Idaho App. R. 21, the appellate court had no jurisdiction to address the merits of defendant's claim of error and dismissed it because the appeal was not timely filed. A temporary order filed on May 22 placed defendant on probation, making July 3 the last day for him to file his notice of appeal, which he missed by three days. Defendant erroneously

relied upon the May 25 date of entry of the final order in calculating the time he had to file his notice of appeal. *State v. Schultz*, 147 Idaho 675, 214 P.3d 661 (2009).

Oil company's notice of appeal was untimely, Idaho App. R. 14(a), Idaho R. Civ. P. 58(a), because the company filed the notice of appeal more than 42 days after the district court's order, which was a separate document and was a judgment under Idaho R. Civ. P. 54(a). *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 148 Idaho 588, 226 P.3d 530 (2010).

### **Final Judgment.**

The judgment of conviction which included the sentencing order, was a final judgment for purposes of appeal. Placing defendant on probation did not affect the finality of the judgment of conviction and sentence, for the purpose of appeal. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

A judgment which contained a blank for insertion of costs was considered a final judgment for purposes of activating the time for appeal. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

An order adopted by the Industrial Commission, which denied the claimant's petition on the grounds that she had failed to establish that her change in condition was attributable to the accident and resultant injury, was a final and appealable order even though the Commission retained jurisdiction to decide any further issues presented on the matter; the fact that the Commission retained jurisdiction to resolve other issues did not affect the finality of the order with respect to her change of condition. *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 682 P.2d 91 (1984).

Where the court's order included a comprehensive adjudication of the subject matter in controversy and represented a final determination of the rights of the parties, it was intended to be the final judgment. *Equal Water Rights Ass'n v. Coeur D'Alene*, 110 Idaho 247, 715 P.2d 917 (1985).

### **In General.**

When the judge denied the plaintiff's motion under I.R.C.P. 60(b) for relief from the dismissal, the plaintiff had ten days to file a motion for amendment or alteration under I.R.C.P. 59(a) or (e), and he had 42 days to appeal. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

Appellate court had jurisdiction to hear the State's appeals of the granting of defendants' motions to suppress where the orders granting the motions to suppress were interlocutory orders and were not transformed into



final judgments because I.A.R. 11(c)(7) and 14(a) granted the State the right to appeal such orders simply by filing a notice of appeal within 42 days; no final judgments had yet been entered in either of the cases, such that the cases did not involve the failure to file a timely notice of appeal from a final judgment. *State v. Bicknell*, 140 Idaho 201, 91 P.3d 1105 (2004).

### **Jurisdiction of Court.**

Because the question of jurisdiction on appeal from a conviction is fundamental, it must not be ignored when brought to the attention of the Court of Appeals, and should be addressed before considering the merits of the substantive appeal. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

An order denying attorney fees is appealable and where notice of appeal was filed within 42 days of court's order denying attorney fees, court had jurisdiction to consider the appeal as it related to the order denying attorney fees. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

The requirement of perfecting an appeal within the 42-day time period is jurisdictional; appeals taken after expiration of the filing period must be dismissed. *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986).

In a criminal case, the time to file an appeal is enlarged by the length of time the district court retains jurisdiction; however, when the court releases retained jurisdiction or places the defendant on probation, the time for appeal starts to run. *State v. Joyner*, 121 Idaho 376, 825 P.2d 99 (Ct. App. 1992).

Appellate jurisdiction would vest only if a notice of appeal was filed within 42 days of the entry of a particular order sought to be challenged. *Ziemann v. Creed*, 121 Idaho 259, 824 P.2d 190 (Ct. App. 1992).

Defendant's motion to "reinstate" his appeal essentially constituted a petition for rehearing, which was timely and extended the period within which to seek further appellate review of the district court's dismissal decision, until 42 days following determination of the motion for reinstatement of the appeal from the magistrate division. When the district court entered an order on April 8, 1991, denying defendant's petition for rehearing, defendant's only remaining remedy was to appeal to the Supreme Court within 42 days. He was not entitled to file another petition for rehearing or any similar motion labeled as a "Motion for Reconsideration." Defendant did not file a notice of appeal within 42 days of April 8, 1991. Instead, he waited until after the district court again refused to reinstate the appeal from the magistrate division, and

then he filed a notice of appeal on May 31. Because the time for filing a notice of appeal was not stayed by the filing of the unauthorized "Motion for Reconsideration," the motion was not only unauthorized, it was also untimely. As a result, the Court of Appeals had no jurisdiction to review the merits of the district court's decision to dismiss the appeal. *Dieziger v. Pickering*, 122 Idaho 718, 838 P.2d 321 (Ct. App. 1992).

Where defendant filed a timely notice of appeal from an amended order of restitution entered against him for arson damages, the court had jurisdiction to consider his appeal pursuant to I.A.R. 14(a). *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Defendant failed to timely file a notice of appeal from district court's appellate decision affirming magistrate's denial of his motion to suppress, choosing instead to proceed on remand to the magistrate in defense of the underlying charge. Court of appeals therefore lacked subject matter jurisdiction over defendant's appeal of magistrate's order. Because defendant did not assert that he would raise any other issues if provided with the opportunity to appeal to the district court the magistrate's final judgment, remand was inappropriate, and his appeal was dismissed. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

Defendant failed to timely file a notice of appeal from district court's appellate decision affirming magistrate's denial of his motion to suppress, choosing instead to proceed on remand to the magistrate in defense of the underlying charge. Court of appeals therefore lacked subject matter jurisdiction over defendant's appeal of magistrate's order. Because defendant did not assert that he would raise any other issues if provided with the opportunity to appeal to the district court the magistrate's final judgment, remand was inappropriate, and his appeal was dismissed. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

District court lacked jurisdiction to order a second period of retained jurisdiction because I.C. § 19-2601(4) is clear that the district court has to order probation prior to ordering the second period of jurisdiction; thus, the district court's order relinquishing jurisdiction on the second rider was void, and defendant's appeal was untimely under Idaho App. R. 14(a). *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011).

### **Jury Verdict.**

A "verdict of the jury" is not included in the list of appealable matters contained in I.A.R. 11(c), and it is not a judgment, order or decree of the district court from which an appeal can



be taken. A verdict, as such, is not appealable; only a judgment rendered on the verdict is appealable. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

#### **Notice.**

In a malpractice action brought by client against former attorney the evidence was undisputed that the trial court's law clerk sent a copy of the summary judgment order to client the day before the district court clerk placed the clerk's filing stamp on the order, and that the trial court records did not show that the clerk of the district court ever sent client a copy of the order bearing the filing stamp. Since the placement of the filing stamp on the summary judgment order determined when the entry of judgment occurred, the trial court's finding that client did not have actual notice of the entry of judgment dismissing client's claims against his former attorney was not clearly erroneous. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992).

#### **Post-Conviction Relief.**

Where no claim of deficiency in the presentation of a Rule 35 motion was raised as a ground for post-conviction relief, the filing of a Rule 35 motion beyond the fourteen-day limit provided by subsection (a) of this Rule does not extend the time for filing a post-conviction application. *Mills v. State*, 126 Idaho 330, 882 P.2d 985 (Ct. App. 1994).

Inmate's petitions for post-conviction relief were the functional equivalent of filing a notice of appeal. Where a litigant files documents with the court within the time limit required by the rules and those documents give notice to other parties and the courts of a litigant's intent to appeal as required by the rules, those documents can be effective as a notice of appeal. *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005).

#### **Timeliness.**

I.A.R. 17(e) deals with the subject matter scope of an appeal, and does not extend the time for filing a notice of appeal as prescribed in this rule. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

Where defendant was not placed on probation with regard to sentences imposed in June, 1987, until September 26, 1989, and notice of appeal was filed on June 6, 1990, well beyond 42 days after September 26, 1989, court could not review the propriety of the judgments of conviction, and the sentences imposed, due to lack of jurisdiction as the result of an untimely appeal. *State v. Morris*, 119 Idaho 448, 807 P.2d 1286 (Ct. App. 1991).

Subdivision (c)(7) of this rule and Idaho Appellate Rule 11 specifically authorizes an interlocutory appeal from "an order granting a motion to suppress." However, such an appeal must have been perfected by filing a notice of appeal within 42 days from the date of the court's order suppressing the evidence obtained during the execution of the search warrant. *Richardson v. \$4,543.00 U.S. Currency*, 120 Idaho 220, 814 P.2d 952 (Ct. App. 1991).

This rule provides that the time for appeal from a "criminal judgment, order or sentence" can be extended by the filing of a motion within 14 days of the judgment; however, there is no similar provision, permitting an extension of the time to appeal, applicable with respect to appellate review of a post-judgment order revoking probation once the 14 days following the judgment has expired. Any order thereafter entered, including the revocation of probation, is simply an "order made after judgment" which is appealable under I.A.R. 11(c)(9), but the appeal must be filed within 42 days of that order; under these rules, defendant's motion to reconsider the probation revocation which was filed seven days after the entry of the order revoking probation did not extend the time within which to appeal from that order and because the appeal was taken untimely with respect to the order revoking probation, the court was without jurisdiction to review the merits of that order. *State v. Yeaton*, 121 Idaho 1018, 829 P.2d 1367 (Ct. App. 1992).

Defendant's notice of appeal was filed 43 days after the judgment of conviction was entered. Pursuant to I.A.R. 21 and this Rule, defendant's appeal is untimely, and the court therefore lacks jurisdiction to address the substantive issues. *State v. Payan*, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996).

The filing of a timely motion to alter or amend a judgment under I.R.C.P. 59(e) tolls the time for appeal from the challenged judgment. *J.P. Stravens Planning Assocs. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996).

Since pursuant to § 19-2601 a trial court can retain jurisdiction only once, where court had retained jurisdiction on January 17, 1995 and placed defendant on probation which was later revoked for probation violations, written order of December 29, 1995 which stated that the court was retaining jurisdiction was of no effect and time for appeal was not enlarged as the court had no authority to retain jurisdiction a second time even though court issued a corrected order on January 24, 1996 stating that it was not retaining jurisdiction and appeal filed on February 29, 1996 was more

than 42 days from the entry of the order which he attempted to appeal and was thus untimely. *State v. Ferguson*, 130 Idaho 160, 938 P.2d 187 (1997).

Defendant's failure to file a notice of appeal within 42 days from the district court's appellate decision on a magistrate's interlocutory order denying his motion to suppress evidence required automatic dismissal of his appeal. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

Appeal was dismissed as untimely because it was not filed with 42 days of the judgment. *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 147 Idaho 56, 205 P.3d 1192 (2009).

### **Tolling of Running.**

Since a motion for new trial, a motion to alter judgment, and objections to judgment, findings and conclusions were untimely, they did not terminate the running of the 42 days in which to file notice of appeal. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

The time for filing appeals, as provided by subdivision (a), is terminated only by motions cognizable under the Civil or Criminal Rules of Procedure. *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983).

A timely motion to reduce or to correct a sentence under I.C.R. 35 is a motion which, if granted, could affect the judgment in the action; thus, where the defendant filed such a timely motion, the time for filing an appeal was terminated until the court ruled upon the motion. Therefore, where the defendant filed his appeal from the judgment against him within 42 days of the denial of his motion to have his sentence reduced, the defendant's appeal was timely filed. *State v. Knight*, 106 Idaho 496, 681 P.2d 6 (Ct. App. 1984).

The time for filing appeal commences anew after the disposition of a timely post-judgment motion. *Sinclair Mktg., Inc. v. Siepert*, 107 Idaho 1000, 695 P.2d 385 (1985).

Where the trial court entered a partial summary judgment against the plaintiff on June 3, but the clerk of the court did not mail the order denying the plaintiff's motion for reconsideration until November 30, and there was no evidence in the record to indicate that the plaintiff or his attorney actually knew that the court denied the motion for reconsideration prior to November 30, the 42-day appeal period under subdivision (a) of this rule could not have commenced to run until at least November 30, despite the fact that the district court filed judgment and certified the case for appeal under I.R.C.P. 54(b) after the plaintiff filed the motion for reconsideration. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Defendant's motion for a new trial extended the time for appeal from the judgment, consistent with the purpose and intent of this rule, where, although defendant's motion for a new trial was not filed in a documentary form with the district court, the motion was made on the record in open court, was argued, and was considered by the trial judge at the same hearing when the judgment of conviction was pronounced; the judge took the motion under advisement and suspended execution of the judgment of conviction in the meantime, and had the motion been granted, it clearly would have affected the judgment and sentence. *State v. Poland*, 116 Idaho 34, 773 P.2d 651 (Ct. App. 1989).

The time for appeal was not tolled by the Justice's motion because the motion was filed more than 14 days after the order relinquishing jurisdiction. *State v. Justice*, 122 Idaho 407, 834 P.2d 1323 (Ct. App. 1992).

The time for appeal from any criminal judgment, order or sentence stops running when a motion is filed within 14 days of the entry of a judgment which, if granted, could affect the judgment, order or sentence. The appeal period does not stop running merely because the defendant is placed on probation. *State v. Fox*, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992).

Even if motion for a new trial had not fallen within the parameters of § 19-2406, it would have extended the time for appeal from the judgment under the tolling provisions of this rule. *State v. Lee*, 131 Idaho 600, 961 P.2d 1203 (Ct. App. 1998).

Motion under I.R.C.P. 59 to alter or amend the judgment or a motion under I.R.C.P. 11(a)(2)(B) for reconsideration tolls the time period for the filing of a notice of appeal as provided in I.A.R. 14(a). *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

**Cited in:** *Neal v. Harris*, 100 Idaho 348, 597 P.2d 234 (1979); *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *State v. Stradley*, 102 Idaho 41, 624 P.2d 949 (1981); *State v. Smith*, 103 Idaho 135, 645 P.2d 369 (1982); *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983); *State v. Torres*, 107 Idaho 895, 693 P.2d 1097 (Ct. App. 1984); *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985); *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct. App. 1985); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985); *Valley Bank v. Dalton*, 110 Idaho 87, 714 P.2d 56 (Ct. App. 1985); *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986); *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986); *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987); *Marcher v. Butler*, 113 Idaho

867, 749 P.2d 486 (1988); *State v. Montague*, 114 Idaho 319, 756 P.2d 1083 (Ct. App. 1988); *Wiley v. Fielding*, 115 Idaho 437, 767 P.2d 280 (Ct. App. 1989); *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989); *Hoopes v. Bagley* (In re Estate of Bagley), 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990); *State v. Caldwell*, 119 Idaho 281, 805 P.2d 487 (Ct. App. 1991); *State v. Ward*, 120 Idaho 182, 814 P.2d 442 (Ct. App. 1991); *State v. Coffin*, 122 Idaho 392, 834 P.2d 909 (Ct. App. 1992); *State v. Alberts*, 124 Idaho 489, 861 P.2d 59 (1993); *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994); *State v. Wilson*, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995); *Swisher v. State*, 129 Idaho 467, 926 P.2d

1314 (Ct. App. 1996); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Cochran v. State*, 133 Idaho 205, 984 P.2d 128 (Ct. App. 1999); *Dunlap v. Cassia Mem. Hosp. & Med. Ctr.*, 134 Idaho 233, 999 P.2d 888 (2000); *State v. Jakoski*, 139 Idaho 352, 79 P.3d 711 (2003); *Hoskinson v. Hoskinson*, 139 Idaho 448, 80 P.3d 1049 (2003); *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003); *State v. Veloquio*, 141 Idaho 154, 106 P.3d 480 (Ct. App. 2005); *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005); *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Computation.

Jurisdiction.

Premature Appeal.

Timeliness.

Vacation of Judgment.

Validity of Judgment.

##### Computation.

Time is computed from date of filing of order with clerk. *Kimzey v. Highland Livestock & Land Co.*, 37 Idaho 9, 214 P. 750 (1923).

Notice of appeal is sufficient where it is filed one day after time had elapsed, when last day fell on Sunday. *Myers v. Harvey*, 39 Idaho 724, 229 P. 1112 (1924).

Where original entry of denial of motion for new trial was incorrect and court subsequently made formal entry of order of denial, time for appeal was from entry of formal order. *Hample v. McKinney*, 48 Idaho 221, 281 P. 1 (1929).

Time within which appeal may be taken is jurisdictional and Supreme Court can neither extend time nor cure defect in failing to take appeal within that time, although such defect is caused by laches of clerk. *Moe v. Harger*, 10 Idaho 194, 77 P. 645 (1904); *McElroy v. Whitney*, 24 Idaho 210, 133 P. 118 (1913); *Chapman v. Boehm*, 27 Idaho 150, 147 P. 289 (1915).

Where notice of appeal is not filed until after time fixed by statute, Supreme Court acquires no jurisdiction. *Glenn v. Aultman & Taylor Mach. Co.*, 30 Idaho 719, 167 P. 1163 (1917).

##### Jurisdiction.

Appeal taken after expiration of statutory time will be dismissed since perfection of appeal within such time is jurisdictional.

*Mills v. Board of County Comm'rs*, 35 Idaho 47, 204 P. 876 (1922); *Goade v. Gossett*, 35 Idaho 84, 204 P. 670 (1922); *Continental & Commercial Trust & Sav. Bank v. Werner*, 36 Idaho 601, 215 P. 458 (1923), Appeal dismissed, *Continental & C. T. & S. Bank v. Werner*, 264 U.S. 576, 44 S. Ct. 452, 68 L. Ed. 857 (1924); *Kimzey v. Highland Livestock & Land Co.*, 37 Idaho 9, 214 P. 750 (1923); *Wallace v. McKenna*, 37 Idaho 579, 217 P. 982 (1923); *Price v. Case*, 40 Idaho 197, 232 P. 576 (1925); *West States Mtg. Loan Co. v. Hurst*, 41 Idaho 80, 237 P. 1107 (1925); *In re Dunn's Estate*, 45 Idaho 23, 260 P. 432 (1927).

##### Premature Appeal.

Dismissal of appeal prematurely taken is not affirmance of judgment, and does not defeat an appeal regularly taken. *Stout v. Cunningham*, 33 Idaho 83, 189 P. 1107 (1920).

Appeal from order denying motion for new trial, taken before such order is filed, will be dismissed. *Goade v. Gossett*, 35 Idaho 84, 204 P. 670 (1922).

##### Timeliness.

Under former law that provided that appeals from final summary judgment would have to be taken within 60 days of entry of judgment, and even assuming this time would be tolled because the district court clerk failed to provide immediate notice as required by I.R.C.P. 77(d), where the defendant admitted he knew of the March 21 judgment by April 11, his appeal filed on August 11 was too late, since there were still over four weeks, after April 11, in which to file the appeal within the time allowed or seek an extension. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

##### Vacation of Judgment.

Vacation of judgment does not extend time for appeal. *Boam v. Sewell*, 41 Idaho 718, 241 P. 1020 (1925).



**Validity of Judgment.**

Whether or not a judgment is void does not affect the necessity of making a timely appeal.

First Sec. Bank v. Neibaur, 98 Idaho 598, 570 P.2d 276 (1977).

**Rule 15. Cross-appeal after an appeal.**

(a) **Right to cross-appeal.** After an appeal has been filed, a timely cross-appeal may be filed from any interlocutory or final judgment or order. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment or order, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.

(b) **Time for filing.** A cross-appeal, as a matter of right, may be made only by physically filing the notice of cross-appeal with the clerk of the district court or administrative agency within the 42 day time limit prescribed in Rule 14, as it applies to the judgment or order from which the cross-appeal is taken, or within 21 days after the date of filing of the original notice of appeal, whichever is later. (Adopted March 27, 1989, effective July 1, 1989; amended March 1, 2004, effective July 1, 2004; amended March 29, 2010, effective July 1, 2010.)

**STATUTORY NOTES**

**Compiler's Notes.** Former Rule 15 which was adopted March 25, 1977, effective July 1, 1977 and amended March 30, 1984, effective

July 1, 1984 was rescinded by Order of the Idaho Supreme Court of March 27, 1989, effective July 1, 1989.

**JUDICIAL DECISIONS**

**ANALYSIS**

Additional Issue by Respondent.  
Cross-Appeal Not Required.  
Failure to File Cross-Appeal.  
Timeliness.

**Additional Issue by Respondent.**

Even if a district court determined that defendant was not entitled to a Franks hearing after improperly hearing in-camera testimony, the district court's decision was correct because defendant should not have been granted a hearing in a prior order; therefore, the State did not seek affirmative relief and properly brought the issue of defendant's entitlement to a Franks hearing as an additional issue on appeal under I.A.R. 35(b)(4) instead of being required to cross appeal from the previous district court order under I.A.R. 15(a). State v. Fisher, 140 Idaho 365, 93 P.3d 696 (2004).

**Cross-Appeal Not Required.**

State could not have appealed an order granting an in-camera hearing and concluding that defendant had met the threshold showing and was entitled to a Franks hearing because it was not an appealable order ac-

cording to I.A.R. 11(c), and the State was not required to cross-appeal the order under I.A.R. 15(a) when defendant appealed his later convictions because the State was not seeking affirmative relief. State v. Fisher, 140 Idaho 365, 93 P.3d 696 (2004).

As to the issue of the application of this rule, the owners were not seeking to reverse or vacate the judgment, nor were they seeking a reversal of the finding upon which the judgment was based; the rule presented no bar to the court's consideration of an issue, and the owners were not required to file a cross-appeal. McKay v. Boise Project Bd. of Control, 141 Idaho 463, 111 P.3d 148 (2005).

The state was not required to file a cross appeal under Idaho App. R. 11(g) or paragraph (a) of this rule, as the state did not seek to reverse, vacate, or modify the district court's denial of the defenan't's petition. The state merely urged affirmance of that denial and asserted an alternate basis for upholding the judgment. Leer v. State, 148 Idaho 112, 218 P.3d 1173 (2009).

**Failure to File Cross-Appeal.**

Defendants were precluded from bringing additional issues on appeal where they were seeking a change in judgment, but failed to



file a cross-appeal. *Miller v. Board of Trustees*, 132 Idaho 244, 970 P.2d 512 (1998), cert. denied, 526 U.S. 1159, 119 S. Ct. 2050, 144 L. Ed. 2d 216 (1999).

#### **Timeliness.**

A timely notice of appeal or cross-appeal is a jurisdictional prerequisite to challenge a determination made by a lower court. Failure to timely file such a notice "shall cause auto-

matic dismissal" of the issue on appeal. *Carr v. Carr*, 116 Idaho 754, 779 P.2d 429 (Ct. App. 1989).

The defendant's cross-appeal on the issue of damages was untimely, even though it was filed within 21 days of the untimely filing of the plaintiff's appeal. *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

**Cited in:** *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

#### **Cross-Appeal by Opposing Party.**

If a party qualifies as a party opposing the appeal, he has 14 days following the notice of appeal to file a cross-appeal, without regard

to which party the cross-appeal is filed against. *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct. App. 1985) (decision prior to 1984 amendment).

### **Rule 16. Bonds on appeal.**

(a) **No Cost Bond Required.** No undertaking on appeal for costs shall be required.

(b) **Waiver of Supersedeas Bond.** The party in whose favor an execution may issue may agree in writing that the party will not execute pending the appeal, in which case no supersedeas bond shall be necessary to stay execution and the district court shall issue a stay so that no writ of execution shall issue on the judgment, or be served if already issued, pending final disposition of appeal. (Adopted March 25, 1977, effective July 1, 1977.)

#### JUDICIAL DECISIONS

#### **Doctrine of *Martinson v. Martinson*.**

Since former § 13-203 was repealed and I.A.R. 16(a) was adopted there was no longer a requirement of posting a cost bond on appeal, the doctrine of *Martinson v. Martinson*, 90 Idaho 490, 414 P.2d 204 (1966), that an

uncashed check, given as an appeal bond, does not constitute such a bond, has been eliminated, and where the notice exception to I.A.R. 1 was satisfied, the appeal would be heard. *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1978).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

#### **Supersedeas Bond.**

##### **—Amount.**

Judgment foreclosing a chattel mortgage is not a money judgment and consequently an undertaking in the sum of \$300 stays execution thereof pending appeal, and no further undertaking can be required. *Barnes v. Buffalo Pitts Co.*, 6 Idaho 519, 57 P. 267 (1899).

On appeal from judgment and decree foreclosing a mechanic's or laborer's lien, in order to stay further proceedings for collection of judgment appeals from, it is necessary that the amount of the stay bond to cover waste and use and occupation of the premises directed to be sold be fixed by the trial judge, and such supersedeas bond is properly given.

*Naylor & Norlin v. Lewiston & S.E. Elec. Ry. Co.*, 14 Idaho 722, 95 P. 827 (1908).

Where a judgment was entered holding certain sales and transfers of personal and other property fraudulent and void, and a receiver was appointed to take charge of such property and an appeal was taken by the defendants and an undertaking on appeal in the sum of \$300 was filed, the receivership may be continued pending the appeal. *Morbeck v. Bradford-Kennedy Co.*, 18 Idaho 458, 110 P. 261 (1910).

When appeal has been taken from a judgment or order directing the sale or delivery of possession of real property, it is the duty of the trial judge on application therefor by appellant, to make an order fixing the amount

of a supersedeas undertaking. Appellant may make application to have amount of such undertaking fixed at any time after appeal and before the case is finally disposed of. Possession of real property, the subject of the litigation, acquired during pendency of appeal by one not a party to the action, does not defeat appellant's right to have amount of supersedeas undertaking fixed. *Mays v. Winstead*, 59 Idaho 677, 86 P.2d 471 (1939).

#### —Child Custody.

Where a husband appealed from a district court order awarding custody of children and directing payment by him for their support, but did not post a supersedeas bond, the district court had jurisdiction to enforce payment of the support money during the pendency of the appeal by citation for contempt. *Montgomery v. Montgomery*, 89 Idaho 319, 404 P.2d 610 (1965).

#### —Complaint.

A complaint in an action on a supersedeas bond on a judgment directing delivery of certain documents is sufficient, notwithstanding the absence of allegations as to damages incurred, since damages were considered as liquidated and measured by the amount of the bond. *Coeur d'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307 (1936).

#### —Effect.

The giving of a supersedeas bond only stays enforcement of the judgment while the appeal is pending, and does not change the judgment or debts evidenced by it, or vacate the judgment. *Lincoln Mines Operating Co. v. Huron Holding Corp.*, 27 F. Supp. 720 (D. Idaho 1939), *aff'd*, 312 U.S. 183, 61 S. Ct. 513, 85 L. Ed. 725 (1941).

#### —Foreclosure Suits.

On appeal from judgment of foreclosure of mortgage on personal property, undertaking stays execution. *Barnes v. Buffalo Pitts Co.*, 6 Idaho 519, 57 P. 267 (1899).

To stay execution of foreclosure decree it is necessary to give an undertaking and where this is not done and the foreclosure is perfected by sale and delivery of sheriff's deed, the only right remaining in the mortgagor is that of redemption. *Sherwood v. Daly*, 58 Idaho 744, 78 P.2d 357 (1938); *Eagle Rock Corp. v. Idamont Hotel Co.*, 60 Idaho 639, 95 P.2d 838 (1939).

#### —Injunction.

Although a decree in an injunction suit directing the distribution of water stored in a reservoir is in effect a mandatory injunction, the execution of such decree will not be stayed without the giving of an undertaking. *Salmon*

*River Canal Co. v. District Court*, 38 Idaho 377, 221 P. 135 (1923).

#### —Judgment Against Sureties.

Where, after affirmance on appeal, appellee filed in trial court a motion to proceed, containing a notice to sureties on appellant's supersedeas bond that he would apply for a summary decree on the bond, service of which notice was admitted by surety, such surety was a quasi party to the proceeding, and the court was authorized to render summary judgment against it. *Empire State-Idaho Mining & Dev. Co. v. Hanley*, 136 F. 99 (9th Cir. 1905).

No formal motion for summary judgment against sureties is required, oral application for the order is sufficient. *Baldwin v. Anderson*, 52 Idaho 243, 13 P.2d 650 (1932).

#### —Liability of Surety.

That appeal, in which a supersedeas bond sued upon was given, was taken from an order denying a new trial, and that affirmance on appeal was predicated upon the lack of timely statutory notice of intention to move for a new trial, does not relieve the surety of liability for failure to comply with the judgment, especially where the trial court and all parties acted upon the theory that the supersedeas bond stayed the judgment. *Coeur d'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307 (1936).

The obligation of the sureties on an undertaking is an obligation to obey the order of the appellate court upon the appeal, without reference to any question of damages to the other party, the whole sum of the bond being recoverable in the event of nonperformance. *Coeur d'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307 (1936).

#### —Measure of Damages.

Where the sum mentioned in a supersedeas bond is in the nature of a statutory penalty for the nonperformance of a statutory duty it is not necessary to show actual damages and the whole sum may be recovered. *Coeur d'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307 (1936).

#### —Notice of Hearing.

Entry of judgment on a supersedeas bond given by a surety company without notice for failure to pay or an opportunity for a hearing was not a denial of due process where the opportunity for such a hearing was provided by an appeal after the entry of judgment. *American Sur. Co. v. Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932).

#### —Preservation of Attachment.

Only purpose of giving supersedeas is to

provide additional remedy of keeping attachment alive, if supersedeas is filed within time specified. *Citizens Auto. Inter-Insurance Exch. v. Andrus*, 70 Idaho 114, 212 P.2d 406 (1949).

Giving supersedeas bond preserves plaintiff's security for the payment of any judgment he might obtain in the event he succeeds on appeal. *Sherwood v. Porter*, 58 Idaho 523, 76 P.2d 928 (1938).

The court determined that the judgment for defendant operated as a dissolution of the attachment and released the attached property and the additional undertaking, not having been filed until seven days after the entry of the judgment, did not stay the self-executing quality of the judgment appealed from.

*Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).

The dissolvent force of a judgment for the defendant is neutralized if a perfected appeal providing the additional undertaking is filed before or at the time judgment for defendant is entered and the appeal is perfected within the specified period. *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).

#### —Proceedings After Appeal.

Execution issued pending an appeal perfected by service of notice and a filing of a supersedeas bond is without authority of law and should be quashed on motion. *Miller v. Pine Mining Co.*, 3 Idaho 603, 32 P. 207 (1893).

### Rule 17. Notice of appeal — Contents.

A notice of appeal shall contain substantially the following information:

(a) **Title.** The title of the action or proceeding.

(b) **Court or Agency Title.** The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official.

(c) **Case Number.** The number assigned to the action or proceeding by the trial court or administrative agency.

(d) **Parties.** The name of the appealing party and the party's attorney and the name of the adverse party and that party's attorney. An address, phone number and email address must also be given, except no email address is required for persons appearing pro se.

(e) **Designation of Appeal.**

(1) **A Designation of the Judgment or Order Appealed From.** The notice of appeal shall designate the judgment or order appealed from which shall be deemed to include, and present on appeal:

(A) All interlocutory judgments and orders entered prior to the judgment, order or decree appealed from, and

(B) All final judgments and orders entered prior to the judgment or order appealed from for which the time for appeal has not expired, and

(C) All interlocutory or final judgments and orders entered after the judgment or order appealed from except orders relinquishing jurisdiction after a period of retained jurisdiction or orders granting probation following a period of retained jurisdiction.

(2) **Premature Filing of Notice of Appeal.** A notice of appeal filed from an appealable judgment or order before formal written entry of such document shall become valid upon the filing and the placing the stamp of the clerk of the court on such appealable judgment or order, without refile the notice of appeal.

(f) **Issues.** A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.



(g) **Jurisdictional Statement.** A statement as to the basis for the right to appeal to the Idaho Supreme Court from the judgments or orders described in paragraph 1 of the notice of appeal.

(h) **Transcript.** A designation as to whether a transcript is requested, and if requested, whether a standard transcript, a supplemented transcript, or a partial transcript as defined in Rule 25 is requested by the appellant. The notice shall also state whether the appellant's copy of the transcript shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the notice of appeal, the appellant will receive a hard copy of the transcript. If a supplemented transcript is requested, the request shall specifically identify each of the items of additional record requested which would otherwise be excluded under Rule 25(c).

(i) **Record.** A designation of documents, if any, to be included in the clerk's or agency's record in addition to those automatically included pursuant to the following Rule 28.

(j) **Exhibits - Civil cases.** A designation of documents, charts, or pictures offered or admitted as exhibits in a trial or hearing to be copied and sent to the Supreme Court.

(k) **Sealed Record.** A statement as to whether an order has been entered sealing all or any part of the record or transcript.

(l) **Certification.** A certification of the attorney of the appellant, or affidavit of the appellant representing himself or herself:

(1) That service of the notice of appeal has been made upon the reporter of the trial or proceeding;

(2) That the clerk of the district court or administrative agency has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24, or that appellant is exempt from paying such fees because of stated reasons;

(3) That the estimated fees for preparation of the clerk's or agency's record have been paid, or that appellant is exempt from paying such fees because of stated reasons;

(4) That all appellate filing fees have been paid, or that appellant is exempt from paying such fees because of stated reasons; and

(5) That service has been made upon all other parties required to be served pursuant to Rule 20, and that in all cases referred to in Section 67-1401(1), Idaho Code, service has been made upon the attorney general of the state of Idaho.

The appellant shall not be required to certify the payment of estimated fees in criminal appeals, appeals from denial of a petition for writ of habeas corpus, or petitions for post-conviction relief, if the district court has entered an order, or thereafter enters an order within 14 days of filing the notice of appeal, that such costs shall be at county expense.

(m) **Amended Notice of Appeal.** In the event the original notice of appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of appeal, the appellant may thereafter file an amended notice of appeal correctly setting



forth the facts and information. An amended notice of appeal shall be filed with the clerk of the district court in the same manner as the original notice of appeal but no filing fee shall be required. If the original notice of appeal was timely filed from an appealable judgment, order or decree, the amended notice of appeal will relate back to the date of filing of the original notice of appeal. If the amended notice of appeal includes a request for preparation of additional transcripts, the notice must include an estimate of the number of additional pages requested and a certification that the amended notice has been served on each reporter of whom a request for additional transcript is made. Except in capital cases, an amended notice of appeal may not be filed after the record has been filed with the Supreme Court.

(n) **Signature.** The name and signature of the attorney for the appellant, or name of appellant if the appellant does not have an attorney.

(o) **Form.** The notice of appeal shall be in substantially the following form:

(Appellant's Attorney's Name)

Attorney for Appellant

Post Office Address

Phone Number

Email address. (Email address is required for attorneys).

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR \_\_\_\_\_ COUNTY (IN THE  
(PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF  
THE STATE OF IDAHO)

(Title of original action or	)	
proceeding together with	)	Case No. _____
the additional designation	)	NOTICE OF APPEAL
of parties as appellant and	)	
respondent)	)	

TO: THE ABOVE NAMED RESPONDENT(S), (Names) AND THE PARTY'S ATTORNEYS, (Names and Addresses) AND THE CLERK OF THE ABOVE ENTITLED COURT (ADMINISTRATIVE AGENCY).

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant(s) (Name) appeal(s) against the above named respondent(s) to the Idaho Supreme Court from (The final judgment) (The order, describing it) \_\_\_\_\_, entered in the above entitled action (proceeding) on the \_\_\_\_\_ day of \_\_\_\_\_, (Honorable Judge \_\_\_\_\_) (Chairman \_\_\_\_\_) presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule \_\_\_\_\_ I.A.R.

☐ This is an EXPEDITED APPEAL pursuant to I.A.R. 12.2.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.
4. Has an order been entered sealing all or any portion of the record? If so, what portion?
5. (a) Is a reporter’s transcript requested?

\_\_\_\_\_

(b) The appellant requests the preparation of the following portions of the reporter’s transcript in ☐ hard copy ☐ electronic format ☐ both (check one):  
e.g.  
(Specific proceedings identified by date and title of hearing if less than a standard transcript is being requested)  
or (The reporter’s standard transcript as defined in Rule 25(c), I.A.R.)  
or (The reporter’s standard transcript as defined in Rule 25(c), I.A.R. supplemented by the following:)  
(Voir dire examination of jury)  
(Closing arguments of counsel)  
(The following reporter’s partial transcript:)  
(The testimony of witness “X”)  
(Conferences on requested instructions)  
(Instructions verbally given by court)

6. The appellant requests the following documents to be included in the clerk’s (agency’s) record in addition to those automatically included under Rule 28, I.A.R.: e.g.  
(All requested and given jury instructions)  
(The deposition of “X”)  
(Plaintiff’s motion for continuance of trial)
7. Civil cases only. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. I certify:
- (a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:
- Name and Address: \_\_\_\_\_
- Name and Address: \_\_\_\_\_

Name and Address: \_\_\_\_\_

(b)(1) ☐ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter’s transcript.

(2) ☐ That the appellant is exempt from paying the estimated transcript fee because \_\_\_\_\_

(c)(1) ☐ That the estimated fee for preparation of the clerk’s or agency’s record has been paid.

(2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because \_\_\_\_\_

(d)(1) ☐ That the appellate filing fee has been paid.

(2) ☐ That appellant is exempt from paying the appellate filing fee because \_\_\_\_\_

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED THIS \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_.

/s/ Attorney’s signature

\_\_\_\_\_  
(Name of Attorney or Firm for Appellant)  
Attorneys for the Appellant

(When certification is made by a party instead of the party’s attorney, the following affidavit must be executed pursuant to Rule 17(i))

State of Idaho )  
 ) ss.  
County of \_\_\_\_\_ )

\_\_\_\_\_ being sworn, deposes and says:  
That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of his or her knowledge and belief.

\_\_\_\_\_  
Signature of Appellant

Subscribed and Sworn to before me this \_\_\_\_, day of \_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Title  
Residence

(Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 26, 1992, effective July 1, 1992; amended April 3, 1996, effective July 1, 1996; amended January 30, 2001, effective July 1, 2001; amended March 24, 2005, effective July 1, 2005; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended April 7, 2008, effective July 1, 2008; amended March 19, 2009, effective July 1, 2009; amended January 4, 2010, effective February 1, 2010; amended March 29, 2010, effective July 1, 2010; amended March 18, 2011, effective July 1, 2011; amended November 20, 2012, effective January 1, 2013.)

### JUDICIAL DECISIONS

#### ANALYSIS

Absence of Summons.  
 Adequate Record.  
 Appeal Inadequate.  
 Construction.  
 Contemporaneous Order.  
 Designation of Appeal.  
 Incorporation of Custody Order.  
 Parties to Appeal.  
 Post-Conviction Relief.  
 Premature Notices.  
 Scope of Appeal.  
 — Post-Judgment Orders.  
 Separate Appealable Order.  
 Time for Appeal.  
 Time for Notice.

#### Absence of Summons.

The original summons was not automatically included in the record for an appeal from a default judgment in a debt collection, thus the mere absence of the summons in the record, without a proper request for its inclusion by defendant, was insufficient upon which to base defendant's allegation of error that there was no valid summons in the record. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

#### Adequate Record.

An appellant bears the burden of presenting an adequate record to support the issues raised on an appeal; failure to provide a transcript may preclude a review of any issue which depends upon such a transcript for resolution. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

#### Appeal Inadequate.

Taxpayer appealed from the decision of the

District Court determining the amount of tax, penalty, and interest taxpayer owed; in its initial brief presented to the court, taxpayer raised only issues concerning the correctness of the district court's decision on the merits of the State Tax Commission's redetermination and concerning taxpayer's entitlement to attorney fees on appeal. In neither its initial brief nor in its reply brief did taxpayer cite authorities or present argument challenging the District Court's decision upholding the board's dismissal of taxpayer's appeal; therefore, the Idaho Supreme Court would not consider whether the District Court correctly upheld the board's dismissal of taxpayer's appeal. *Grand Canyon Dories, Inc. v. Idaho State Tax Comm'n*, 121 Idaho 515, 826 P.2d 476 (1992).

#### Construction.

Subdivision (e)(1)(A) of this rule might be construed to allow the Supreme Court to consider a referee's order denying a motion to compel discovery; to do so, however, would expand the statutory right of appeal specified by the legislature in § 72-724 to include orders that were not orders of the Commission, and is beyond the court's authority to do so. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 812 P.2d 276 (1991).

#### Contemporaneous Order.

Where confiscation order was issued contemporaneously with order from which appeal was taken, it qualified under subdivision (e) of this rule; this rule is a notice provision, and it would be incongruous to allow an appeal from orders entered prior and subsequent to the order from which the appeal is taken, but not from orders entered contempo-



raniously. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

### **Designation of Appeal.**

Under subdivision (e) of this rule as it was in effect on September 10, 1979, an appeal from a final order denying a motion to set aside order granting post-conviction relief included an appeal from all judgments, orders and decrees in the action or proceeding and, thus, the notice of appeal designating an appeal from such order, presented for appeal all orders entered in the action, including the order granting post-conviction relief. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

Appeal from the second summary judgment included the previous interlocutory summary judgment by operation of this rule and the appellant's failure to specifically designate the first summary judgment in his notice of appeal was not fatal. *IBM Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984).

An improper designation of the "judgment, order or decree appealed from," as required by subdivision (e) of this rule, is a nonjurisdictional defect. *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 702 P.2d 922 (Ct. App. 1985).

### **Incorporation of Custody Order.**

Where interlocutory order of custody was incorporated into final judgment of divorce under subsection (e) of this rule, the Supreme Court of Idaho in reviewing the final judgment must necessarily review the custody order. *Moye v. Moye*, 102 Idaho 170, 627 P.2d 799 (1981).

### **Parties to Appeal.**

An amendment for the purpose of adding or redesignating the alignment of parties to an appeal ought to occur either prior to the Supreme Court's assignment of the case to the Court of Appeals so all parties have been provided with opportunities to file briefs setting forth their respective positions on the issues raised by the appeal and allowing the Supreme Court full consideration of whether to retain the case or assign it to the Court of Appeals for disposition or, at the very least, before submission of the case to this court for decision on the merits and for determination of the rights and interests of the various parties who might be affected by the appeal. *Security Pac. Bank v. Curtis*, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993).

### **Post-Conviction Relief.**

Court had jurisdiction to consider the merits of the inmate's appeal from the dismissal of his petitions for post-conviction relief because his action in filing the motions and

affidavits was the functional equivalent of filing a notice of appeal. Where a litigant files documents with the court within the time limit required by the rules and those documents give notice to other parties and the courts of a litigant's intent to appeal as required by the rules, those documents can be effective as a notice of appeal. *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005).

### **Premature Notices.**

The adoption of the 1983 amendment to subdivision (e)(2) of this rule afforded the Court of Appeals the freedom in the pending case to decide that premature notices of appeal to the district court matured and validly vested jurisdiction in that court, upon entry of record of the written judgments of conviction in the magistrate division, so that the district court did have jurisdiction to hear the appeal from convictions of criminal trespass. *State v. Gissel*, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

Notice of appeal was premature where it was from a judgment rendered under I.R.C.P., Rule 54(b), governing multiple parties and claims, and it was not certified as appealable under that rule; however, the subsequent filing of two formal judgments which disposed of the remaining claims cured the defect as of that date. *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n*, 105 Idaho 509, 670 P.2d 1294 (1983).

Where the appellants filed a notice of appeal on December 11 and the final judgment was filed on January 4, the appeal became effective on January 4 under subdivision (e)(2) of this rule. *Valley Bank v. Dalton*, 110 Idaho 87, 714 P.2d 56 (Ct. App. 1985).

Subdivision (e)(2) of this rule applies only in situations where the court has orally ruled, thereby indicating the outcome, the notice of appeal is then filed, and the court subsequently enters a written order or judgment consistent with its earlier indication. *Hawley v. Green*, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993).

Post-conviction petitioner's notice of appeal from a district court's notice of intent to dismiss, though premature and interlocutory in nature, was nevertheless sufficient to effectuate an appeal from a final order dismissing the petition four days after the petitioner's notice of appeal was filed. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

### **Scope of Appeal.**

If there is a final appealable order in a case and an appeal is properly taken from that order, then all other interlocutory orders issued prior to the entry of the final appealable order which would otherwise not be appeal-

able may be considered by the Supreme Court. *Keeven v. Wakley* (In re Estate of Keeven), 110 Idaho 452, 716 P.2d 1224 (1986).

Subdivision (e) of this rule and § 1-205 are parallel provisions and both serve the ends of judicial economy; both contemplate that if there is a final appealable order before the Supreme Court, the court should resolve all interlocutory issues which have been passed upon by the trial court so that possibly another appeal will be avoided. Hence, although an order declaring part of decedent's property as separate or community was not normally an appealable order, the court addressed this issue, based on the mandate of subdivision (e) of this rule and § 1-205, where the magistrate's order that the decedent's husband was not an omitted spouse was appealed. *Keeven v. Wakley* (In re Estate of Keeven), 110 Idaho 452, 716 P.2d 1224 (1986).

Where an order denying the plaintiff's motion to augment the record was entered subsequent to an order denying him medical and disability benefits, the notice of appeal filed for the earlier order covered his appeal of the later one, and that second order was reviewable on appeal. *Warden v. Idaho Timber Corp.*, 132 Idaho 454, 974 P.2d 506 (1999).

#### — Post-Judgment Orders.

Although defendant's direct appeal from a judgment of conviction was filed before his motion to modify the sentence was dismissed, the appeal of conviction did encompass the denial of his motion to modify; a notice of appeal from a judgment is deemed to include all post-judgment orders, and an order denying a motion to modify a sentence is such a post-judgment order. *State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993).

#### Separate Appealable Order.

Where the District Court entered an order that appellate fees and costs were not waived, after the Supreme Court had dismissed the original action and entered an order waiving only the filing fee for that appeal, the District Court order was deemed to involve a separately appealable order "made after final judgment," even though an appeal was deemed to include all interlocutory or final orders entered after the order appealed from, as the Supreme Court by its own order, (a) treated the matter as a discrete appeal by giving it a designation and a case number separate from the earlier appeal, (b) assigned the action to the Court of Appeals for determination, and (c) suspended further proceedings in the earlier action until the instant appeal was decided. *Madsen v. Idaho Dep't of Health & Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

#### Time for Appeal.

Where there has been a final judgment, order or decree entered and the time for taking an appeal has not been extended under the provisions of I.R.C.P. 59, and no appeal has been timely taken, the provisions of this rule do not extend or reopen the appeal time on such final judgment or order. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

The defendant's appeal was timely as to both contempt orders identical except for the award of costs and attorney fees, because the appeal included both judgments within its scope. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

In a dispute over the sale of land between two tenants in common, a judgment in 2003 ordering an accounting was not final in nature because the accounting had not been completed; therefore, an appeal from a money judgment entered after the accounting in 2005 was final, and it included the 2003 judgment. The 2003 judgment was merely interlocutory in nature. *Watson v. Watson*, 144 Idaho 214, 159 P.3d 851 (2007).

District court signed an order granting summary judgment and an order awarding court costs, but it did not sign a separate document that would constitute a judgment until one month after the builder had filed its notice of appeal, making the builder's notice of appeal premature. However, since the district court's grant of the landowner's motion for summary judgment resolved all of the substantive issues in the case, the builder's premature notice of appeal became valid upon entry of the final judgment. *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 226 P.3d 1263 (2010).

Because motion to confirm and arbitrator's award was filed, and granted, under I.C. § 7-911, it was appealable as a matter of right under Idaho App. R. 11(a)(8) and I.C. § 7-919(a)(3); moreover, Idaho App. R. 17(e)(1)(B) does not extend the time for filing an appeal, but instead, must be read in conjunction with Idaho App. R. 11. *Harrison v. Certain Underwriters at Lloyd's*, 149 Idaho 201, 233 P.3d 132 (2010).

#### Time for Notice.

Where the defendant filed his appeal after the jury verdict but prior to the entry of judgment of conviction, and he failed to amend his notice of appeal following entry of the judgment of conviction, the Court of Appeals could not consider the appeal as it had no jurisdiction on an appeal from a verdict. *State v. Rollins*, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

Subdivision (e) of this rule deals with the subject matter scope of an appeal, and does

not extend the time for filing a notice of appeal as prescribed in I.A.R. 14. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

Defendant argues that, because the district court eventually entered an amended judgment of conviction, his notice of appeal was premature rather than untimely, and this court has jurisdiction over the appeal. The language of this Rule applies where the trial rules orally, the notice of appeal is then filed and the trial court subsequently enters a written judgment. Hence, subsection (e) of this Rule should not be interpreted to allow an untimely filing from the original judgment of conviction to be made timely by a later amendment to the judgment of conviction. *State v. Payan*, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996).

**Cited in:** *Sines v. Blaser*, 100 Idaho 50, 592

P.2d 1367 (1979); *State v. Dennard*, 102 Idaho 824, 642 P.2d 61 (1982); *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984); *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986); *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986); *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986); *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987); *State v. Porath*, 113 Idaho 974, 751 P.2d 670 (Ct. App. 1988); *Wilsey v. Fielding*, 115 Idaho 437, 767 P.2d 280 (Ct. App. 1989); *Ziemann v. Creed*, 121 Idaho 259, 824 P.2d 190 (Ct. App. 1992); *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996); *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997); *Blaha v. Eagle City Council*, 134 Idaho 768, 9 P.3d 1234 (2000); *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Attorney.  
Discretion.  
Material Defect.  
Multiple Appeals.  
Specificity.

##### **Attorney.**

Attorney admitted to practice in the district court in which a cause is tried, but not in the Supreme Court, can legally sign notice of appeal and take all steps necessary to perfect such appeal, for until appeal is perfected the case is in the trial court. *Taylor v. McCormick*, 7 Idaho 524, 64 P. 239 (1901).

##### **Discretion.**

It is not necessary that notice of appeal be directed to clerk of lower court. *Westheimer v. Thompson*, 3 Idaho 560, 32 P. 205 (1893).

Notice of appeal from judgment and order denying new trial is sufficient, although it is entitled solely with names of original parties to the action, and is addressed only to attorneys of the original adverse party; whereas, other parties were brought in by way of cross-complaint filed by appellant, where additional parties appeared by the same counsel as original adverse party to whose attorneys notice is directed. *Idaho Comstock Mining & Milling Co. v. Lundstrum*, 9 Idaho 257, 74 P. 975 (1903).

Where notice of appeal is addressed to clerk of court and to attorney for defendants, the fact that the attorney designated in the notice did not represent all defendants is not suffi-

cient to vitiate such notice. *Frost v. Alturas Water Co.*, 11 Idaho 294, 81 P. 996 (1905).

Where notice of appeal is addressed to certain parties, naming them, its legal effect is limited to such parties. *Glenn v. Aultman & Taylor Mach. Co.*, 30 Idaho 727, 167 P. 1163 (1917); *Williams v. Sherman*, 34 Idaho 63, 199 P. 646 (1921); *Mahaffey v. Pattee*, 46 Idaho 16, 266 P. 430 (1928); *Hutton v. Davis*, 56 Idaho 231, 53 P.2d 345 (1935).

Where notice of appeal is directed to one party alone, its service upon another party would not effect of bringing such other party before court. *Mahaffey v. Pattee*, 46 Idaho 16, 266 P. 430 (1928).

##### **Material Defect.**

Notice of appeal is defective in form which states that such appeal is from a judgment in favor of plaintiffs, when in fact it is in favor of some of defendants; but where such defect does not affect the substantial rights of respondents it will be disregarded. *Taylor v. McCormick*, 7 Idaho 524, 64 P. 239 (1901).

##### **Multiple Appeals.**

Same notice of appeal may specify both appeal from judgment and appeal from order upon motion for new trial. *McCoy v. Oldham*, 1 Idaho 465 (1873).

##### **Specificity.**

Orders from which the statute makes no provision for appeal may be reviewed on appeal from judgment or order denying new trial, without being specified in notice of appeal. *Warren v. Stoddart*, 6 Idaho 692, 59 P. 540 (1899).



## RESEARCH REFERENCES

**A.L.R.** Sufficiency of “designation,” under Federal Appellate Procedure Rule 3(c) or former Federal Civil Procedure Rule 73 (b), of judgment or order appealed from in civil case by notice of appeal not specifically designating such judgment or order. 2 A.L.R. Fed. 545.

**Rule 18. Notice of cross-appeal — Contents.**

A notice of cross-appeal shall contain substantially the following information:

- (a) **Title.** The title of the action or proceeding.
- (b) **Court or Agency Title.** The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official.
- (c) **Case Number.** The number assigned to the action or proceeding by the trial court or administrative agency.
- (d) **Parties.** The name of the party cross-appealing and the party’s attorney and the name of the adverse party and that party’s attorney. An address, phone number and email address must also be given, except no email address is required for persons appearing pro se.
- (e) **Designation of Appeal.** A designation of the judgment or order appealed from shall be deemed to include, and present on appeal, the same interlocutory and final judgments and orders in the same manner as provided for a notice of appeal under Rule 17(e).
- (f) **Issues.** A preliminary statement of the issues on appeal which the cross-appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the cross-appellant from asserting other issues on appeal.
- (g) **Jurisdictional Statement.** A statement as to the basis for the right to cross-appeal to the Idaho Supreme Court from the judgments or orders described in paragraph 1 of the notice of cross-appeal.
- (h) **Transcript.** A designation as to what portion, if any, of the reporter’s transcript is requested by the cross-appellant in addition to those requested by the appellant in the original notice of appeal, and a certification that the estimated reporter’s fee for the transcript requested by the cross-appeal has been paid or that payment is exempt. The notice shall also state whether the cross-appellant’s copy of this additional transcript shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the notice of cross-appeal, the cross-appellant shall receive a hard copy of the transcript.
- (i) **Record.** A designation of documents, if any, to be included in the clerk’s or agency’s record in addition to those automatically included pursuant to the following Rule 28 and those designated by the appellant in the initial notice of appeal.
- (j) **Exhibits - Civil Cases.** A designation of documents, charts, or pictures offered or admitted as exhibits in a trial or hearing, if any, in addition to those requested by the appellant in the original notice of appeal, to be copied and sent to the Supreme Court.



(k) **Certification.** A certification of the attorney of the cross-appellant, or affidavit of the person representing himself or herself:

(1) That service of the notice of cross-appeal and any request for additional transcript has been made upon the reporter;

(2) That the estimated reporter's fees for the requested transcript, if any, have been paid, or that cross-appellant is exempt from paying such fees for stated reasons;

(3) That the estimated fees for including any additional documents in the clerk's or agency's record have been paid, or that cross-appellant is exempt from paying such fees for stated reasons;

(4) That all appellate filing fees have been paid, or that cross-appellant is exempt from paying such fees because of stated reasons; and

(5) That service has been made upon all other parties required to be served pursuant to Rule 20; and that in all cases referred to in Section 67-1401(1), Idaho Code, service has been made upon the attorney general of the state of Idaho.

(l) **Amended Notice of Cross-Appeal.** In the event the original notice of cross-appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of cross-appeal, the cross-appellant may thereafter file an amended notice of cross-appeal correctly setting forth the facts and information. An amended notice of cross-appeal shall be filed with the clerk of the district court in the same manner as the original notice of cross-appeal but no filing fee shall be required. If the original notice of cross-appeal was timely filed from an appealable judgment, order or decree, the amended notice of cross-appeal will relate back to the date of filing of the original notice of cross-appeal.

(m) **Signature.** The name and signature of the attorney for the cross-appellant, or name of cross-appellant if the cross-appellant does not have an attorney.

(n) **Form.** The notice of cross-appeal shall be in substantially the following form:

(Cross-Appellant's Attorney's Name)

Attorney for Cross-Appellant

Post Office Address

Phone Number

Email address. (Email address is required for attorneys).

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR \_\_\_\_\_ COUNTY (IN THE  
(PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF  
THE STATE OF IDAHO)

(Title of original action or  
proceeding together with  
the additional designation  
of parties as cross-appellant  
and cross-respondent)

Case No. \_\_\_\_\_  
NOTICE OF CROSS-APPEAL

TO: THE ABOVE NAMED CROSS-RESPONDENT(S), (Names) AND  
THE PARTY'S ATTORNEYS, (Names and Addresses) AND THE CLERK  
OF THE ABOVE ENTITLED COURT (ADMINISTRATIVE AGENCY).

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant(s) (Name) appeal(s) against the above  
named respondent(s) to the Idaho Supreme Court from (The final judgment)  
(The order, describing it) \_\_\_\_\_, entered in the  
above entitled action (proceeding) on the \_\_\_\_\_ day of \_\_\_\_\_,  
(Honorable Judge \_\_\_\_\_) (Chairman \_\_\_\_\_) presid-  
ing.

2. That the party has a right to cross-appeal to the Idaho Supreme Court,  
and the judgments or orders described in paragraph 1 above are appealable  
orders under and pursuant to Rule [e.g., (11(a)(2)) or (12(a)) I.A.R.]

3. A preliminary statement on appeal which the cross-appellant then  
intends to assert in the appeal; provided, any such list of issues on appeal  
shall not prevent the cross-appellant from asserting other issues on appeal.

4. (a) Is additional a reporter's transcript requested? \_\_\_\_\_  
Any additional transcript is to be provided in [ ] hard copy [ ] electronic  
format [ ] both (check one).

(b) The cross-appellant requests the preparation of the following  
portions of the reporter's transcript: e.g.

(The entire reporter's standard transcript as defined in Rule 25(a), I.A.R.)

(The entire reporter's standard transcript supplemented by the following:)

(Voir dire examination of jury)

(Closing arguments of counsel)

(The following reporter's partial transcript:)

(The testimony of witness "X")

(Conferences on requested instructions)

(Instructions verbally given by court)

5. The cross-appellant requests the following documents to be included in  
the clerk's (agency's) record in addition to those automatically included  
under Rule 28, I.A.R. and those designated by the appellant in the initial  
notice of appeal: e.g.

(All requested and given jury instructions)

(The deposition of "X")

(Plaintiff's motion for continuance of trial)

6. Civil Cases Only. The cross-appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court in addition to those requested in the original notice of appeal.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

7. I certify:

(a) That a copy of this notice of cross-appeal and any request for additional transcript have been served on each reporter of whom an additional transcript has been requested as named below at the address set out below:

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

(b)(1) ☐ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the cross-appeal..

(2) ☐ That the cross-appellant is exempt from paying the estimated transcript fee because \_\_\_\_\_

(c) That service has been made upon all parties required to be served pursuant to Rule 20. (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.)

DATED THIS \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_.

/s/ Attorney's signature

\_\_\_\_\_  
(Name of Attorney or Firm  
for Cross-Appellant)  
Attorneys for Cross-Appellant

(When certification is made by a party instead of the party's attorney the following affidavit must be executed pursuant to Rule 18(i))

State of Idaho )  
 ) ss.  
County of \_\_\_\_\_ )

\_\_\_\_\_ being sworn, deposes and says:

That the party is the cross-appellant in the above-entitled cross-appeal and that all statements in this notice of cross-appeal are true and correct to the best of his or her knowledge and belief.

\_\_\_\_\_  
Signature of  
Cross-Appellant

Subscribed and Sworn to before me this \_\_\_\_, day of \_\_\_\_, 20\_\_.

\_\_\_\_\_  
Title  
Residence

(Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended April 3, 1996, effective July 1, 1996; amended February 4, 2008, effective March 1, 2008; amended March 19, 2009, effective July 1, 2009; amended March 29, 2010, effective July 1, 2010.)

JUDICIAL DECISIONS

**Cited in:** Mortimer v. Riviera Apts., 122 Idaho 839, 840 P.2d 383 (1992); Security Pac. Bank v. Curtis, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993).

**Rule 19. Request for additional transcript or clerk’s or agency’s record — Payment.**

(a) **Requests for less than the standard transcript and standard record on appeal.** When the appellant has requested less than the standard transcript per I.A.R. 25 or less than the standard clerk’s or agency’s record per I.A.R. 28, and the respondent wants to include documents that are part of the standard transcript or standard clerk’s or agency’s record, then the respondent must file a request for this additional material within 14 days of the filing of the notice of appeal or within 14 days of the amended notice of appeal that reduced the standard transcript or standard record requested. The respondent’s request must be served upon the appellant and the court reporter or court clerk or administrative agency as appropriate. The appellant must pay the estimated cost of the additional material within 14 days of the requested additions and file a receipt with the court or agency unless otherwise ordered by the court or agency. The additional cost may be taxed to the proper party upon the decision on appeal.

(b) **No transcript requested.** If the appellant does not request any reporter’s transcript in the notice of appeal and the respondent wants to include the reporter’s transcript, then the respondent must file a request for this additional material within 14 days of the filing of the notice of appeal or within 14 days of the amended notice of appeal that eliminated the



transcript requested. The respondent's request must be served upon the appellant and the court reporter or court clerk or administrative agency as appropriate. The respondent shall be responsible for paying the cost of the reporter's transcript and must pay the estimated cost within 14 days of the requested additions and file a receipt with the court or agency unless otherwise ordered by the court or agency. The request shall also state whether the respondent's copy of the transcript shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the request for transcript, the respondent shall receive a hard copy of the transcript.

(c) **Requests for documents in addition to the standard transcript and standard clerk's or agency's record.** When the appellant has requested the standard transcript per I.A.R. 25 and the standard clerk's or agency's record per I.A.R. 28 and the respondent wants to include additional documents, the respondent must file a request for this additional material within 14 days of the filing of the notice of appeal or within 14 days of the amended notice of appeal that eliminated these additional documents. The respondent's request must be served upon the appellant and the court reporter or court clerk or administrative agency as appropriate. The respondent shall be responsible for paying the cost of the additional documents and must pay the estimated cost of the additional material within 14 days of the requested additions and file a receipt with the court or agency unless otherwise ordered by the court or agency. The additional cost may be taxed to the proper party upon the decision on appeal.

(d) **Preparation of additional transcript or record.** The additional transcript or record requested shall be incorporated into the original transcript or record and included in the index and table of contents by the reporter or clerk if reasonably practicable, but may be prepared as a supplemental transcript or record.

(e) **Sanctions.** If the court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, the court may deny that portion of the costs the court deems to be excessive and/or impose monetary sanctions. Notice and an opportunity to respond shall be provided before sanctions are imposed.

(f) **Form.** The request for additional transcript or record, made after the filing of the notice of appeal or notice of cross-appeal, shall be in substantially the following form:

(Respondent's Attorney's Name)

Attorney for Respondent

Post Office Address

Phone Number

Email address. (Email address is required for attorneys).

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR \_\_\_\_\_ COUNTY (IN THE  
(PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF  
THE STATE OF IDAHO)

(Title of original action or )  
proceeding together with ) Case No. \_\_\_\_\_  
the additional designation ) REQUEST FOR ADDITIONAL  
of parties as appellant and ) (TRANSCRIPT) (RECORD)  
respondent) )

TO: THE ABOVE NAMED APPELLANT(S) (CROSS-APPELLANTS))  
AND THE PARTY'S ATTORNEY, AND THE (REPORTER) (CLERK) OF  
THE ABOVE ENTITLED (COURT) (ADMINISTRATIVE AGENCY).

NOTICE IS HEREBY GIVEN, that the Respondent (Cross-Respondent) in  
the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R.,  
the inclusion of the following material in the reporter's transcript or the  
(clerk's) (agency's) record in addition to that required to be included by the  
I.A.R. and the notice of appeal. Any additional transcript is to be provided in  
[ ] hard copy [ ] electronic format [ ] both (check one):

- 1. Reporter's transcript: e.g.  
(The entire reporter's standard transcript as defined in Rule 25(a), I.A.R.)  
(The entire reporter's standard transcript supplemented by the following:)  
(Voir dire examination of jury)  
(Closing arguments of counsel)  
(The following reporter's partial transcript:)  
(The testimony of witness "X")  
(Conferences on requested instructions)  
(Instructions verbally given by court)
- 2. Clerk's or Agency's Record: e.g.  
(Affidavit of "X")  
(Plaintiff's requested instructions)  
(Notice to take deposition of "Y")
- 3. Exhibits (civil cases only):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. I certify that a copy of this request for additional transcript(s) has been  
served on each court reporter of whom a transcript is requested as named  
below at the addresses set out below and that the estimated number of  
additional pages being requested is \_\_\_\_\_:

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

I further certify that this request for additional record has been served upon the clerk of the district court or administrative agency and upon all parties required to be served pursuant to Rule 20 (and upon the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

Dated this \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_.

/s/ Attorney's signature

\_\_\_\_\_  
(Name of Attorney or Firm for Respondent)  
Attorneys for the Respondent

(When certification is made by a party instead of the party's attorney the following affidavit must be executed.)

State of Idaho )  
 ) ss.  
County of \_\_\_\_\_ )

\_\_\_\_\_ being sworn, deposes and says:

That the party is the (respondent) (cross-respondent) in the above-entitled request and that all statements in this request are true and correct to the best of his or her knowledge and belief.

\_\_\_\_\_  
Signature of (Respondent)  
(Cross-Respondent)

(Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 1992, effective July 1, 1992; amended March 9, 1999, effective July 1, 1999; amended March 1, 2000, effective July 1, 2000; repealed and readopted March 21, 2007, effective July 1, 2007; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended March 19, 2009, effective July 1, 2009.)

**JUDICIAL DECISIONS**

**Cited in:** Collins v. Collins, 130 Idaho 705,  
946 P.2d 1345 (Ct. App. 1997).

**Rule 20. Filing and service of documents.**

A notice of appeal or notice of cross-appeal from a district court or an administrative agency, a petition for rehearing, and a petition for review to the Supreme Court are not deemed filed until they are physically received by the clerk of the respective court or administrative agency. For the purpose of filing all other documents involved in the appellate process, and for the purpose of service of all documents upon parties to an action, including service of a copy of a notice of appeal, a petition for rehearing or a petition for review, if the document is transmitted by mail such filing and service shall be deemed complete upon mailing. A certificate of mailing signed by an attorney that a document was properly mailed in the United States mail with postage prepaid to named persons on a day certain shall create a rebuttable presumption that such mailing was so made. At the time of the filing of a notice of appeal or cross-appeal, the appellant or cross-appellant shall serve copies thereof upon all persons who were parties and who appeared in the proceedings below, whether or not they are parties to the appeal, and upon each court reporter from whom a transcript is requested. At the time of the filing of any other document in the appellate process, the party filing the same shall serve a copy thereof upon all other parties to the action who are parties to the appeal, or who were parties in the proceeding below and who could be affected by the appeal; provided, if the parties to be served are numerous or cannot be found the trial court may order substituted service by publication, or otherwise, upon motion of the serving party. The party shall certify such service and the date and manner of service on the original document filed. Upon receipt of the notice of appeal, the Clerk of the Supreme Court shall notify the court reporter(s) identified in the Clerk's Certificate of Appeal that a transcript has been requested. (Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended January 3, 2008, effective March 1, 2008.)

**JUDICIAL DECISIONS**

**Timeliness of Filing**

Inmate's appeal of the district court's denial of his petition for post-conviction relief was timely, even though his original notice of appeal was not physically received by the clerk of the court within 42 days of the district court's dismissal order, because, under the mail box rule, the inmate provided ample

evidence that he did in fact present a notice of appeal for mailing on August 3, nine days before the August 12 deadline. *Hayes v. State*, 143 Idaho 88, 137 P.3d 475 (Ct. App. 2006).

**Cited in:** *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992); *Security Pac. Bank v. Curtis*, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993).

**DECISIONS UNDER PRIOR RULE OR STATUTE**

ANALYSIS	Necessity of Filing.
Compliance.	Order of Filing.
Failure to Serve.	Persons Served.
Jurisdiction.	—Attachment.
	—Child Custody.



- Default Judgments.
- Dismissal.
- Foreclosure.
- Industrial Accident Board.
- Intervention.
- Joint and Several Judgments.
- Party to Action.
- Personal Injury.
- Probate.
- Quiet Title Action.
- Special Appearance.
- Proof of Service.
- Service by Mail or Telegraph.
- Service on Attorneys.
- Waiver.

### **Compliance.**

Two separate notices of appeal, each directed to one or two adverse parties, were sufficient compliance with former similar provision. *Mendini v. Milner*, 47 Idaho 322, 276 P. 35 (1929).

### **Failure to Serve.**

A motion to dismiss appeal must be sustained in the absence of service on one of the parties whose interests might be affected by the court's decision. *Finlayson v. Humphreys*, 67 Idaho 193, 174 P.2d 210 (1946).

### **Jurisdiction.**

Requirement that notice of appeal shall be served on adverse party or his attorney is jurisdictional. *Diamond Bank v. Van Meter*, 18 Idaho 243, 108 P. 1042 (1910).

Notice must be effectual against necessary and adverse party to appeal in order that court have jurisdiction. *Williams v. Sherman*, 34 Idaho 63, 199 P. 646 (1921); *Lind v. Lambert*, 40 Idaho 569, 236 P. 121 (1925), *aff'd*, *Lambert v. Paysee*, 45 Idaho 564, 263 P. 1001 (1928); *Abel v. Robert Noble Estate*, 43 Idaho 391, 252 P. 493 (1927); *In re Dunn's Estate*, 45 Idaho 23, 260 P. 432 (1927); *Walker v. Jackson*, 48 Idaho 18, 279 P. 293 (1929).

Serving and filing proper notice of appeal is jurisdictional. *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934).

Service of notice of appeal on all adverse parties, or their attorney, is necessary to give the Supreme Court jurisdiction of the case. *Finlayson v. Humphreys*, 67 Idaho 193, 174 P.2d 210 (1946).

### **Necessity of Filing.**

Appeal is not taken until notice is filed and served, both of which acts must be done within statutory time allowed for taking appeal. *Moe v. Harger*, 10 Idaho 194, 77 P. 645 (1904).

Former similar provision was mandatory, and required appellant to file with proper clerk and serve on adverse party or his attor-

ney notice of appeal. *Adams v. McPherson*, 3 Idaho 718, 34 P. 1095 (1893); *Richardson v. Banbury*, 39 Idaho 1, 225 P. 1023 (1924).

### **Order of Filing.**

It was formerly held that filing of notice must precede or be contemporaneous with service of a copy on adverse party (*Slocum v. Slocum*, 1 Idaho 589); but it is now settled that order of filing and serving notice is immaterial, but both acts must be performed within prescribed time. *Arthur v. Mounce*, 4 Idaho 487, 42 P. 509 (1895).

### **Persons Served.**

Notice of appeal must be served on each party whose interest would be affected by modification or reversal of judgment appeal from, whether such party be plaintiff, defendant, or intervener, and whether he appears or is in default. *Titiman v. Alamance Mining Co.*, 9 Idaho 240, 74 P. 529 (1903); *Miller v. Wallace*, 26 Idaho 373, 143 P. 524 (1914); *State Bank v. Watson*, 27 Idaho 211, 148 P. 470 (1915); *Bridgham v. National Pole Co.*, 27 Idaho 214, 147 P. 1056 (1915).

### **—Attachment.**

Husband is not adverse party to his wife who intervenes in attachment suit against him by third party, where, if she can prosecute the action at all, she must do so for their joint benefit, and her appeal will not be dismissed for failure to serve on him. *Holt v. Empey*, 32 Idaho 106, 178 P. 703 (1919).

### **—Child Custody.**

The maternal grandmother of a minor child of divorced parents was not an "adverse party" upon whom must be served notice of appeal from an order awarding a child's custody to the grandmother, where she was not a party to the custody proceedings between divorced husband and wife, and was not brought in by any order or process of the court and did not seek the custody of the child by petition, but was merely custodian of the child by appointment of the court. *Roosma v. Moots*, 62 Idaho 450, 112 P.2d 1000 (1941).

### **—Default Judgments.**

Defaulting defendants are not entitled to notice on appeal by other defendants. *Aulbach v. Dahler*, 4 Idaho 522, 43 P. 192 (1895).

Where judgment is rendered in favor of defendants, all the defendants must be served with notice of plaintiff's appeal, although some of such defendants defaulted. *Baker v. Drews*, 9 Idaho 276, 74 P. 1130 (1903); *Wright v. Spencer*, 38 Idaho 447, 221 P. 846 (1923); *Lind v. Lambert*, 40 Idaho 569, 236 P. 121 (1925), *aff'd*, *Lambert v. Paysee*, 45 Idaho 564, 263 P. 1001 (1928).

Where default is entered and right of defendant can not be prejudicially affected by further proceedings in case, he is not entitled to notice of such further proceedings. *Lind v. Lambert*, 40 Idaho 569, 236 P. 121 (1925), *aff'd*, *Lambert v. Paysee*, 45 Idaho 564, 263 P. 1001 (1928); *Aulbach v. Dahler*, 4 Idaho 522, 43 P. 192 (1895).

Where one defendant did not appear and his default was entered, and during the trial counsel for the other defendant moved the court to dismiss the case as to such defendant, the plaintiff proceeded properly in these circumstances in serving the notice of appeal on counsel of remaining defendant without serving it on the defaulting defendant. *Houghtelin v. Diehl*, 47 Idaho 636, 277 P. 699 (1929).

Where mortgagor permitted default to be taken against her in mortgage foreclosure suit and was not served with notice of appeal, appellate court was without jurisdiction to entertain appeal. *Gibson v. Boone*, 47 Idaho 735, 279 P. 409 (1929).

#### —Dismissal.

Where motion for nonsuit is sustained as to one of several defendants, and verdict is rendered against other defendants, the defendant in whose favor judgment of nonsuit is entered is not adverse party, and need not be served with notice of appeal. *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909).

#### —Foreclosure.

On appeal from order refusing to vacate writ of assistance issued after judgment in foreclosure proceedings, judgment of foreclosure is in no way reviewable, and parties to foreclosure proceedings who are not interested in the writ of assistance need not be served with notice of appeal. *Mills v. Smiley*, 9 Idaho 325, 76 P. 783, 76 P. 786 (1904).

#### —Industrial Accident Board.

When no one has appeared as general or ad litem guardian for an infant and the general guardian is not named as respondent nor served with notice of appeal, Supreme Court is without jurisdiction to review award by accident board to infant as dependent of deceased employee. *Hutton v. Davis*, 56 Idaho 231, 53 P.2d 345 (1935).

#### —Intervention.

Intervener is adverse party and notice of appeal should be served on him. *Berlin Mach. Works v. Bradford-Kennedy Co.*, 21 Idaho 669, 123 P. 637 (1912).

#### —Joint and Several Judgments.

Where joint judgment is rendered against two or more parties, and appeal is taken by

one of them, then all other parties against whom such joint judgment has been rendered are adverse parties, and notice of appeal must be served upon each in order to give appellate court jurisdiction. *Jones v. Quantrell*, 2 Idaho 153, 9 P. 418 (1886); *Coffin v. Edgington*, 2 Idaho 627, 23 P. 80 (1890); *Lydon v. Godard*, 5 Idaho 607, 51 P. 459 (1897); *Lewiston Nat'l Bank v. Tefft*, 6 Idaho 104, 53 P. 271 (1898); *Doust v. Rocky Mt. Bell Tel. Co.*, 14 Idaho 677, 95 P. 209 (1908); *Diamond Bank v. Van Meter*, 18 Idaho 243, 108 P. 1042 (1910); *Glenn v. Aultman & Taylor Mach. Co.*, 30 Idaho 727, 167 P. 1163 (1917).

Where there is a several judgment for a different amount against each defendant, one defendant is not an adverse party to appeal by another defendant such as to be entitled to notice. *Aulbach v. Dahler*, 4 Idaho 522, 43 P. 192 (1895).

Where judgment is rendered in favor of defendants, all defendants must be served with notice of plaintiff's appeal, although some of such defendants defaulted. *Baker v. Drews*, 9 Idaho 276, 74 P. 1130 (1903).

Where same counsel is attorney for three defendants and only one of them appeals, notice of appeal need not be served upon the nonappealing defendants or their counsel. *Weeter Lbr. Co. v. Fales*, 20 Idaho 255, 118 P. 289 (1911).

#### —Party to Action.

Though person may be named in complaint as party to action, he is not an adverse party upon whom notice of appeal must be served where he was not served with process, did not appear in the action, and no judgment was entered either for or against him. *McKinnon v. McIlhargey*, 24 Idaho 720, 135 P. 826 (1913); *Kissler v. Moss*, 26 Idaho 516, 144 P. 647 (1914); *Walker v. Jackson*, 48 Idaho 18, 279 P. 293 (1929).

Not all persons whose interest might possibly be affected by judgment on appeal are entitled to notice, but only those persons who are parties. *Eldridge v. Payette-Boise Water Users Ass'n*, 48 Idaho 182, 279 P. 713 (1929).

Service of notice of appeal on claimants who have merely filed claims with receiver is not necessary, as they are not parties to action. *Eldridge v. Payette-Boise Water Users Ass'n*, 48 Idaho 182, 279 P. 713 (1929).

#### —Personal Injury.

In suit by plaintiff to recover damages for personal injuries sustained while riding in a car to which she had been transferred by a bus driver wherein the verdict of the jury was in favor of plaintiff and driver of car against the bus company but only judgment was in favor of plaintiff against the bus company, the

driver of the car was not an adverse party to defendant's appeal so as to require the serving of notice of the appeal papers on the car driver. *Clark v. Tarr*, 76 Idaho 383, 283 P.2d 942 (1955).

#### —Probate.

Since title to property of intestate passes to heirs, such heirs are interested parties in sale of property, and where sale has been confirmed by probate court and purchaser appeals from such confirmation, such heirs or their guardian ad litem are adverse parties and must be served with notice of appeal. *Reed v. Stewart*, 12 Idaho 699, 87 P. 1002 (1906).

Where district court could exercise jurisdiction on appeal in probate proceeding without certain parties being served with notice, it was not necessary to serve such parties with notice of appeal from district court's judgment to Supreme Court. *Kline v. Shoup*, 35 Idaho 527, 207 P. 584 (1922).

#### —Quiet Title Action.

Codefendants in quiet title action are both adverse parties, within meaning of former section, notwithstanding that one of the defendants might be called on to answer the other defendant regarding conveyance by former to latter, and where former is not served with notice of the appeal, a motion to dismiss will lie. *Finlayson v. Humphreys*, 67 Idaho 193, 174 P.2d 210 (1946).

#### —Special Appearance.

Notice must be served on parties who made a general appearance, but not on parties appearing specially to attack jurisdiction of court. *Kline v. Shoup*, 35 Idaho 527, 207 P. 584 (1922).

#### Proof of Service.

It must affirmatively appear from transcript that notice of appeal had been served as required by former section, or appeal will be dismissed. *Anderson v. Knott*, 1 Idaho 626 (1876); *Tootle v. French*, 3 Idaho 1, 25 P. 1091 (1891); *Adams v. McPherson*, 3 Idaho 718, 34 P. 1095 (1893); *Doust v. Rocky Mt. Bell Tel. Co.*, 14 Idaho 677, 95 P. 209 (1908); *Diamond Bank v. Van Meter*, 18 Idaho 243, 108 P. 1042 (1910); *Chapman v. Boehm*, 27 Idaho 150, 147 P. 289 (1915); *State Bank v. Watson*, 27 Idaho 211, 148 P. 470 (1915); *Bridgham v. National Pole Co.*, 27 Idaho 214, 147 P. 1056 (1915); *Cook v. Miller*, 30 Idaho 749, 168 P. 911 (1917); *Green v. Morrison*, 37 Idaho 420, 216 P. 1035 (1923); *Richardson v. Banbury*, 39 Idaho 1, 225 P. 1023 (1924); *Bain v. Tolley*, 39 Idaho 174, 226 P. 1069 (1924).

Where there is no proof of service of notice

of appeal, appeal should be dismissed. *Davis v. Bach*, 33 Idaho 551, 196 P. 673 (1921).

It is fact of service rather than proof of service upon which jurisdiction of court rests, and on motion to dismiss appeal for lack of service of notice of appeal on adverse parties, it is proper to entertain suggestion for diminution of record accompanied by affidavits showing service on such parties. *Mendini v. Milner*, 47 Idaho 322, 276 P. 35 (1929).

Motion to dismiss appeal on the ground that notice of service had been omitted from transcript was denied, and augmentation ordered, where proof showed that an affidavit of service had been filed with clerk of district court. *Common Sch. Dist. No. 58 v. Lunden*, 71 Idaho 486, 233 P.2d 806 (1951).

#### Service by Mail or Telegraph.

A nonresident defaulting defendant may be served with a notice of appeal by depositing same in the post office. *Titiman v. Alamance Mining Co.*, 9 Idaho 240, 74 P. 529 (1903).

Service of notice of appeal is complete when notice with copy thereof was deposited in mail. *People's Sav. & Trust Co. v. Rayl*, 45 Idaho 776, 265 P. 703 (1928); *Bothwell v. Keefer*, 52 Idaho 737, 20 P.2d 199 (1933).

Notice of appeal may be served by mail. *Isaak v. Journey*, 52 Idaho 274, 13 P.2d 247 (1932); *Bothwell v. Keefer*, 52 Idaho 737, 20 P.2d 199 (1933).

Where parties to be served with notice of appeal resided at different place from party making service it was proper to serve such notice of appeal by mailing. *Mendini v. Milner*, 47 Idaho 322, 276 P. 35 (1929).

Notice of appeal may be served by mail and where undertaking is filed simultaneously with the notice of appeal, the appeal is perfected. *Isaak v. Journey*, 52 Idaho 274, 13 P.2d 247 (1932).

Service of notice of appeal by mail is proper and such service is complete when the notice is deposited in the mail. *Bothwell v. Keefer*, 52 Idaho 737, 20 P.2d 199 (1933).

Where a copy of a notice of appeal was deposited in the post office in a sealed envelope with postage prepaid, and directed to the respondents' attorney at his post-office address within the 90 days after the entry of the judgment appealed from, and another copy of such notice was transmitted by telegraph to the clerk of the lower court, and filed by him within such time, the notice was duly filed within the time required by law. *Roddy v. State*, 64 Idaho 653, 135 P.2d 298 (1943).

Service of notice of appeal was sufficient, though the notice telegraphed to the clerk of the lower court and filed by him within the statutory time was not served on respon-



dents. *Roddy v. State*, 64 Idaho 653, 135 P.2d 298 (1943).

The service of notice of appeal by telegraph is lawful. *Roddy v. State*, 64 Idaho 653, 135 P.2d 298 (1943).

**Service on Attorneys.**

Affidavit of service of notice of appeal “upon the attorney for respondent by leaving a true copy thereof at his office in Boise City, Ada County, Idaho territory, on the twenty-first

day of May, 1883.” is insufficient to show service. *Warner v. Teachenor*, 2 Idaho 38, 2 P. 717 (1884).

**Waiver.**

Defective service of notice of appeal is waived by admission of service contained in transcript. *Wilson v. Wilson*, 6 Idaho 597, 57 P. 708 (1899); *Mendini v. Milner*, 47 Idaho 322, 276 P. 35 (1929).

**Rule 20.1. Filing and service of documents by facsimile machine.**

(a) **Filing With Court.** An application for stay of execution of a criminal or civil judgment or a petition for review, but not the supporting memorandum or brief, may be filed with the Supreme Court by a facsimile machine process. Any other document may be filed with the Supreme Court by a facsimile machine process when there is an emergency and when orally approved by the office of the clerk of the court in advance of filing. The clerk shall file stamp the facsimile copy as an original and the signature on the copy shall constitute the required signature under Rule 11.1. When a brief or memorandum is thereafter filed in support of a document filed by the facsimile process, each copy of the brief or memorandum shall have attached to it a copy of the motion, application or petition which was filed by the facsimile process. Filings may be made with the Supreme Court only during normal working hours. Provided, documents over ten (10) pages in length cannot be filed by the facsimile machine process.

(b) **Service of Documents.** Service of a document which has been filed with the Supreme Court by facsimile process may be made upon an attorney by transmitting a copy to the office of the attorney by a facsimile machine process. Provided, this rule shall not require a facsimile machine to be maintained in the office of an attorney. (Adopted November 15, 1989, effective January 1, 1990.)

**Rule 21. Effect of failure to comply with time limits.**

The failure to physically file a notice of appeal or notice of cross-appeal with the clerk of the district court or an administrative agency, or the failure to physically file a petition for rehearing or a challenge to a final redistricting plan with the clerk of the Supreme Court, each within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition, upon the motion of any party, or upon the initiative of the Supreme Court. Failure of a party to timely take any other step in the appellate process shall not be deemed jurisdictional, but may be grounds only for such action or sanction as the Supreme Court deems appropriate, which may include dismissal of the appeal. (Adopted March 25, 1977, effective July 1, 1977; amended April 18, 1983, effective July 1, 1983; amended November 20, 2012, effective January 1, 2013.)



## STATUTORY NOTES

**Cross References.** I.A.R., Rule 17 (Notice of Appeal); I.A.R., Rule 18 (Notice of Cross-

Appeal); I.A.R., Rule 42 (Petition for Rehearing).

## JUDICIAL DECISIONS

## ANALYSIS

Dismissal.  
Judgments.  
Jurisdiction.  
Post-Conviction Relief.  
Requirement Jurisdictional.  
Timeliness.

**Dismissal.**

The failure to file the notice of appeal and the failure to file a timely motion which suspends the time period, shall cause automatic dismissal of such appeal upon the motion of any party, or upon the initiative of the Supreme Court. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

The district court erred in dismissing the appeal without an express finding that the failure to "perfect" the appeal has resulted in delay which has prejudiced the respondent. *Neal v. Harris*, 100 Idaho 348, 597 P.2d 234 (1979).

The requirement of perfecting an appeal within the time period allowed by I.A.R. Rules 11 and 14, is jurisdictional. An appeal taken after expiration of the filing period will be dismissed. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Since there is no rule of criminal procedure which permits a party to file a motion for reconsideration of an order granting a motion to suppress evidence such a motion does not terminate the time for filing notice of appeal under I.A.R. 14(a). Accordingly, where state filed motion for reconsideration of an order granting a motion to suppress but did not file timely notice of appeal from such order, the appeal must be dismissed. *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983).

Because the filing by the state of its objection and motion concerning costs and attorney fees did not extend the time to appeal the judgment, the time for appeal had expired when the landowners filed their appeal over three months after entry of judgment in condemnation action; hence the appeal had to be dismissed, as to the judgment. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

A timely notice of appeal or cross-appeal is a jurisdictional prerequisite to challenge a determination made by a lower court. Failure to timely file such a notice "shall cause auto-

matic dismissal" of the issue on appeal. *Carr v. Carr*, 116 Idaho 754, 779 P.2d 429 (Ct. App. 1989).

Dismissal of an appeal is a permissible sanction when the appellant fails to file a timely brief. *Hoopes v. Bagley* (In re Estate of Bagley), 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990).

**Judgments.**

A trial court cannot restart the time for appeal by the mere expedient of entering a second judgment identical to the first. *Spreader Specialists, Inc. v. Monroc, Inc.*, 114 Idaho 15, 752 P.2d 617 (Ct. App. 1987), overruled on other grounds, *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

**Jurisdiction.**

Because this rule provides that "any other step" in the appellate process is not jurisdictional, the absence of a motion for acceptance of an appeal did not deprive the district court of jurisdiction. *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999).

Defendant failed to timely file a notice of appeal from district court's appellate decision affirming magistrate's denial of his motion to suppress, choosing instead to proceed on remand to the magistrate in defense of the underlying charge. Court of appeals therefore lacked subject matter jurisdiction over defendant's appeal of magistrate's order. Because defendant did not assert that he would raise any other issues if provided with the opportunity to appeal to the district court the magistrate's final judgment, remand was inappropriate, and his appeal was dismissed. *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008).

Whether an appellate court lacks jurisdiction is a question of law over which that court exercises free review. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

**Post-Conviction Relief.**

Court had jurisdiction to consider the merits of the inmate's appeal from the dismissal of his petitions for post-conviction relief because his action in filing the motions and affidavits was the functional equivalent of filing a notice of appeal. Where a litigant files documents with the court within the time limit required by the rules and those docu-

ments give notice to other parties and the courts of a litigant's intent to appeal as required by the rules, those documents can be effective as a notice of appeal. *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005).

### **Requirement Jurisdictional.**

A timely notice of appeal is a jurisdictional requirement. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Appeal filed 43 days after entry of judgment of conviction was untimely under I.A.R. 14 where no intervening motion was made in the case, and the failure to file timely notice was a jurisdictional defect requiring dismissal of the appeal under this rule. *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

Parties could not waive the appellant's failure to timely file the appeal, since failure to timely file an appeal deprives an appellate court of jurisdiction. *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

Where the second notice of appeal was not timely under I.A.R. 14, which requires that the notice of appeal be filed within 42 days of the filing of the judgment or post trial order appealed from and nearly two years elapsed from the filing of the order granting a new trial on August 1, 1989, to the filing of the notice of appeal, the notice of appeal was dismissed because it was not timely filed and the timely filing of a notice of appeal is jurisdictional. *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991).

State's motion to dismiss charges against the defendant, without prejudice, was a final, appealable order under I.A.R. 11, even though the prosecution intended to immediately re-file identical charges, and defendant's failure to file an appeal within 42 days under I.A.R. 14 deprived the appellate court of jurisdiction to review the denial of the motion, pursuant to this rule. *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (2008).

### **Timeliness.**

Defendant's notice of appeal was filed 43

days after the judgment of conviction was entered; pursuant to this Rule and I.A.R. 14, defendant's appeal is untimely, and the court therefore lacks jurisdiction to address the substantive issues. *State v. Payan*, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996).

The failure to timely file a notice of appeal is jurisdictional and causes automatic dismissal of such appeal. *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

Post-conviction petitioner's notice of appeal from a district court's notice of intent to dismiss, though premature and interlocutory in nature, was nevertheless sufficient to effectuate an appeal from a final order dismissing the petition four days after the petitioner's notice of appeal was filed. *Weller v. State*, 146 Idaho 652, 200 P.3d 1201 (2008).

Appeal was dismissed as untimely because it was not filed with 42 days of the judgment. *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 147 Idaho 56, 205 P.3d 1192 (2009).

Where defendant relied upon the date of entry of a final order, rather than upon the date of entry of a temporary order which place him on probation, he filed his notice of appeal later than allowed, and the appeal was properly dismissed. *State v. Schultz*, 147 Idaho 675, 214 P.3d 661 (2009).

**Cited in:** *State v. Smith*, 103 Idaho 135, 645 P.2d 369 (1982); *Lindstrom v. District Bd. of Health*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985); *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989); *Sartain v. Fidelity Fin. Servs., Inc.*, 116 Idaho 269, 775 P.2d 161 (Ct. App. 1989); *Hunting v. Clark County Sch. Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997); *Hoskinson v. Hoskinson*, 139 Idaho 448, 80 P.3d 1049 (2003); *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004); *Pierce v. State*, 142 Idaho 32, 121 P.3d 963 (2005); *State v. Savage*, 145 Idaho 756, 185 P.3d 268 (2008); *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010).

## **Rule 22. Computation of time.**

In computing the time period prescribed or allowed for the filing or service of any document in these rules, the day of the act or event after which the designated period of time begins to run is not to be included, but the last day of the period so computed is to be included unless it is a Saturday, Sunday or a non-judicial day, as defined in Section 1-1607, Idaho Code, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a non-judicial day as defined in Section 1-1607, Idaho Code. (Adopted March 25, 1977, effective July 1, 1977.)

**Rule 23. Filing fees and clerk’s certificate of appeal — Waiver of appellate filing fee.**

(a) **Filing Fees.** The Clerk of the Supreme Court shall charge the following filing fees for appeals and petitions:

	Filing Fee
(1) Appeals in civil cases except for habeas corpus and post-conviction relief .....	\$94.00
(2) Appeals from the Public Utilities Commission .....	\$94.00
(3) Appeals from the Industrial Commission .....	\$94.00
(4) Any cross-appeals in the appeals set out in (1), (2) and (3) above .....	\$94.00
(5) Applications to intervene .....	\$94.00
(6) Petitions pursuant to Rule 5 under the original jurisdiction of the Supreme Court except for habeas corpus and criminal cases .....	\$76.00
(7) Petitions for rehearing except in criminal actions, or actions for habeas corpus or post-conviction relief .....	\$71.00
(8) Appeals in criminal cases .....	\$ None
(9) Petitions for writ of habeas corpus .....	\$ None
(10) Petitions for post-conviction relief .....	\$ None
(11) Petition for review of a decision of the Court of Appeals ...	\$ None
(12) Review of Violent Sexual Predator designation .....	\$ None
No appellate filing fee is required for agencies of the State of Idaho and Counties of the State of Idaho, including public defenders, pursuant to I.C. § 67-2301 and I.C. § 31-3212(2).	

(b) **Collection and Transmittal to the Clerk of the Supreme Court.** The Clerk of the Supreme Court shall charge and collect the appropriate fee for any petitions initially filed with the Supreme Court. Upon the filing of a notice of appeal, or notice of cross-appeal, the clerk of the district court or administrative agency where the document is filed shall charge and collect the appropriate filing fee and the clerk shall forthwith forward a certified copy of the notice of appeal together with the filing fee to the Clerk of the Supreme Court; provided, an administrative agency may forward the filing fee to the Clerk of the Supreme Court with the Certificate of Appeal. The Clerk of the Supreme Court shall forward all such fees to the state treasurer for deposit in the appropriate fund.

(c) **Waiver of Appellate Filing Fee.** Any appellate filing fee set forth under subsection (a) of this rule may be waived pursuant to section 31-3220, Idaho Code, if such waiver is approved by the Supreme Court. Any party desiring waiver of the appellate filing fee in a civil appeal shall first make application to the district court or administrative agency from which the appeal is taken in accordance with the rules of procedure adopted by the judicial district of the district court or the administrative agency from which the appeal is taken. The order of the district court or administrative agency recommending waiver or no waiver of the appellate filing fee shall be filed by



the appellant with the notice of appeal. The appellant shall also file with the notice of appeal a verified petition, motion or affidavit sworn to be the appellant stating:

- (1) The name and address of the applicant.
- (2) A request for the waiver of the appellate filing fee.
- (3) A statement of the factual basis showing the indigency of the applicant to pay such filing fee.
- (4) A certification by the applicant that the applicant believes that the applicant is entitled to waiver of the filing fee.

(d) **Request for Waiver.** All of said documents filed with the district court with the notice of appeal requesting a waiver of the appellate filing fee shall be forwarded by the clerk of the district court to the Supreme Court at the same time and with the notice of appeal. The Clerk of the Supreme Court, upon receiving the notice of appeal and the request for the waiver of the appellate filing fee shall mark all documents as “lodged” indicating the date and time received. The Supreme Court will rule upon the request for waiver of the appellate filing fee without further briefs or arguments unless otherwise ordered by the Court. If the Supreme Court grants the waiver of the appellate filing fee, it will enter an order to that effect and the Clerk of the Court shall thereupon file the notice of appeal and all other documents relating to the waiver of the appellate filing fee which shall be deemed filed on the date and time they were initially lodged with the Supreme Court. In the event the Supreme Court denies the waiver of the appellate filing fee the Clerk shall so notify the appellant and the notice of appeal and all documents relating to the waiver of the appellate filing fee shall be lodged with the Supreme Court but not filed, and no appeal shall be pending with the Supreme Court unless and until the appellate filing fee is paid by the appellant.

(e) **Automatic Waiver.** In any appeal in which the appellant or cross-appellant is represented by the Idaho Legal Aid Services, the appellate filing fee shall automatically be waived and the clerk of the district court and the Clerk of the Idaho Supreme Court shall accept the notice of appeal or notice of cross-appeal without the payment of the appellate filing fee.

(f) **Certificate of Appeal.** Along with the notice of appeal or notice of cross-appeal, the clerk of the district court or the administrative agency shall prepare and send to the Clerk of the Supreme Court a Certificate of Appeal in the form provided by these rules. Provided, if the appeal is from the denial by the trial court of an application for waiver of fees, the clerk shall attach to the Certificate of Appeal copies of the motion or application for waiver of fees, all affidavits and documents presented in support of the motion or application and the order of the trial court denying the same.

(g) **Form of Certificate of Appeal.** The Certificate of Appeal made by the clerk of the district court or administrative agency for filing with the Supreme Court shall be in the following form:



IN THE DISTRICT COURT OF THE \_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR \_\_\_\_\_ COUNTY (IN  
THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL  
COMMISSION) OF THE STATE OF IDAHO)

(Title of original action or )  
proceeding together with ) Supreme Court No. \_\_\_\_  
additional designation of ) CLERK'S CERTIFICATE  
parties as appellant and ) OF APPEAL  
respondent) )  
\_\_\_\_\_) )

Appeal from: \_\_\_\_\_ Judicial District,  
\_\_\_\_\_ County.  
Honorable \_\_\_\_\_ presiding.  
(Public Utilities Commission) (Industrial Commission) \_\_\_\_\_ presiding  
Case number from court or agency: \_\_\_\_\_  
(Date and Description)

Order or judgment appealed from: \_\_\_\_\_

Attorney for Appellant: \_\_\_\_\_

Attorney for Respondent: \_\_\_\_\_

Appealed by: \_\_\_\_\_

Appealed against: \_\_\_\_\_

Notice of Appeal filed: \_\_\_\_\_ (date)

Amended Notice of Appeal filed: \_\_\_\_\_ (date)

Notice of Cross-Appeal filed: \_\_\_\_\_ (date)

Amended Notice of Cross-Appeal filed: \_\_\_\_\_ (date)

Appellate fee paid: \_\_\_\_\_ (date and amount) \_\_\_\_\_ (none—explanation)

Respondent or Cross-Respondent's request for additional record  
filed: \_\_\_\_\_ (date)

Respondent or Cross-Respondent's request for additional reporter's  
transcript filed: \_\_\_\_\_ (date)

Was District Court Reporter's transcript requested? \_\_\_\_\_

Estimated number of pages \_\_\_\_\_

If so, name of each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk of the (District Court)  
Secretary of the  
(Public Utilities Commission)  
(Industrial Commission)

(Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 5, 1990, effective July 1, 1990; amended April 28, 1983, effective July 1, 1993; April 11, 1994, effective July 1, 1994; amended April 3, 1996, effective July 1, 1996; amended March 24, 2004, effective July 1, 2004; amended March 21, 2007, effective July 1, 2007; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended January 4, 2010, effective February 1, 2010; amended November 20, 2012, effective January 1, 2013.)

JUDICIAL DECISIONS

**Cited in:** Madsen v. Idaho Dep't of Health & Welfare, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

**Rule 24. Reporter's transcript — Number — Estimate of fees — Time for preparation — Waiver of reporter's fee.**

(a) **Number and Use of Transcripts.** The reporter shall prepare an original hard copy, one additional hard copy and one electronic copy of the reporter's transcript for the Supreme Court which shall be lodged with the district court and filed with the Supreme Court following settlement. In addition, the reporter shall prepare one copy of the reporter's transcript for the appellant and one copy for the respondent with each party electing whether to receive it in electronic format or in hard copy or both. If there are multiple appellants or respondents, they shall determine by stipulation which appellant or respondent shall be served with the transcript by the clerk and the manner and time and use of the transcript by each appellant

IN THE DISTRICT COURT OF THE \_\_\_\_ JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR \_\_\_\_\_ COUNTY (IN  
THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL  
COMMISSION) OF THE STATE OF IDAHO)

(Title of original action or proceeding together with additional designation of parties as appellant and respondent) )  
 ) Supreme Court No. \_\_\_\_  
 ) CLERK'S CERTIFICATE  
 ) OF APPEAL  
 )  
 )  
 )  
 \_\_\_\_\_ )

Appeal from: \_\_\_\_\_ Judicial District,  
\_\_\_\_\_ County.  
Honorable \_\_\_\_\_ presiding.  
(Public Utilities Commission) (Industrial Commission) \_\_\_\_\_ presiding  
Case number from court or agency: \_\_\_\_\_  
(Date and Description)

Order or judgment appealed from: \_\_\_\_\_

Attorney for Appellant: \_\_\_\_\_  
Attorney for Respondent: \_\_\_\_\_  
Appealed by: \_\_\_\_\_  
Appealed against: \_\_\_\_\_  
Notice of Appeal filed: \_\_\_\_\_ (date)

Amended Notice of Appeal filed: \_\_\_\_\_ (date)

Notice of Cross-Appeal filed: \_\_\_\_\_ (date)

Amended Notice of Cross-Appeal filed: \_\_\_\_\_ (date)

Appellate fee paid: \_\_\_\_\_ (date and amount) \_\_\_\_\_ (none—explanation)

Respondent or Cross-Respondent's request for additional record  
filed: \_\_\_\_\_ (date)

Respondent or Cross-Respondent's request for additional reporter's  
transcript filed: \_\_\_\_\_ (date)

Was District Court Reporter's transcript requested? \_\_\_\_\_  
Estimated number of pages \_\_\_\_\_

If so, name of each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
Clerk of the (District Court)  
Secretary of the  
(Public Utilities Commission)  
(Industrial Commission)

(Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 5, 1990, effective July 1, 1990; amended April 28, 1983, effective July 1, 1993; April 11, 1994, effective July 1, 1994; amended April 3, 1996, effective July 1, 1996; amended March 24, 2004, effective July 1, 2004; amended March 21, 2007, effective July 1, 2007; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended January 4, 2010, effective February 1, 2010; amended November 20, 2012, effective January 1, 2013.)

JUDICIAL DECISIONS

**Cited in:** Madsen v. Idaho Dep't of Health & Welfare, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

**Rule 24. Reporter's transcript — Number — Estimate of fees — Time for preparation — Waiver of reporter's fee.**

(a) **Number and Use of Transcripts.** The reporter shall prepare an original hard copy, one additional hard copy and one electronic copy of the reporter's transcript for the Supreme Court which shall be lodged with the district court and filed with the Supreme Court following settlement. In addition, the reporter shall prepare one copy of the reporter's transcript for the appellant and one copy for the respondent with each party electing whether to receive it in electronic format or in hard copy or both. If there are multiple appellants or respondents, they shall determine by stipulation which appellant or respondent shall be served with the transcript by the clerk and the manner and time and use of the transcript by each appellant



or respondent. In the absence of such stipulation the determination shall be made by the trial court or agency upon the application of any party or the clerk. If a reporter's transcript has already been prepared for the appellant and/or respondent in an Idaho Public Utilities Commission appeal, when requested by the Supreme Court the reporter shall furnish two computer-searchable transcripts in electronic format to the Court, but additional copies need not be made for the parties.

(b) **Additional Electronic Copy.** Once an original transcript in either hard copy or electronic format has been paid for, any party may request an additional electronic copy of the transcript upon payment of \$20.00 to the court reporter.

(c) **Estimate of Reporter's Fees — Filing.** Upon the conclusion of any trial in the district court, or proceeding in an administrative agency, the reporter shall estimate the number of pages or cost of preparing a transcript of the trial or proceeding and shall certify the amount thereof in writing which shall be delivered to the clerk and filed in the file of the action or proceeding. In the event the reporter fails to so estimate the fees for a transcript within two (2) days from the conclusion of the trial or proceeding, the estimated fees for preparation of the transcript shall be deemed to be the sum of \$200.00, unless the reporter shall thereafter file the reporter's estimated fees before the filing of a notice of appeal; provided, the reporter's estimated fee may be included in the minute entry of the hearing or proceeding or stamped or endorsed thereon.

(d) **Payment of Estimated Reporter's Fees to Clerk.** Before filing a notice of appeal, a party to a trial in the district court or a proceeding in the Public Utilities Commission must first serve a copy of the notice of appeal on the reporter, which may be made by mail to the reporter at the resident chambers of the reporter's judge or the office of the clerk of the Public Utilities Commission addressed to the reporter; and the appealing party shall pay to the clerk of the district court the estimated fees for the preparation of any requested transcript in the amount determined under subparagraph (b) of this rule. After the estimated transcript fees are paid to the clerk of the district court, the clerk shall hold the same in trust and pay the same to the reporter upon the lodging of the completed transcript by the reporter. The payment of the reporter's fee in appeals from the Industrial Commission or Public Utilities Commission shall be as ordered by the respective Commission.

(e) **Time for Preparation of Transcript.** The reporter of any trial or proceedings shall prepare and lodge with the district court or with the administrative agency the requested transcript(s) according to the following:

(1) If the transcript is estimated according to section (c) of this rule to be less than 100 pages in length, the transcript shall be due within 30 days from the date the reporter is notified by the Supreme Court of the requested transcript.

(2) If the transcript is estimated according to section (c) of this rule to be more than 100 pages in length but less than 500 pages in length, the

transcript shall be due within 63 days from the date the reporter is notified by the Supreme Court of the requested transcript.

(3) If the transcript is estimated according to section (c) of this rule to be more than 500 pages in length, and the court reporter estimates that additional time above the 63 days set out in section (d)(2) will be needed to complete the transcript, then the court reporter must file a proposed completion schedule with the Supreme Court. This motion for time to file a transcript estimated to be over 500 pages shall be filed on a form approved by the Supreme Court. The court will then determine the due date for the lodging of the transcript with the district court.

(4) In the event a court reporter fails to provide a written summary of the anticipated length of the reporter's transcript according to part (c) of this rule, the reporter's transcript shall be due within 30 days from the date the reporter is notified by the Supreme Court of the requested transcript.

(f) **Extensions of Time for Preparation of Transcript.** The reporter of any trial or proceeding shall prepare and lodge with the district court or with the administrative agency the requested transcript within the time limits set out in subsection (d) of this rule. If the reporter is unable to meet this deadline an extension of time must be requested from the Idaho Supreme Court. An extension of time for the preparation and lodging of the transcript may be obtained by filing a motion for extension of time with the Idaho Supreme Court at least five days before the transcript is due unless good cause is shown for the failure to timely file a motion. The motion for extension of time shall be on a form approved by the Supreme Court.

(g) **Past Due Transcripts.** In the event a transcript is 14 days past due, the clerk of the Idaho Supreme Court shall notify the court reporter, trial court administrator, administrative district judge and the district judge responsible for supervising the reporter, and the trial court administrator shall take appropriate action which may include

- (1) imposing disciplinary action,
- (2) identifying another official reporter in the district who can provide coverage for court proceedings while the transcript is completed,
- (3) implementing a performance improvement plan that requires week-end and evening hours to complete the transcript(s),
- (4) identifying an official or a freelance court reporter who will complete the transcript and be compensated as appropriate, or
- (5) with approval of the Administrative Director of the Courts, removing the court reporter from the courtroom until the transcript is complete and hiring a different court reporter to provide coverage for court proceedings. In the event a transcript is reassigned to a different court reporter, the court reporter must immediately turn over all notes of the particular proceeding to the trial court administrator. The trial court administrator shall notify the clerk of the Supreme Court of the action taken regarding the transcript, including the anticipated date of filing and any reassignment.

(h) **Waiver of Reporter's Fee.** The payment of the reporter's fee as required by this rule may be waived by the district court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended July 17, 1996, effective October 1, 1996; amended December 31, 1996, effective January 6, 1997; amended September 2, 1997, effective October 1, 1997; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended March 19, 2009, effective July 1, 2009; amended March 18, 2011, effective July 1, 2011.)

### STATUTORY NOTES

**Cross References.** Record on appeal,  
§ 13-203.

### JUDICIAL DECISIONS

#### **Failure to Provide Transcript.**

In petition by mother that child buried in Idaho be exhumed and reinterred in New Mexico, trial court denied father's motion to dismiss on the basis of unclean hands, as the father had wrongfully removed child from New Mexico in violation of court order. Since

father failed to provide a full transcript of the proceeding, there was no support for his claim on appeal that the trial court precluded him from producing further evidence on laches, and the denial of his motion was affirmed. *Garcia v. Pinkham* (In re Pinkham), 144 Idaho 898, 174 P.3d 868 (2007).

### DECISIONS UNDER PRIOR RULE OR STATUTE

#### ANALYSIS

Appeal Expedited.

Costs.

—Waiver.

Effect of Motion.

Extension of Time.

Neglect of Officer.

One Transcript for Separate Appeals.

Presumption of Delivery.

Service and Jurisdiction.

Specification of Errors.

#### **Appeal Expedited.**

Former similar provision, with others, was intended to cheapen and expedite appeals, transferring the duty of preparing appeals from the attorneys to the court officers. *Fischer v. Davis*, 24 Idaho 216, 133 P. 910 (1913).

It was the intention of the legislature to render the preparation of records and transcripts on appeal less technical and perhaps in some instances to broaden the scope of review on appeal. *Steinour v. Oakley State Bank*, 32 Idaho 91, 177 P. 843 (1918).

#### **Costs.**

Costs may be taxed for printed transcripts. *Ulbright v. Baslington*, 20 Idaho 546, 119 P. 294 (1911).

Neither court reporter nor clerk is required, or can be compelled, to proceed in the preparation of their respective transcripts until prescribed statutory fees are paid. *Anderson v. White*, 51 Idaho 392, 5 P.2d 1055 (1931).

#### **—Waiver.**

As to waiver of transcript fees or record costs, the initial decision lies with the District Court, subject to appellate review of the District Court's exercise of discretion. *Madsen v. Idaho Dep't of Health & Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

The initial decision regarding the waiver of transcript fees or record costs lies with the district court pursuant to this rule and I.A.R. 27; the district court's decision is discretionary and is subject to appellate review. In the present case, the issue whether transcript fees should be waived was submitted to the Supreme Court through an appellate motion



and the Supreme Court denied the motion; this issue was thus foreclosed from further review. *State v. Hardman*, 121 Idaho 873, 828 P.2d 902 (Ct. App. 1992).

#### **Effect of Motion.**

Pendency of motion for new trial does not extend the time for preparing and filing the record on appeal from the judgment. *Idaho Gold Dredging Corp. v. Boise-Payette Lumber Co.*, 54 Idaho 270, 30 P.2d 1076 (1934).

#### **Extension of Time.**

District judge has authority to control getting out of reporter's notes and to grant necessary extensions of time for reporter to transcribe his notes and to make all orders in relation thereto. *Fischer v. Davis*, 24 Idaho 216, 133 P. 910 (1913); *Junction Placer Mining Co. v. Reed*, 28 Idaho 219, 153 P. 564 (1915); *Moody v. Crane*, 34 Idaho 103, 199 P. 652 (1921).

A failure to apply for an extension of time within which to file a transcript negatives question of diligence. *Blumauer-Frank Drug Co. v. First Nat'l Bank*, 35 Idaho 436, 206 P. 807 (1922).

Appellate court will not go behind order made by trial court granting further time to reporter within which to prepare and lodge his transcript with clerk of district court. *Obermeyer v. Kendall*, 36 Idaho 144, 209 P. 888 (1922).

#### **Neglect of Officer.**

Failure on part of officer to prepare and deliver transcript within stipulated time will not work a dismissal of the appeal, unless the appellant has been guilty of laches or contributed to the delay. *Fischer v. Davis*, 24 Idaho 216, 133 P. 910 (1913); *Moody v. Crane*, 34 Idaho 103, 199 P. 652 (1921).

It is duty of reporter to keep time for

preparing transcript extended, and his failure to do so will not prejudice rights of appellant. *California Gulch Placer Mining Co. v. Patrick*, 37 Idaho 661, 218 P. 378 (1923).

#### **One Transcript for Separate Appeals.**

Where separate appeals by different parties are taken, one of these parties can secure a transcript and the others avail themselves of it for the basing of their appeals, thus saving expense. Where one party obtains a transcript, other appellants refusing to pay for same may not use same on appeal. *Morris-Roberts Co. v. Mariner*, 24 Idaho 788, 135 P. 1166 (1913).

#### **Presumption of Delivery.**

In the absence of a showing of an actual delivery date of the completed copies of the transcript to appellants' attorneys, it may be presumed that delivery was accomplished at the time of filing in this court. *Guiles v. Kellar*, 68 Idaho 249, 192 P.2d 853 (1948).

#### **Service and Jurisdiction.**

Failure to serve reporter's transcript does not justify dismissal of appeal, in the absence of prejudice to the party not served. *Guiles v. Kellar*, 68 Idaho 249, 192 P.2d 853 (1948).

Where copy of transcript was served on attorney for city in zoning case who delivered transcript to attorney for other adverse parties, there was no prejudice so failure to serve copy on other adverse party was not grounds for dismissal of appeal. *Moerder v. City of Moscow*, 74 Idaho 410, 263 P.2d 993 (1953).

#### **Specification of Errors.**

Reporter's transcript is adequate to present for review any question of insufficiency of evidence which may afterwards be properly presented by specification of insufficiency in brief on appeal. *McKinlay v. Javan Mines Co.*, 42 Idaho 770, 248 P. 473 (1926).

### **RESEARCH REFERENCES**

**A.L.R.** Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal. 66 A.L.R.3d 954.

### **Rule 25. Reporter's transcript — Contents.**

The reporter's transcript shall contain those portions of the record designated by the parties in conformance with and as defined in this rule.

(a) **Designation of Transcript.** The parties are responsible for designating the proceedings necessary for inclusion in the reporter's transcript on appeal. Parties are encouraged and expected to specify a transcript more limited than the standard transcript where appropriate. All requests for transcripts, including a request for a standard transcript in a criminal



appeal, must identify the name of the court reporter(s) along with the date and title of the proceeding(s), and an estimated number of pages.

(b) **Partial Transcript.** The partial transcript shall consist of those portions of the testimony and proceedings specifically designated in the notice of appeal, notice of cross-appeal, or request for additional reporter's transcript under Rule 19.

(c) **Standard Transcript — Civil Appeals.** There is no standard transcript in civil appeals. Requested proceedings must identify the name of the court reporter(s) along with the date and title of the proceeding(s), and an estimated number of pages.

(d) **Standard Transcript — Criminal Appeals.** If any party requests the reporter's standard transcript, the transcript shall include all testimony and proceedings reported by the reporter in the trial of the action or proceedings or the hearing at which the guilty plea was entered and the sentencing hearing, except the following which shall not be included in a standard transcript:

(1) The voir dire examination of the jury.

(2) The opening statements and closing arguments of counsel.

(3) The conference on requested instructions, the objections of the parties to the instructions, and the court's ruling thereon.

(4) The oral presentation by the court of written instructions given to the jury and reported by the reporter. While the written requested instructions given by the district court in an action shall not be included in the reporter's transcript, they shall be included in the clerk's record if specifically requested pursuant to Rules 19 or 28(c).

(5) All other hearings and proceedings which were heard by the trial court at some time other than during the course of the trial. Transcripts of pre-trial and post-trial proceedings other than the entry of a guilty plea or sentencing must be specifically designated and requested.

(6) Oral arguments on appeal to the district court.

(e) **Standard Transcript in Death Penalty Cases.** In criminal appeals in which the death penalty was imposed the standard transcript shall include all hearings and proceedings held in the trial court of every nature and description.

(f) **Depositions or Statements.** Depositions or statements which are read into the record shall be reported by the reporter and shall be included in the reporter's standard transcript or when specifically requested by a party. Depositions or statements which are admitted as exhibits in evidence but not read into the record, and depositions or statements which are not read into the record but which are considered by the court in the trial of the action or by an administrative agency in a proceeding, or in connection with any motion in the action or proceedings, shall not be included in the reporter's transcript, but shall be included in the clerks or agency's record if specifically requested pursuant to Rules 19 or 28(c).

(g) **Recorded Testimony.** Any audio recording or audio-visual recording of testimony given under oath and played during the proceeding shall be reported by the reporter and included in the reporter's standard transcript

in the same manner as other testimony of the trial or hearing. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended April 3, 1996, effective July 1, 1996; amended March 18, 1998, effective July 1, 1998; amended March 1, 2000, effective July 1, 2000; amended March 21, 2007, effective July 1, 2007; amended March 19, 2009, effective July 1, 2009; amended March 18, 2011, effective July 1, 2011; amended November 20, 2012, effective January 1, 2013.)

STATUTORY NOTES

**Compiler’s Notes.** In the introductory language of subsection (c), the words “or proceedings” were reinserted following “action,” to correct an inadvertent omission in the Court’s Order of March 21, 2007, amending that provision.

For supplementary provisions of this rule

applicable to appeals of Snake River Basin Adjudication matters to the Idaho Supreme Court, see Administrative Order 13 (June 25, 2001), set forth in the Appendix to the Idaho Court Rules.

**Cross References.** Record on appeal, § 13-203.

JUDICIAL DECISIONS

ANALYSIS

Construction with Other Rules.  
Excluded Material.  
In General.  
Recorded Material.  
—Specific Request for Material Required.

**Construction with Other Rules.**  
Where the district court suggested that inclusion of documents relating to the first district court proceeding was mandated by the “shall also include” language of I.A.R. 28(b) and by the “shall contain” language of I.A.R. 25(c), and also reasoned that judicial economy dictated it would be better to include an item that the Supreme Court would be free not to consider than to wrongly strike it and go through the additional process of augmentation, the court properly exercised its discretion in denying the city’s request for deletion. *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (1999).

**Excluded Material.**  
Although it is within the judge’s discretion to order transcripts of proceedings in the magistrate division, a general order for tran-

scripts ordinarily does not include oral arguments by counsel on motions. *Davis v. Davis*, 114 Idaho 170, 755 P.2d 3 (Ct. App. 1988).

**In General.**  
Appellate records should be tailored to the issues. *State v. Huskey*, 106 Idaho 91, 675 P.2d 351 (Ct. App. 1984).

**Recorded Material.**  
**—Specific Request for Material Required.**  
Appellants failed to request that contested jury instructions be included in the clerk’s record and instead, were attached as an appendix to appellant’s opening brief, but to be included in the record, jury instructions must be specifically requested in the notice of appeal pursuant to subsection (e) of this Rule, therefore, the Supreme Court was bound by the record and could not consider the instructions that were not a part of the record. *State ex rel. Ohman v. Talbot Family Trust*, 120 Idaho 825, 820 P.2d 695 (1991).

**Cited in:** *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983); *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988).

## DECISIONS UNDER PRIOR RULE OR STATUTE

## ANALYSIS

Amended Pleading.  
Augmented Records.  
Excluded Material.  
Instructions.  
Specification of Errors.  
Sufficiency of Transcript.

**Amended Pleading.**

When amended pleading has been filed and no question raised as to original pleading, latter must not be put in transcript. *Ryan v. Old Veteran Mining Co.*, 35 Idaho 637, 207 P. 1076 (1922).

**Augmented Records.**

Where proceedings could have been obtained to augment transcript, appeal was not dismissable by reason of praecipe failing to ask for an order bringing in a designated additional party or transcript failing to show such order where respondent failed to show wherein order was material to appeal or that any matter necessary to support respondents judgment was omitted from transcript. *Guiles v. Kellar*, 68 Idaho 249, 192 P.2d 853 (1948).

**Excluded Material.**

Papers, when not included in reporters transcript and no part of judgment roll, are not properly part of transcript on appeal and should be stricken. *King v. Seebeck*, 20 Idaho 223, 118 P. 292 (1911); *Baldwin v. Singer Sewing Mach. Co.*, 48 Idaho 596, 284 P. 1027 (1930).

**Instructions.**

Instructions given or refused and exceptions thereto are properly part of reporter's transcript on appeal, but they may, in response to appellant's praecipe, be included in

clerk's transcript. *T.W. & L.O. Naylor Co. v. Bowman*, 37 Idaho 514, 217 P. 263 (1923).

In a criminal action, instructions given and refused must be included in transcript prepared by reporter and settled by trial judge. *State v. Trathen*, 51 Idaho 435, 6 P.2d 150 (1931). See *State v. Upham*, 52 Idaho 340, 14 P.2d 1101 (1932).

When a reporter's transcript is used, appellants should not request the instructions "given, or refused" in praecipe to clerk since statute now imposes duty on court reporter to include them in his transcript. *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

**Specification of Errors.**

Question of insufficiency of evidence to support judgment may be raised on reporter's transcript if presented by specification of insufficiency in brief. *Marnella v. Froman*, 35 Idaho 21, 204 P. 202 (1922).

"Omissions" from reporter's transcript may be designated as "errors" by respondent on appeal. *Aker v. Aker*, 52 Idaho 50, 11 P.2d 372 (1932).

**Sufficiency of Transcript.**

Where the findings of the trial judge are challenged, the practice and statutes in this state declare that the transcript affirmatively show all the evidence. *Nash v. Hope Silver-Lead Mines, Inc.*, 79 Idaho 137, 314 P.2d 681 (1957).

The transcript not containing all the testimony and other evidence, the court must necessarily presume that the evidence justifies the decision and that the findings are supported by substantial evidence. *Nash v. Hope Silver-Lead Mines, Inc.*, 79 Idaho 137, 314 P.2d 681 (1957).

**Rule 26. Preparation and arrangement of reporter's transcripts.**

The reporter's transcript of all judicial proceedings shall be prepared in accordance with and as defined by this rule.

(a) **Paper.** The transcript shall be clearly and legibly printed on white, unglazed paper 8 ½ x 11 inches in size on at least 20 pound paper.

(b) **Margins.** The margins at the top and bottom of each page shall be one inch. The left margin shall be a maximum of 1.5 inches and the right margin shall be a maximum of .5 inches,

(c) **Lines.** The lines of each transcript shall be double-spaced with a minimum of 25 lines and a maximum of 30 lines per page. Quotations, citations, and parenthetical notes may be single-spaced. Each line shall be numbered on the left margin, each page shall be numbered consecutively at



the bottom center of each page. Each page may be printed on the front and back.

(d) **Font.** The transcript shall be printed in courier or equivalent font style.

(e) **Type Size.** The type size shall be ten characters to the inch.

(f) **Indentions.** All indentions for paragraphs and “Q” and “A” shall be seven spaces with subsequent lines extended to the left margin.

(g) **Parentheticals.** Parenthetical material shall be indented no more than 12 spaces from the left margin with no blank spaces before or after the parenthetical. Parentheticals shall be clear and concise and shall avoid the use of legal terms. The following parentheticals shall be used wherever possible and placed on a single line;

Proceeding adjourned	
Clerk complied	Witness complied
Witness excused	Counsel complied
Bailiff complied	(Name) exhibit admitted
Exhibit marked	In the presence of the jury
In the absence of the jury	Discussion held off the record
Record read back	Recess
Document shown to witness	Document produced by counsel
Proceedings in chamber	

(h) **Colloquies.** A colloquies shall begin on the same line as the identification of the speaker, no more than seven spaces from the left margin with subsequent lines extended to the left margin.

(i) **Page Breaks.** Page breaks shall be used only after a recess or at the beginning of a new day.

(j) **Index.** Each volume of the reporter’s transcript shall contain an index of the contents of the complete reporter’s transcript in alphabetical order, describing the proceedings and date, volume number, page and line, together with the name of each witness, form of testimony, (e.g. direct, cross, redirect, etc.) and indicate where each exhibit is marked, offered, admitted, or rejected. The reporter’s transcript shall report the trial or proceedings in chronological order. Each index may be separate.

(k) **Cover Page.** Each volume of the reporter’s transcript shall include a cover page, which shall state the title of the Supreme Court and the title of the action in the district court or administrative agency with the names and proper designation of the parties on appeal. The proceedings reported shall be included, together with the title of the district court or administrative agency appealed from, the name of the presiding judge or chair, and the names of the attorneys and the parties for which they appear in the appeal.

(l) **Binding.** Each volume of the reporter’s transcript shall be bound with a front cover of heavy clear plastic and a back cover of 65 pound paper-stock or heavier material, fastened at the left edge in spiral or plastic-type binding, so as to open as flat as possible. A transcript shall contain no more than 300 pages, unless the transcript can be completed in 350 pages or less.



(m) **Compressed Transcript.** The reporter's transcript shall be prepared in a compressed format in the same arrangement as specified in this rule with the following requirements:

A. The cover page and indexes shall be printed in standard format for ready identification, which information can also be included in the compressed transcript.

B. The compressed format shall have no more than 8 pages of regular transcript on one page of compressed transcript, using both the front and back of each page and having no more than two columns of text on a page. The pagination shall be horizontal as follows:

1 2

3 4

C. The compressed transcript shall contain identification of page and line numbers from the standard transcript and shall be printed in a format that is easily readable.

D. Each volume of a compressed transcript shall contain no more than 200 pages, unless the transcript can be completed in 250 pages or less.

(n) **Certificate of Reporter.** At the end of the reporter's transcript, the reporter preparing the transcript shall certify that the reporter was the reporter of the trial or proceeding, or that the reporter was designated by the district court, agency, or Supreme Court to transcribe the proceedings, and that the transcript is a true and accurate report of such trial or proceeding to the best of the reporter's ability, and that the transcript contains all of the material designated in the notice of appeal, any notice of cross-appeal, and any request for additional transcripts, which may have been served upon the reporter.

(o) **Filing notice of lodging with the district court.** Upon lodging one or more transcripts with the district court or administrative agency the court reporter shall file a notice of lodging with the district court, a copy of which shall be sent to the Supreme Court by email, fax or letter. The notice shall state that the court reporter has lodged all assigned appellate transcript(s) requested in that appeal and shall list each transcript lodged by date and title of proceeding. If more than one transcript is requested from a court reporter within the same appeal the court reporter shall not file this notice until all transcripts due from that court reporter have been lodged. The notice of lodging shall be file stamped by the district clerk and included in the clerk's record on appeal.

(p) **Transcripts on Appeal from the Public Utilities Commission.** On appeal from the Public Utilities Commission, the reporter may file transcripts complying with the Public Utility Commission's rules for preparation of transcripts so long as the first page and cover page of all such transcripts shall state the title of the Supreme Court, the title of the proceedings in the Public Utilities Commission, the names and proper designation of the parties and their counsel. (Adopted July 17, 1996, effective October 1, 1996; amended effective October 1, 1996; amended March 18, 1998, effective July 1, 1998; amended March 19, 2009, effective July 1, 2009.)

STATUTORY NOTES

**Compiler's Notes.** Former Rule 26 which comprised Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 26, 1992, effective July 1, 1992 was rescinded by Su-

preme Court Order of July 17, 1995, effective October 1, 1996.

**Cross References.** Record on appeal, § 13-203.

**Rule 26.1. Computer-searchable disks of transcripts.**

(a) **Ordering Disks.** If a written transcript is requested, any party may request computer-searchable disks of some or all of the written transcript. The request for a disk must be filed with the district court and served upon the reporter within fourteen (14) days after the filing of the notice of appeal or within fourteen (14) days after the filing of notice of cross-appeal. The request for disks shall not eliminate written transcripts as required by these rules.

(b) **Preparation and Service of Disks.** The reporter shall provide disks of the entire transcript unless a partial transcript is requested by a party. The disks shall be in standard ASCII code unless otherwise agreed by the reporter and the party ordering the disks. The reporter shall serve the disks on the parties requesting them within fourteen (14) days after service of the written transcripts on the parties. Each disk shall be labeled with the case title and number of the case. Each disk also must be individually labeled to show its position in the sequence of disks, the pages of the written transcript contained on the disk and the date of the proceedings contained on the disk. (e.g. disk 5 of 7, transcript pages 1251-1449, heard September 10, 1990.) The complete set of disks must be accompanied by a written index showing the case name, case number, disk name, dates of the hearings, disk number, and volume and page numbers.

(c) **Copies of Disks for Court.** If any party requests disks, the reporter shall prepare and file with the Supreme Court duplicate disks in standard ASCII code within fourteen (14) days after filing the written transcripts. The parties shall pay the cost of such computer-searchable disks filed with the Supreme Court, as provided in subsection (d) of this rule.

(d) **Charges for Disks.** Reporters may charge and receive the sum of \$.25 per transcript page for disks requested by a party; provided, the reporter shall receive the sum of \$7.50 per disk for the disks filed with the Supreme Court as required by subsection (c) of this rule. The estimated charges for the disks shall be based upon the estimate of the transcript filed by the reporter under Rule 24(b) and shall be paid by the requesting party to the clerk of the district court for the benefit of the reporter when the request is filed with the court. The charges shall be adjusted by the reporter and the party making the request when the actual number of pages of transcript has been determined. The charges for the disks to be filed with the Supreme Court under subsection (c) of this rule shall be paid to the clerk of the district court by the first party requesting such disks. (Adopted March 20, 1991, effective July 1, 1991.)

**Rule 27. Clerk's or agency's record — Number — Clerk's fees — Payment of estimated fees — Time for preparation — Waiver of clerk's fee.**

(a) **Number and Use of Record.** The clerk of the district court or agency shall prepare five copies of the clerk's or agency's record. Three copies shall be filed with the Supreme Court as provided by Rule 29. One copy shall be provided to the appellant and one copy shall be provided to the respondent. If there are multiple parties, they shall determine by stipulation which party shall be served with the record by the clerk and the manner and time of use of the record by each party. In the absence of such a stipulation, the determination shall be made by the district court or agency upon the application of any party or the clerk. Any party may also request and pay for an additional separate copy of the record from the clerk.

(b) **Option for scanning the record.** In counties listed on a roster maintained by the Office of the Supreme Court Clerk as authorized to scan the record, the appellant may request that the clerk of the district court scan the entire district court file as the record or may designate certain documents to be included in the scanned record. All filed documents will be scanned in pdf format and five copies of the clerk's record in CD format will be prepared and distributed in accord with subsection (a) of this rule. Exhibits, including a presentence investigation report, shall be sent in accord with Rule 31. The district court clerk shall notify the Clerk of the Supreme Court by e-mail that the record will be provided in this manner.

(c) **Clerk's Fee.**

(1) **Paper copy.** The clerk of the district court shall charge and collect a fee for the preparation of the record in the sum of \$1.25 for each page of the record. Provided, in addition to this fee the clerk shall charge and collect an additional fee for the actual cost of the record covers. Such fee shall be full payment for five complete copies of the record. Any party may obtain an additional copy of the record for the charge of \$.50 per page. The clerk of an administrative agency shall charge such sum, in any, as ordered by the administrative agency.

(2) **Scanned copy.** The clerk of the district court shall charge and collect a fee for preparation of the scanned record in the sum of \$ 0.65 for each page of the district court file if the entire file is scanned. If, at the appellant's request, less than the full record is scanned, then the clerk of the court shall collect a fee of \$100.00 plus \$0.65 per page for the scanned pages. In both instances, such fee shall be full payment for five complete copies of the record. Any party may request an additional copy of the record on CD upon payment of \$ 20.00 to the clerk of the district court.

(d) **Payment of Estimated Fees.** Before a notice of appeal is filed, the appellant shall pay the clerk an estimated record fee as computed by the clerk of the district court or administrative agency in accordance with subparagraph (b) of this rule, provided, if the estimated fee has not been made within two (2) days after the conclusion of the trial or proceeding, the estimated fees for preparation of the record shall be deemed to be the sum of \$100.00 until the actual fee has been computed.



(e) **Time for Preparation.** The clerk of the district court or administrative agency shall prepare the clerk’s or agency’s record and have it ready for service on the parties within 30 days of the date of the filing of the notice of appeal. The clerk shall retain the copies of the clerk’s or agency’s record until the reporter’s transcript, if any, is finished and thereafter cause the same to be settled and forwarded to the Supreme Court as provided by Rule 29. An extension of time for preparation of the record may be obtained by filing a motion for extension of time with the Idaho Supreme Court at least five days before the record is due unless good cause is shown for the failure to timely file a motion. The motion for extension of time shall be on a form approved by the Supreme Court.

(f) **Waiver of Clerk’s Fee.** The payment of the clerk’s record fee as required by this rule may be waived by the district court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982; amended March 20, 1985, effective July 1, 1985; amended June 19, 1995, effective July 1, 1995; amended March 9, 1999, effective July 1, 1999; amended March 24, 2005, effective July 1, 2005; amended February 4, 2008, effective March 1, 2008; amended April 7, 2008, effective July 1, 2008; amended June 24, 2010, effective July 1, 2010; amended March 18, 2011, effective July 1, 2011.)

STATUTORY NOTES

**Compiler’s Notes.** For supplementary provisions of this rule applicable to appeals of Snake River Basin Adjudication matters to the Idaho Supreme Court, see Administrative

Order 13 (June 25, 2001), set forth in the Appendix to the Idaho Court Rules.

**Cross References.** Record on appeal, § 13-203.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.  
Costs.  
—Waiver.

**Constitutionality.**

The fee charged to an appellant for preparation of the clerk’s record on appeal did not violate Const., art. 1, § 18, where she did not assert that the fee set by subsection (b) of this rule, \$1.25 for each page of the record, was an unreasonable amount, and she made no showing that she should be relieved from the payment of the fee for the clerk’s record on grounds of indigency. *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct. App. 1988).

**Costs.**

—Waiver.

As to waiver of transcript fees or record costs, the initial decision lies with the District Court, subject to appellate review of the District Court’s exercise of discretion. *Madsen v. Idaho Dep’t of Health & Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

The initial decision regarding the waiver of transcript fees or record costs lies with the district court pursuant to I.A.R. 24 and this rule; the district court’s decision is discretionary and is subject to appellate review. In the present case, the issue whether transcript fees should be waived was submitted to the Supreme Court through an appellate motion



and the Supreme Court denied the motion; this issue was thus foreclosed from further review. *State v. Hardman*, 121 Idaho 873, 828 P.2d 902 (Ct. App. 1992).

**Cited in:** *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### **Payment of Fees.**

Neither court reporter nor clerk is required, or can be compelled, to proceed in the prepa-

ration of their respective transcripts until prescribed statutory fees are paid. *Anderson v. White*, 51 Idaho 392, 5 P.2d 1055 (1931).

### **Rule 28. Preparation of clerk's or agency's record — Content and arrangement.**

(a) **Designation of Record.** Parties are responsible for designating the documents which will comprise the clerk's record on appeal. The standard record described in subsection (b) is not designed to include many items (i.e., motions for summary judgment, affidavits, jury instructions, etc.) which may be pertinent to the appeal in a specific case. Parties are encouraged to designate a clerk's or agency's record more limited than the standard record.

(b) **Content — Standard Record.** The clerk's or agency's record shall automatically include the following pleadings and documents, including the following pleadings and documents filed in the magistrates division:

(1) In civil cases and proceedings, unless limited by designation in the notice of appeal or amended notice of appeal:

- A. Register of actions.
- B. Any order sealing all or any portion of the record.
- C. The original and any amended complaint or petition.
- D. The original and any amended answer or response to the complaint or petition.
- E. The original and any amended counterclaim, third party claim, or cross-claim.
- F. The original and any amended answer or response to a counterclaim.
- G. The jury verdict rendered in a jury trial.
- H. The findings of fact and conclusions of law and any memorandum decision entered by the court.
- I. All judgments and decrees.
- J. A list of all exhibits offered, whether or not admitted.
- K. Notice of appeal and cross-appeal.
- L. Any request for additional reporter's transcript or clerk's record.
- M. A court reporter's notice of lodging with the district court.
- N. Table of contents and index, which shall be placed at the beginning of each volume of the record.

(2) In criminal cases and proceedings.

- A. Any order sealing all or any portion of the record.
- B. Register of actions.
- C. All court minutes.
- D. All uniform citations, complaints, information and indictments.

E. All orders of the court.

F. All motions filed by either the state or the defendant.

G. All written plea agreements.

H. The jury verdict.

I. The judgment or order withholding judgment.

J. A list of all exhibits offered, whether admitted or not.

K. Presentence Investigation Reports; however, this report shall be forwarded as a confidential exhibit and shall not be placed in the bound clerk's record.

L. Notice of appeal and any notice of cross-appeal.

M. Any request for additional reporter's transcript or clerk's record.

N. A court reporter's notice of lodging with the district court.

O. In criminal appeals in which the death penalty was imposed, all documents in the trial court file of every nature, kind and description, except that the presentence investigation report shall be forwarded as an exhibit to the record.

(3) In administrative proceedings:

A. Any order sealing all or any portion of the record.

B. Any original or amended complaint, petition, application or other initial pleading.

C. Any answer or response thereto.

D. All documents relating to an application or petition to intervene.

E. Any protest or other opposition filed by a party.

F. A list of all exhibits offered, whether or not admitted.

G. The findings of fact and conclusions of law, or if none, any memorandum decision entered by the agency.

H. The final decision, order or award.

I. Petitions for rehearing or reconsideration and orders thereon.

J. Notice of appeal and any notice of cross-appeal.

K. Any request for additional reporter's transcript or agency's record.

L. Table of contents and index.

(c) **Additional Documents.** The clerk's or agency's record shall also include all additional documents requested by any party in the notice of appeal, notice of cross-appeal and requests for additional documents in the record. Any party may request any written document filed or lodged with the district court or agency to be included in the clerk's or agency's record including, but not limited to, written requested jury instructions, written jury instructions given by the court, depositions, briefs, statements or affidavits considered by the court or administrative agency in the trial of the action or proceeding, or considered on any motion made therein, and memorandum opinions or decisions of a court or administrative agency.

(d) **Preparation of Record.** The clerk shall prepare the record on paper by making clearly and distinctly legible photocopies or other reproductions of all documents included in the record. The clerk shall type or have typed any document which cannot be reproduced in a distinctly legible form.

(e) **Cover of Record.** The clerk's or agency's record shall be bound with a cover of 65 pound paper stock or heavier material and shall not have a

plastic or acetate cover. The record shall be fastened at the top edge so as to open as flatly as possible.

(f) **Arrangement and Numbering.** All pleadings, documents, and papers required to be in the clerk's or agency's record shall be inserted chronologically as indicated by the date of filing. Each page of the clerk's or agency's record shall be numbered consecutively at the bottom of the page. The numbering shall include every page included in the record even if it was not a filed document, such as the title page, the table of contents, the index, and the register of actions. Each volume of the clerk's or agency's record shall contain no more than 200 pages unless the record can be completed in 250 pages.

(g) **Table of Contents and Index of Record.** Each volume of the clerk's or agency's record shall contain a chronological table of contents of the documents included in the entire record and shall have an alphabetical index indicating the volume and page where each pleading, document or paper may be found.

(h) **Certificate of Clerk.** The clerk of the court or administrative agency shall certify at the end of the record, that the record contains true and correct copies of all pleadings, documents and papers designated to be included in the clerk's or agency's record by Rule 28, the notice of appeal, any notice of cross-appeal, and any designation of additional documents to be included in the clerk's or agency's record. The clerk's or agency's record shall also include the certificate required by Rule 31(d).

(i) **Certificate of Service.** The clerk shall certify in the record, or in the clerk's certificate, the date of service of the record and the transcript on the parties or their counsel. (Adopted March 25, 1977, effective July 1, 1977; amended December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 26, 1992, effective July 1, 1992; amended June 19, 1995, effective July 1, 1995; amended March 1, 2000, effective July 1, 2000; amended January 30, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002; amended April 21, 2007, effective July 1, 2007; amended January 4, 2010, effective February 1, 2010; amended February 27, 2013, effective July 1, 2013.)

#### STATUTORY NOTES

**Compiler's Notes.** For supplementary provisions of this rule applicable to appeals of Snake River Basin Adjudication matters to the Idaho Supreme Court, see Administrative

Order 13 (June 25, 2001), set forth in the Appendix to the Idaho Court Rules.

**Cross References.** Record on appeal, § 13-203.

#### JUDICIAL DECISIONS

##### ANALYSIS

Construction with Other Rules.  
Inclusion of Summons.

##### Jurisdiction of Court.

##### Construction with Other Rules.

Where the district court suggested that

inclusion of documents relating to the first district court proceeding was mandated by the “shall also include” language of subsection (b) of this rule and by the “shall contain” language of I.A.R. 25(c), and also reasoned that judicial economy dictated it would be better to include an item that the Supreme Court would be free not to consider than to wrongly strike it and go through the additional process of augmentation, the court properly exercised its discretion in denying the city’s request for deletion. *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (1999).

**Inclusion of Summons.**

The original summons was not automatically included in the record for an appeal from a default judgment in a debt collection, thus the mere absence of the summons in the record, without a proper request for its inclusion by defendant, was insufficient upon

which to base defendant’s allegation of error that there was no valid summons in the record. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

**Jurisdiction of Court.**

Where, in a criminal case which began in the magistrates division and was appealed from there to the district court, the record as certified by the clerk of the district court did not contain any judgments entered prior to the district court decision, the record did not establish the appellate jurisdiction of the district court and the district court decision on appeal had to be vacated. It necessarily followed that appeal to the Supreme Court as a matter of right on the merits did not exist. *State v. Mason*, 102 Idaho 866, 643 P.2d 78 (1982).

**Cited in:** *State v. Adams*, 115 Idaho 724, 769 P.2d 601 (Ct. App. 1989).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

- Certificate.
- Findings of Fact and Conclusions of Law.
- Instructions.
- Judgment in Other Case.
- Judgment Roll.
- Memorandum Decision.
- Motion for New Trial.
- Motion to Strike.
- Presumption on Appeal.

**Certificate.**

Clerk’s certificate that he considered all the records and files of the cause as contained in the judgment roll, if erroneous, should have been considered in the court below. *Baldwin v. Singer Sewing Mach. Co.*, 48 Idaho 596, 284 P. 1027 (1930).

Where original transcript certified by clerk omitted papers used by judge in denying motion for new trial and clerk refused to execute supplemental certificate on the ground that he was not present at the time the motion was determined, and judge who had retired could not remember what papers were used, and attorneys for appellee refused to join with attorney for appellant in executing a certificate, the latter was entitled to execute the certificate where no contention was made that it was not correct. *Julien v. Barker*, 75 Idaho 413, 272 P.2d 718 (1954).

A clerk’s certificate that the transcript contained “all the pleadings contained in the file which were before the district court at the time said court entered its order from which the appeal is taken,” without certifying as to

what papers or evidence were presented to the court at the hearing was insufficient. *Scheel v. Rinard*, 91 Idaho 736, 430 P.2d 482 (1967).

**Findings of Fact and Conclusions of Law.**

The remarks and statements of the trial court can not be treated as findings of fact and conclusions of law on an appeal from a final judgment when as a requisite to such appeal the appellate court must be furnished with a copy of the judgment roll, which in this particular case included the findings of the trial court. *Roberts v. Roberts*, 68 Idaho 535, 201 P.2d 91 (1948), modified on other grounds, *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967).

**Instructions.**

On appeal from conviction, instructions given by court embodied in clerk’s transcript are properly before court without being included in reporter’s transcript. *State v. Upham*, 52 Idaho 340, 14 P.2d 1101 (1932).

**Judgment in Other Case.**

Judgment obtained in another case and relied upon in action must be copied into record or certified copy thereof included. *DeBarre v. Tway*, 46 Idaho 474, 270 P. 618 (1928).

**Judgment Roll.**

The judgment roll does not become a part of the record on appeal from an order granting or denying a motion for a new trial, unless same was used on hearing of motion in lower court. *Johnston v. Bronson*, 19 Idaho 449, 114 P. 5 (1911).



Fact that clerk incorporates in judgment roll papers which do not belong there does not make them legally part of judgment roll or entitle them to be brought to appellate court as such, unless record discloses they were used or considered or submitted and their consideration refused at hearing in lower court. *Blandy v. Modern Box Mfg. Co.*, 40 Idaho 356, 232 P. 1095 (1925).

Where the praecipe calls for the pleadings, the findings of the court and the decree, which papers ordinarily constitute the judgment roll, an objection claiming the judgment roll is not included in the praecipe or transcript is immaterial and does not constitute grounds for dismissal of appeal. *Guiles v. Kellar*, 68 Idaho 249, 192 P.2d 853 (1948).

#### **Memorandum Decision.**

Memorandum decision of trial court is not part of the record on appeal, but a motion to strike will be denied where the decision was a document of nine typewritten pages covering every detail in fact, and may have been the trial court's findings on the facts, and was so treated by the parties. *Varkas v. Varkas*, 64 Idaho 297, 130 P.2d 867 (1942).

A memorandum decision of the trial judge is not properly a part of the record. *Natatorium Co. v. Board of Comm'rs*, 67 Idaho 143, 174 P.2d 936 (1946).

#### **Motion for New Trial.**

Where appellate court is unable to determine from record what papers were used on hearing in lower court, and consequently un-

able to tell what papers, files, and records should be contained in transcript, appeal from an order overruling a motion for a new trial will be dismissed. *Johnston v. Bronson*, 19 Idaho 449, 114 P. 5 (1911).

Where the record on appeal does not contain a copy of the order denying motion for a new trial, appeal from such order will be dismissed. *Bulfinch v. Schatz*, 37 Idaho 462, 217 P. 983 (1923).

#### **Motion to Strike.**

Paragraphs of a pleading which are stricken out remain, nevertheless, a part of the judgment roll and of the record on appeal. *Warren v. Stoddart*, 6 Idaho 692, 59 P. 540 (1899).

Where motion in trial court to strike the cost bill from the files and the rulings of the court thereon are not properly in the record, they can not be considered on appeal. *Fairview Inv. Co. v. Lamberson*, 25 Idaho 72, 136 P. 606 (1913).

Order denying motion to strike respondent's cost bill can not be reviewed because it is not part of the judgment roll, nor is it one of the papers required to be furnished to the court upon appeal. *Bell v. Stadler*, 31 Idaho 568, 174 P. 129 (1918).

#### **Presumption on Appeal.**

Where an appeal is taken on a judgment roll alone, the Supreme Court must decide the case upon the assumption that the evidence supported the findings made by the trial court. *American Mut. Bldg. & Loan Co. v. Kesler*, 64 Idaho 799, 137 P.2d 960 (1943).

### **Rule 29. Settlement and filing of reporter's transcript and clerk's or agency's record.**

(a) **Settlement of Transcript and Record.** Upon the completion of the reporter's transcript, the reporter shall lodge the original and all copies with the clerk of the district court or administrative agency. Upon the receipt of the reporter's transcript and upon completion of the clerk's or agency's record, the clerk of the district court or administrative agency shall serve copies of the reporter's transcript and clerk's or agency's record upon the parties by serving one copy of the transcript and record on the appellant and one copy of the transcript and record on the respondent. In all appeals from criminal prosecutions and post-conviction relief petitions service shall be made upon the attorney general of the state of Idaho, as representative of the state. Service may be by personal delivery or by mail. If service is made by mail it shall be accompanied by a certificate indicating the date of mailing. If there are multiple parties appellant or respondent the clerk shall mail or deliver a notice of the lodging of the reporter's transcript and clerk's or agency's record to all attorneys or parties appearing in person, stating that the transcript and record have been lodged, and further stating that the

clerk will serve the same upon the parties upon receipt of a stipulation of the parties, or order of the district court or administrative agency, as to which parties shall be served with the transcript and record. The parties shall have 28 days from the date of the service of the transcript and the record within which to file objections to the transcript or the record, including requests for corrections, additions or deletions. In the event no objections to the reporter's transcript or clerk's or agency's record are filed within said 28-day time period, the transcript and record shall be deemed settled. Any objection made to the reporter's transcript or clerk's or agency's record must be accompanied by a notice setting the objection for hearing and shall be heard and determined by the district court or administrative agency from which the appeal is taken. After such determination is made, the reporter's transcript and clerk's or agency's record shall be deemed settled as ordered by the district court or administrative agency. The reporter's transcript and clerk's or agency's record may also be settled by stipulation of all affected parties.

(b) **Filing Transcript and Record with Supreme Court.** Upon settlement of the reporter's transcript and clerk's or agency's record, the clerk of the district court or administrative agency shall, within seven (7) days, file the original hard copy, one additional hard copy and one electronic copy of the transcript and three copies of the clerk's or agency's record with the Clerk of the Supreme Court. The Clerk of the Supreme Court shall notify all attorneys of record, or parties appearing in person, of the date of such filing. Such notification shall also state when the briefs of the parties are required to be filed. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 30, 1984, effective July 1, 1984; amended July 17, 1996, effective October 1, 1996; amended January 30, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002; amended March 19, 2009, effective July 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Record on appeal,  
§ 13-203.

**JUDICIAL DECISIONS**

**ANALYSIS**

Construction with Other Rules.  
Voir Dire of Jurors.

**Construction with Other Rules.**

Even the opportunity to file an objection under this rule is not the last opportunity for a party to request additions to the clerk's records or the reporter's transcript. After the record and transcript are settled pursuant to this rule, a party may still request augmentation or deletions from the transcript or record by filing a motion with the Supreme

Court pursuant to IAR 30. *Collins v. Collins*, 130 Idaho 705, 946 P.2d 1345 (Ct. App. 1997).

Where the district court minutes were such that meaningful review of the defendant's claims was possible, the failure of appellate counsel to object to the record on appeal or include the transcript from a motion hearing was not fatal to the appeal. *State v. Murphy*, 133 Idaho 489, 988 P.2d 715 (Ct. App. 1999).

Where the district court suggested that inclusion of documents relating to the first district court proceeding was mandated by the "shall also include" language of I.A.R. 28(b) and by the "shall contain" language of

I.A.R. 25(c), and also reasoned that judicial economy dictated it would be better to include an item that the Supreme Court would be free not to consider than to wrongly strike it and go through the additional process of augmentation, the court properly exercised its discretion in denying the city's request for deletion. *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (1999).

### **Voir Dire of Jurors.**

Where a voir dire of potential jurors was held in the judge's chambers to determine whether jurors had viewed or heard about defendant wearing handcuffs as he entered

the courtroom, and where the transcript of the official court reporter contained the questions asked but not the jurors' responses to those questions, the defendant could not complain of the failure to include the responses in light of the fact that the record on appeal contained no motion for an addition to the reporter's transcript to include the responses of the jurors. *State v. Youngblood*, 117 Idaho 160, 786 P.2d 551 (1990).

**Cited in:** *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984); *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus*, 127 Idaho 239, 899 P.2d 949 (1995).

## DECISIONS UNDER PRIOR RULE OR STATUTE

### ANALYSIS

Amendments to Transcript.  
Change of Judge.  
Delivery to Supreme Court.  
Diminution of Record.  
Discretion of Court.  
Failure to Settle.  
Judgment on Findings of Referee.  
Mandamus.  
Necessity of Settlement.  
Neglect of Attorneys.  
Service.  
Waiver of Time Limitations.  
What Constitutes "Settlement".

### **Amendments to Transcript.**

Amendments to reporter's transcript may be incorporated therein, by reference in court's order settling transcript, to stipulation of parties concerning proposed amendments. *Robinson v. St. Maries Lumber Co.*, 32 Idaho 651, 186 P. 923 (1920) (this practice is not to be commended on account of liability to confusion).

### **Change of Judge.**

Judge succeeding in office judge who tried case is authorized to settle transcript. *Aker v. Aker*, 52 Idaho 50, 11 P.2d 372 (1932).

### **Delivery to Supreme Court.**

When appellant has, within the time fixed by law, done everything the statute requires, the fact that the clerk whose duty it is to deliver the record to the Supreme Court prematurely delivered it, was no ground for striking it from the record. *Williamson v. Wilson*, 55 Idaho 337, 42 P.2d 290 (1935).

### **Diminution of Record.**

Joinder in error by stipulation that settlement of transcript should constitute true record on appeal estops either party from raising question of diminution of record, so far as

joinder in error extended. *Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 35 Idaho 303, 206 P. 178 (1922).

### **Discretion of Court.**

Settlement of reporter's transcript in first instance is by trial court. *Little v. Jefferis*, 35 Idaho 27, 202 P. 602 (1922).

Question whether necessary evidence has been omitted from transcript is within discretion of judge who settles transcript. *Aker v. Aker*, 52 Idaho 50, 11 P.2d 372 (1932).

### **Failure to Settle.**

Supplemental transcript which is not settled or allowed by court is not subject to review on appeal. *Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 35 Idaho 303, 206 P. 178 (1922).

On appeal from judgment or from an order denying a new trial, where no reporter's transcript has been settled and allowed, the Supreme Court can not review whether the trial court's findings are sustained by the evidence, but must assume that there was evidence to justify the findings made. *Anderson v. Walker Co.*, 38 Idaho 751, 225 P. 144 (1924).

On appeal from order of judge other than trial judge refusing to settle transcript, such judge being a stranger to the record, Supreme Court must examine record *sua nisi* prius court would. *Aker v. Aker*, 52 Idaho 50, 11 P.2d 372 (1932).

In absence of objection to transcript when served, or suggestion of its incorrectness, fact that there is no order of court settling the transcript is no ground for dismissal of appeal. *Geist v. Moore*, 58 Idaho 149, 70 P.2d 403 (1937).

### **Judgment on Findings of Referee.**

On appeal from judgment on findings of referee, any adverse ruling of referee saved in reporter's transcript, may be assigned as er-



ror and considered same as if proceedings were had before, and in course of trial by, district court. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

#### **Mandamus.**

Mandamus lies to compel judge to settle transcript when properly presented. *Johnson v. Ensign*, 34 Idaho 374, 201 P. 723 (1921).

#### **Necessity of Settlement.**

Reporter's transcript is not required to be settled or filed prior to hearing of motion for new trial. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912); *Bohannon Dredging Co. v. England*, 30 Idaho 721, 168 P. 12 (1917).

Former statute left it to the judge alone to settle the transcript, and mere failure of counsel to designate errors did not limit the power of the judge or excuse the necessary statutory requirement of a settlement of such transcript. *Grisinger v. Hubbard*, 21 Idaho 469, 122 P. 853 (1912).

The transcript of evidence certified to by stenographer must be settled by trial judge to have same reviewed upon appeal to Supreme Court. *Furey v. Taylor*, 22 Idaho 605, 127 P. 676 (1912); *Chapman v. A.H. Averill Mach. Co.*, 27 Idaho 213, 147 P. 785 (1915); *Wells v. Culp*, 30 Idaho 438, 166 P. 218 (1917); *Minneapolis Threshing Mach. Co. v. Peterson*, 31 Idaho 745, 176 P. 99 (1918); *Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 35 Idaho 303, 206 P. 178 (1922); *McCarty v. Warnkin*, 35 Idaho 614, 207 P. 1075 (1922).

Where stenographer's transcript is not settled on motion made within proper time, appeal must be dismissed. *Edwards v. Anderson*, 23 Idaho 508, 130 P. 1001 (1913).

Transcript not settled by judge will be stricken on motion. *Strand v. Crooked River Mining & Milling Co.*, 23 Idaho 577, 131 P. 5 (1913); *Chapman v. A.H. Averill Mach. Co.*, 28 Idaho 121, 152 P. 573 (1915).

An order overruling a motion for a new trial can not be considered on appeal where the record fails to contain a transcript of the evidence, duly certified and settled. *Wells v. Culp*, 30 Idaho 438, 166 P. 218 (1917).

#### **Neglect of Attorneys.**

Where attorneys for both parties, due to inattention or lack of interest, fail to proceed to have the reporter's transcript settled, respondent has no grounds for complaint as to delay. *Guiles v. Kellar*, 68 Idaho 249, 192 P.2d 853 (1948).

#### **Service.**

The failure to make service divests the Supreme Court of jurisdiction to consider on appeal the record or that portion thereof involved in the failure of service. *Bohannon Dredging Co. v. England*, 30 Idaho 721, 168 P. 12 (1917); *Boise-Payette Lumber Co. v. McCarthy*, 31 Idaho 305, 170 P. 920 (1918); *Columbia Trust Co. v. Balding*, 34 Idaho 579, 205 P. 264 (1921); *Ft. Misery Hwy. Dist. v. State Bank*, 41 Idaho 491, 239 P. 277 (1925); *Hudson v. Kootenai Power Co.*, 48 Idaho 95, 279 P. 619 (1929).

#### **Waiver of Time Limitations.**

By stipulating that reporter's transcript might be settled by trial court, respondents waived objection that it was not lodged with clerk within required time. *Robinson v. St. Maries Lumber Co.*, 32 Idaho 651, 186 P. 923 (1920).

Where respondent permits transcript to be settled by court without objection, he waives his right to object on the ground that it was not served on him within the statutory time. *Littler v. Jefferis*, 35 Idaho 27, 202 P. 602 (1922); *Lucas v. City of Nampa*, 37 Idaho 763, 219 P. 596 (1923).

#### **What Constitutes "Settlement".**

Where the transcript is properly certified by the court reporter and contains an acknowledgment of service by counsel for plaintiff and does not show any designation of errors by either party and the completed transcript is properly certified by the clerk, under such circumstances the reporter's transcript is "deemed settled by the judge." *Pacific Fin. Corp. v. Axelsen*, 84 Idaho 70, 368 P.2d 430 (1962).

### **Rule 30. Augmentation or deletions from transcript or record.**

(a) Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record. Such a motion shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented to the original motion and to two copies of the motion, which document must have a legible filing stamp of the clerk indicating the date of its filing, or the moving party must establish by citation to the record or transcript that the document was presented to the district court. Any request for augmentation



with a transcript that has yet to be transcribed must identify the name of the court reporter(s) along with the date and title of the proceeding(s), and an estimated number of pages, and must contain a certificate of service on the named reporter(s). The motion and statement shall be served upon all parties. Any party may within fourteen (14) days after service of the motion, file a brief or memorandum in opposition thereto. Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court. The filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule.

(b) The request for augmentation with additional transcript that has yet to be transcribed shall be in substantially the following form:

IN THE SUPREME COURT OF THE STATE OF IDAHO

	)	
	)	Case No. _____
	)	District Court Number _____
Case Name	)	
	)	
	)	<b>MOTION TO AUGMENT</b>
	)	

COMES NOW, (insert party name and status here), and moves in this Court pursuant to Idaho Appellate Rule 30, for an order augmenting the appellate record in the above-entitled appeal with:

A copy of the transcript of the following hearing(s):

Hearing date \_\_\_\_\_  
 Name of hearing \_\_\_\_\_  
 Has a transcript been made? \_\_\_\_\_  
 If it has yet to be transcribed, name of reporter \_\_\_\_\_  
 and estimate of pages \_\_\_\_\_

A file-stamped copy of the following documents, which are attached to this motion:

Name of document \_\_\_\_\_  
Date of filing \_\_\_\_\_

Name of document \_\_\_\_\_  
Date of filing \_\_\_\_\_

The specific grounds for the request are as follows:

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Name of Moving Party  
Status on Appeal

(CERTIFICATE OF SERVICE)

I HEREBY CERTIFY that I have on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, caused a true and correct copy of the attached MOTION TO AUGMENT THE RECORD postage prepaid, to the following parties:

Court Reporter’s name and address if requesting transcripts yet to be described.

\_\_\_\_\_  
Counsel for opposing party(ies)

\_\_\_\_\_  
Name of Moving Party  
Status on Appeal

(Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended March 20, 1985, effective July 1, 1985; amended March 26, 1992, effective July 1, 1992; amended March 24, 2005, effective July 1, 2005; amended January 3, 2008, effective March 1, 2008; amended February 4, 2008, effective March 1, 2008; amended March 19, 2009, effective July 1, 2009; amended January 4, 2010, effective February 1, 2010.)

STATUTORY NOTES

**Cross References.** Record on appeal, § 13-203.

JUDICIAL DECISIONS

**Construction with Other Rule.**

Even the opportunity to file an objection under IAR 29 is not the last opportunity for a party to request additions to the clerk’s records or the reporter’s transcript. After the record and transcript are settled pursuant to IAR 29, a party may still request augmentation or deletions from the transcript or record by filing a motion with the Supreme Court pursuant to this rule. *Collins v. Collins*, 130 Idaho 705, 946 P.2d 1345 (Ct. App. 1997).

Where the district court minutes were such that meaningful review of the defendant’s claims was possible, the failure of appellate counsel to object to the record on appeal or include the transcript from a motion hearing was not fatal to the appeal. *State v. Murphy*, 133 Idaho 489, 988 P.2d 715 (Ct. App. 1999).  
**Cited in:** *State v. Simonson*, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987).

## DECISIONS UNDER PRIOR RULE OR STATUTE

**Filing.**

Supplemental transcript which is not filed within time allowed by rules of court can not

be reviewed on appeal. *Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 35 Idaho 303, 206 P. 178 (1922).

**Rule 30.1. Corrections of transcript or record.**

(a) **By Stipulation.** At any time after the filing of a transcript or record with the Supreme Court the parties may, by stipulation filed with the Court, correct any statement in the transcript or record. The stipulation shall clearly identify the volume, page and line of the statement to be corrected, and upon filing with the Court the clerk shall attach the stipulation to the transcript or record and no order of the Court shall be necessary.

(b) **By Motion.** Any party to an appeal may file a motion for the correction of a statement in a transcript or record filed with the Supreme Court by filing a motion in accordance with Rule 32. The Supreme Court may rule upon the motion directly or may refer that portion of the transcript or record to the trial court or administrative agency for settlement, in which case the ruling of the trial court or agency shall be final. (Adopted March 20, 1985, effective July 1, 1985.)

**Rule 30.2. Augmentation of record on appeal with copy of an ordinance.**

(a) **By motion.** Any party may move the Supreme Court to augment the record on appeal with a copy of an ordinance. A certified copy of the ordinance shall be attached to the motion, and the motion shall be accompanied by a statement setting forth the specific grounds for the request, including that the ordinance was in effect at the time of the action or occurrence at issue in the appeal. The party shall file an original and two copies of the motion and statement and shall serve a copy of the motion and statement upon all parties. Any party may, within fourteen (14) days after service of the motion, file a brief or memorandum in opposition thereto. Unless otherwise expressly ordered by the Supreme Court, such motion shall be determined without oral argument. The filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule.

(b) **By stipulation.** The parties may augment the record on appeal by filing with the Court a stipulation stating that the copy of the ordinance attached to the stipulation was in effect at the time of the action or occurrence at issue in the appeal. (Adopted March 19, 2009, effective July 1, 2009.)

**Rule 31. Exhibits, recordings and documents.**

(a) **Lodging with Supreme Court.** The clerk of the district court or administrative agency shall lodge all of the following exhibits, recordings and documents with the Supreme Court:

(1) Copies of all requested documents, charts and pictures offered or admitted as exhibits in a trial or hearing in a civil case and copies of all

documents, charts and pictures offered or admitted as exhibits in a trial or hearing in a criminal case, except that pictures or depictions of child pornography shall not be copied and sent to the parties or the Supreme Court unless specifically ordered by the court. Documentary exhibits in pdf format may be sent to the Supreme Court on a CD that includes an index. All other exhibits shall be retained by the clerk of the district court or administrative agency, unless otherwise ordered by the Supreme Court. The clerk shall forward to the Supreme Court photographs of all other exhibits in death penalty cases. Upon the request of a party in other cases, the clerk shall forward to the Supreme Court photographs of designated exhibits.

(2) All records and transcripts filed with the district court or administrative agency.

(3) All transcripts from the magistrate's division of the district court.

(4) All audio and audio-visual recordings offered or played during the proceedings.

(b) **Documentary Exhibits.** In any criminal or post-conviction case where a documentary exhibit, including a pre-sentence report, is transmitted to the Supreme Court for use in an appellate proceeding, the district court shall serve a copy of the documentary exhibit on the attorney general and on appellate counsel for the defendant, subject to the confidentiality provisions of I.C.A.R. 32. Copies of documentary exhibits in pdf format may be sent on a CD that includes an index. However, pictures or depictions of child pornography that are separately identified pursuant to I.C.R. 32 (e)(1) shall not be transmitted to the parties or the Supreme Court unless specifically requested.

(c) **Certificate of Clerk or Secretary.** The clerk, secretary, or the officer responsible for collecting exhibits offered or admitted at the trial or hearing shall file a certificate with the Supreme Court certifying the exhibits, recordings and copies of documents which have been lodged with the Supreme Court, specifically identifying each item lodged, and listing and describing those exhibits which are retained by the clerk or secretary. In the event there are no exhibits to be lodged with the Supreme Court, the certificate shall specifically state that no exhibits were lodged.

(d) **Time for Lodging.** Unless otherwise directed by the Supreme Court, the above exhibits, recordings and documents shall be lodged with the Supreme Court at or before the time that the reporter's transcript and clerk's record are lodged with the Supreme Court.

(e) **Disposition of Exhibits.** Unless otherwise ordered by the Supreme Court under Rule 31.1, the Supreme Court will retain the exhibits until ninety (90) days after final determination of the appeal, at which point the court will return all original exhibits and retain an electronic copy of all documentary exhibits. (Adopted June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 18, 1998, effective July 1, 1998; amended November 17, 1999, effective December 1, 1999; amended March 22, 2002, effective July 1, 2002; amended April 7,



2008, effective July 1, 2008; amended March 19, 2009, effective July 1, 2009; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013.)

#### STATUTORY NOTES

**Compiler's Notes.** A former rule 31 (Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985) was rescinded by Supreme Court order of June 14, 1987, effective November 1, 1987.

**Cross References.** Record on appeal, § 13-203.

#### JUDICIAL DECISIONS

**Cited in:** State v. Adams, 115 Idaho 724, 769 P.2d 601 (Ct. App. 1989).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Certification of Exhibits.  
Praecipe for Transcript.  
Reading of Original Exhibits.

##### **Certification of Exhibits.**

Failure to certify exhibits is not jurisdictional and does not entitle respondent to dismissal of appeal. Douglas v. Kenney, 40 Idaho 412, 233 P. 874 (1925).

Propriety of admitting certain exhibits in trial court can not be determined on appeal when they have not been certified to appellate court. Hayes v. Independent Sch. Dist. No. 9, 45 Idaho 464, 262 P. 862 (1928).

##### **Praecipe for Transcript.**

Where appellant's praecipe for transcript does not direct the inclusion of exhibits and such exhibits are not included, the propriety of their admission or exclusion cannot be determined on appeal. Dawson v. Eldredge, 89 Idaho 402, 405 P.2d 754 (1965).

##### **Reading of Original Exhibits.**

Court may refuse to permit withdrawal of original judicial records and may require reading of original exhibits into record, or introduction of certified copies. Evans v. District Court, 50 Idaho 60, 293 P. 323 (1930).

#### **Rule 31.1. Reclaiming exhibits, documents or property.**

At any time after the commencement of an appeal, any interested party or person may file a motion with the Supreme Court for an order permitting the reclamation by such party or person of exhibits offered or admitted in evidence, documents or property displayed or considered in connection with the action, or any property in the possession of any court, department, agency or official. The Supreme Court in its discretion may grant such an order on such conditions and under such circumstances as it deems appropriate, including but not limited to the substitution of a copy, photograph, drawing, facsimile, or other reproduction of the original exhibit, document or property, or the posting of a bond that the exhibit, document or property will be returned if either the Supreme Court or the trial court later orders that such exhibit, document or property be returned to the court for any purpose in the action or appeal. (Adopted June 15, 1987, effective November 1, 1987.)

**Rule 32. Motions — Time for filing — Briefs.**

(a) **Motions to Dismiss.** A motion for involuntary dismissal of an appeal with prejudice for failure to comply with these rules must be filed at least 21 days before oral argument on the merits; provided, a motion to dismiss an appeal for failure to timely physically file a notice of appeal or to dismiss a petition for rehearing for failure to timely physically file a petition for rehearing may be made at any time.

(b) **Voluntary Motions to Dismiss.** Any appealing party may move the court to dismiss the party's appeal with prejudice at any time, before or after oral argument. The court may tax costs and attorney fees as though the non-appealing party had prevailed.

(c) **Other Motions.** All other motions permitted under these rules, other than a motion to dismiss, may be made at any time, before or after oral argument.

(d) **Briefs or Statements to Accompany Motions.** All motions shall include or be accompanied by a brief, statement, or affidavit in support thereof and service shall be made upon all parties to the appeal. Any party may file a brief or statement in opposition to the motion within 14 days from service of the motion. Any application for an extension of time to perform an act under this rule must be accompanied by an affidavit setting forth the reasons or grounds in support thereof. If the opposing party has been contacted and has no objection to the motion the following certificate may be attached:

**CERTIFICATE OF UNCONTESTED MOTION**

The undersigned does hereby certify that he or she has contacted opposing counsel(s) and is authorized to represent that opposing counsel(s) has(have) no objection to this motion.

Dated and certified this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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(e) **Size and Number of Copies.** All motions, notices, affidavits, statements, motion briefs, or any other documents filed with the court should be typed on 8 ½ x 11 inch paper. The body of all such documents may be typed with double line spacing or one-and-one-half (1 ½) line spacing. An original and six copies of each motion, brief, statement, affidavit or memorandum shall be filed with the clerk of the Supreme Court. Prisoners incarcerated or detained in a state prison or county jail may file documents that are legibly hand-printed in black ink, in whole or in part, that otherwise conform to the requirements of these rules.

(f) **Oral Argument.** All motions will be considered and disposed of without oral argument unless otherwise ordered by the Supreme Court. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 18, 1983, effective July 1, 1983;

amended March 23, 1990, effective July 1, 1990; amended January 30, 2001, effective July 1, 2001; amended March 21, 2007, effective July 1, 2007.)

#### DECISIONS UNDER PRIOR RULE OR STATUTE

**Premature Motion.**

Motion to dismiss appeal made when reporter's transcript had not been settled was premature, although more than six months

had elapsed after appeal was perfected. *Welch v. Spokane Int'l Ry.*, 32 Idaho 668, 186 P. 915 (1920).

**Rule 33. Stipulation for dismissal.**

At any point the affected parties may stipulate for the dismissal of the appeal or petition which stipulation shall contain an agreement as to the taxing of costs. Any such stipulation for dismissal signed by some but not all of the parties to an appeal shall be considered and processed as a motion for dismissal under Rule 32. (Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986.)

**Rule 33.1. Stipulation for vacation, reversal or modification of judgment. [Rescinded.]**

#### STATUTORY NOTES

**Compiler's Notes.** This rule (adopted March 23, 1990, effective July 1, 1990) was rescinded by order of the Supreme Court of January 30, 2001, effective July 1, 2001.

**Rule 34. Briefs on appeal — Number — Length — Time for filing — Service of briefs.**

(a) **Number of Copies.** With the exception of cases governed by Idaho Appellate Rule 35(h), the original bound brief, six (6) bound copies, and one unbound, unstapled copy of all appellate briefs shall be filed with the Supreme Court and the original shall be signed by counsel submitting the same. In cases governed by Idaho Appellate Rule 35(h), only the original and four (4) copies of all appellate briefs shall be filed.

(b) **Length of Briefs.** No brief in excess of 50 pages, including covers and anything contained between them excluding addendums or exhibits, shall be filed without consent of the Supreme Court.

(c) **Time for Filing.** Appellant's brief shall be filed with the clerk of the Supreme Court within 35 days of the date that the reporter's transcript and the clerk's or agency's record have been filed with the Supreme Court. The respondent's and cross-appellant's brief, which may be joined in one brief, shall be filed within 28 days after the service of appellant's brief. The cross-respondent's brief, if any, shall be filed within 28 days after the cross-appellant's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief. Briefs of amicus curiae shall be filed within the time set in the order of the Supreme Court granting leave to file an amicus curiae brief.

(d) **Service of Briefs.** Two copies of all appellate briefs shall be served upon each party to the appeal.

(e) **Extension of Time for Filing Brief.** A motion for extension of time for filing a brief may be made no later than the due date for the appellate brief and shall be supported by an affidavit setting forth:

(1) The date when the brief is due;

(2) The number of extensions of time previously granted, and if extensions were granted the original date when the brief was due;

(3) Whether any previous requests for extensions of time have been denied or denied in part;

(4) The reasons or grounds why an extension is necessary;

(5) The number of days of extension deemed necessary and the date on which the brief would become due;

(6) Whether there has been any stipulation of the parties for this application for extension, which stipulation shall not be binding upon the Court;

(7) The position of the opposing parties concerning the application, and whether or not the opposing parties have verbally expressed their agreement or disagreement;

(8) What assurance there is that the brief will be filed within the extended time requested.

Extensions of time for filing briefs shall not be favored and will be granted by the Supreme Court only upon a clear showing of good cause and as provided in Rule 46.

(f) **Augmentation of Briefs.**

(1) At any time before the issuance of an opinion, any party may supplement his brief by the citation of additional authority, identifying the issue on appeal to which it pertains, without written comment thereon, and identifying the headnote or relevant pages of the authority cited. This augmentation may be done by written notice to the court and all parties without first obtaining leave of the court.

(2) At any time before the issuance of an opinion, any party may file a motion to augment the authority and argument presented in his brief. Such motion shall be filed in accordance with Rule 32, with or without the supplemental brief attached, and will be granted by the court upon a showing of good cause why the material had not been included in the prior brief. An order granting a motion to augment a brief will state the time within which any reply brief of an adverse party can be filed. (Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987; effective November 1, 1987; amended January 1, 1995, effective January 1, 1995; amended March 9, 1999, effective July 1, 1999; amended January 30, 2001 and March 30, 2001, effective July 1, 2001; amended March 24, 2005, effective July 1, 2005; amended March 21, 2007, effective July 1, 2007; amended March 18, 2011, effective July 1, 2011.)



## JUDICIAL DECISIONS

## ANALYSIS

Court-Appointed Counsel.  
Failure to File Brief.  
Meritless Appeal.

**Court-Appointed Counsel.**

A court-appointed attorney who believes that his or her client's appeal is without merit must still submit a brief in accordance with this rule. *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998).

**Failure to File Brief.**

Where defendant in fraud case, who was also attorney, appealed pro se and failed to file a brief under this rule and I.A.R. 35, the judgment was affirmed since, absent compliance with the Appellate Rules, the Supreme Court of Idaho will not search the record for

error. *Woods v. Crouse*, 101 Idaho 764, 620 P.2d 798 (1980).

**Meritless Appeal.**

Requiring a court-appointed attorney who believes that his or her client's appeal is without merit to file a brief under this rule does not mean an appellant has a constitutional right to counsel in the post-conviction proceedings or that procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) are applicable. *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998).

**Cited in:** *Duff v. Bonner Bldg. Supply, Inc.*, 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982); *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990); *Estes v. Barry*, 132 Idaho 82, 967 P.2d 284 (1998).

**Rule 34.1. Electronic Briefs (optional).**

In addition to the current requirement for paper copies of briefs, it is requested, but not required, that an additional copy of the brief be filed electronically. Electronic filings will be subject to the same due dates as hard copy briefing. If an electronic copy is filed, it must be submitted in the following form and format:

1. Each efile shall be submitted either by email attachment or on a separate CD, with an electronic copy served on each party to the appeal.
2. Each email attachment or CD must include a label that identifies the case name, the docket number, type of brief (i.e. appellant's brief, respondent's brief).
3. Files shall be submitted as a **searchable** PDF file because this format generally may not be altered.
4. The email attachment or CD must contain only an electronic copy of the submitted hard copy brief. The email attachment or CD **must not** contain any document or material that is not included in the original hard copy of the brief filed with the Court.
5. The **email attachment or CD must be free of viruses** or any other files that would be disruptive to the Court's computer system.
6. If submitting an efile as an email attachment at the time the brief is filed, please advise the Clerk's office **in your transmittal letter accompanying hard copies**; please send efilings to [scbriefts@idcourts.net](mailto:scbriefts@idcourts.net).
7. If an electronic brief is filed, a Certificate of Compliance must also be submitted as a separate document and should read as follows:

## CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an

electronic copy was served on each party at the following email address(es):  
\_\_\_\_\_.

Dated and certified this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Adopted March 21, 2007, effective July 1, 2007.)

**Rule 35. Content and arrangement of briefs.**

(a) **Appellant's Brief.** The brief of the appellant shall contain the following divisions under appropriate headings:

(1) **Table of Contents.** A table of contents, with page references, which shall include an outline of the Argument section of the brief.

(2) **Table of Cases and Authorities.** A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(3) **Statement of the Case.** (i) A statement of the case indicating briefly the nature of the case. (ii) The course of the proceedings in the trial or the hearing below and its disposition. (iii) A concise statement of the facts.

(4) **Issues Presented on Appeal.** A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

(5) **Attorney Fees on Appeal.** If the appellant is claiming attorney fees on appeal the appellant must so indicate in the division of issues on appeal that appellant is claiming attorney fees and state the basis for the claim.

(6) **Argument.** The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

(7) **Conclusion.** A short conclusion stating the precise relief sought.

(b) **Respondent's Brief.** The brief of the respondent shall contain the following divisions under appropriate headings:

(1) **Table of Contents.** A table of contents, with page references, which shall include an outline of the argument section of the brief.

(2) **Table of Cases and Authorities.** A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where there [they] are cited.

(3) **Statement of the Case.** A statement of the case to the extent that the respondent disagrees with the statement of the case set forth in appellant's brief.

(4) **Additional Issues presented on Appeal.** In the event the respondent contends that the issues presented on appeal listed in appellant's

brief are insufficient, incomplete, or raise additional issues for review, the respondent may list additional issues presented on appeal in the same form as prescribed in Rule 35(a)(4) above.

(5) **Attorney Fees on Appeal.** If the respondent is claiming attorney fees on appeal the respondent must so indicate in the division of additional issues on appeal that respondent is claiming attorney fees and state the basis for the claim.

(6) **Argument.** The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

(7) **Conclusion.** A short conclusion stating the precise relief sought.

(c) **Other Briefs.** The appellant or cross-appellant may file a brief in reply to the brief of the respondent or cross-respondent within the time limit specified by Rule 34(c) which may contain additional argument in rebuttal to the contentions of the respondent. An amicus curiae brief permitted by order of the Court may contain a statement of the case, points and authorities, and additional argument on any issue raised by the parties in the appeal or as allowed by order of the Supreme Court. If the respondent has filed a cross-appeal, the appellant shall file a cross-respondent's brief which shall contain all of the requirements of Rule 35(b), above, and, unless otherwise ordered by the court, it shall be combined with appellant's reply brief.

(d) **References in Briefs to Parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum reference to parties by such designations as "appellant," "respondent," and "cross-appellant." To promote clarity and simplicity in the presentation of written and oral contentions of the parties to the Supreme Court, the counsel shall use the designations used in the trial court or other proceedings under review, or the actual names of the parties, or descriptive terms such as the "employee," the "employer," the "landlord," etc.; provided, all references to a minor shall be by the use of initials or a designation other than the minor's actual name.

(e) **References in Briefs to the Reporter's Transcript and Clerk's or Agency's Record.** References to the reporter's transcript on appeal shall be made by the designation "Tr" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16". References to the clerk's or agency's record on appeal shall be made by the designation "R" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16".

(f) **Reproduction of Statutes, Rules, Regulations, Decisions, Etc.** If determination of the issues presented on appeal requires the study of statutes, rules, regulations, recent court decisions not yet published, or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end of the brief.

(g) **Briefs in Cases Involving Multiple Parties.** In cases involving more than one appellant or respondent, including cases consolidated for purposes of appeal, any number of parties to the appeal may join in a single



brief, and any party may adopt by reference any part of the brief of another party.

(h) **Briefs in Criminal Appeals Involving Only Challenges to the Revocation of Probation or the Severity of Sentence.** In criminal appeals involving only claims regarding the revocation of probation, the severity of the sentence, or a motion brought under Idaho Criminal Rule 35, the brief of the appellant and respondent need not be bound or have colored covers, and need not contain a table of contents, table of cases and authorities, or citations to authorities. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended April 3, 1996, effective July 1, 1996; amended March 9, 1999, effective July 1, 1999; amended March 1, 2000, effective July 1, 2000; amended January 30, 2001, effective July 1, 2001; amended October 17, 2003; amended April 1, 2009, effective July 1, 2009.)

## JUDICIAL DECISIONS

### ANALYSIS

Argument.

—Failure to Support.

Attorney Fees.

Award.

Cross-Appeal Not Required.

Failure to Designate Issues.

Failure to File Brief.

Failure to Raise Issue.

Failure to Support.

Argument.

—Failure to Support.

Relief Sought.

Statement of Issue on Appeal.

Statement of Issues.

Subsidiary Issue.

Unspecified Errors.

Waiver.

### Argument.

The defendants apparently intended the I.R.C.P. 68 issue to be part of their cross-appeal, but the appellate court could not address that issue because the defendants did not comply with subsection (a)(6) of this Rule. *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887 (1996).

An award of attorney fees on appeal in favor of the insurer was proper where the appeal was frivolous and where the brief was inadequate pursuant to Idaho R. App. P. 35(a)(6). *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004).

Although a former employee was proceeding pro se in his appeal of an Idaho Industrial

Commission decision denying his unemployment insurance benefits claim, he was held to the same pleading standards as individuals who were represented by counsel, and the court could not consider seven of his claims on appeal because the employee had not supported the claims by propositions of law, by citation to legal authority, or by legal argument. *Huff v. Singleton*, 143 Idaho 498, 148 P.3d 1244 (2006).

Because a power company devoted only a footnote in its appellate brief to a discussion of two issues relating to a term condition in a hydropower water right license, and neither issue was adequately supported by legal authority or argument, the court declined to address the issues. *Idaho Power Co. v. Idaho Dep't of Water Res.* (In re Licensed Water Right No. 03-7018) — Idaho —, 255 P.3d 1152 (2011).

Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by an appellate court. *Minor Miracle Prods., LLC v. Starkey*, 152 Idaho 333, 271 P.3d 1189 (2012).

### —Failure to Support.

Where defendant vaguely asserted that he raised genuine factual issues regarding counsel's performance at trial yet did not identify any and where defendant had not pointed to a single deficiency in trial counsel's performance and did not mention or support allegations that evidence of an out-of-state conviction and confession were inadmissible,



district court's summary dismissal of defendant's application for post-conviction relief was affirmed. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

The failure to support an alleged error with argument and authority is deemed a waiver of the issue. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 996, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

Where the plaintiff did not comply with this rule in that it failed to support its claim for attorney fees on appeal by propositions of law, authority or argument, the appellate court could not consider the claim. *Interlude Constructors, Inc. v. Bryant*, 132 Idaho 443, 974 P.2d 89 (Ct. App. 1999).

The court declined to consider an award of fees where the plaintiffs failed to address the request in the argument section of their brief. *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000).

Where a civil appellant provided insufficient argument and no authority to support his contentions, the appellate court would not relax Idaho App. R. 35(a)(4), and those issues were not considered on appeal. *Haight v. Dale's Used Cars, Inc.*, 139 Idaho 853, 87 P.3d 962 (Ct. App. 2003).

Buyers failed to comply with this rule with respect to their argument that the trial court abused its discretion by failing to grant their motion for a new trial; there was no citation to the record for many of the alleged facts, and there was neither argument nor supporting authority as to why any of the alleged facts constituted a ground for a new trial or why the district court abused its discretion in failing to grant the motion for a new trial. *Bolognese v. Forte*, — Idaho —, 292 P.3d 248 (2012).

#### **Attorney Fees.**

Where a lender was appealing from a judgment denying all relief against the guarantor of loans on which the borrower defaulted, the appeal necessarily embraced the obligation imposed by the attorney fee provisions of the guaranty instruments; therefore, even though the lender had not specified denial of attorney fees as an issue on appeal, the district court on remand should have awarded attorney fees to the lender. *Industrial Inv. Corp. v. Rocca*, 102 Idaho 920, 643 P.2d 1090 (Ct. App. 1982).

Dairyman's action against farmer for non-delivery of hay was based entirely upon the existence of a contract. Although dairyman failed to prove a contract, that failure should not insulate dairyman from having to pay a reasonable award of attorney fees to the prevailing party. Because farmer prevailed in an action brought to recover damages for the

breach of contract for the sale of hay, he was entitled to a reasonable award for attorney fees incurred in bringing the appeal. *Hilt v. Draper*, 122 Idaho 612, 836 P.2d 558 (Ct. App. 1992).

No award of attorney fees on appeal was made where the plaintiff sought such an award as an additional claim in its issues on appeal, but failed to include any argument or authority in its opening brief. *Sprenger, Grubb & Assocs. v. City of Hailey*, 133 Idaho 320, 986 P.2d 343 (1999).

When attorney fees are requested by either party, but are not discussed in the argument portion of the brief, the request will not be considered by the court. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

Doctor's request for attorney fees did not comply with Idaho App. R. 35(b)(6) because he failed to provide argument in support of his request. *Goldman v. Graham*, 139 Idaho 945, 88 P.3d 764 (2004).

This rule did not provide a mechanism by which an appellate court could award attorney fees because the rule merely required that a party indicate in the "Issues on Appeal" section of its brief that it was seeking attorney fees. *Commercial Ventures v. Lea Family Trust*, 145 Idaho 208, 177 P.3d 955 (2008).

Investor was not entitled to attorney fees on appeal because the case presented an issue of first impression and the husband and wife, who brought the claim against their fellow investor who had been paid profits in an investment Ponzi scheme, prevailed on appeal. *Christian v. Mason*, 148 Idaho 149, 219 P.3d 473 (2009).

While paragraph (a)(6) directs an appellant to address his entitlement to attorney's fees in the argument section of his brief, paragraph (a)(5) can be read as allowing appellant to address attorney's fees solely in a section devoted to that topic. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011).

Father was not awarded attorney's fees on appeal as he did not comply with the requirements of (b)(5), and the mother had a good faith basis for arguing that her decision not to go to school was a substantial and material change of circumstances. *Evans v. Sayler*, 151 Idaho 223, 254 P.3d 1219 (2011).

Idaho Appellate Rule 41 and paragraph (a)(5) of this rule merely set forth the procedural steps necessary for a party to seek attorney fees on appeal and do not provide an independent basis for an award of attorney fees. *Collection Bureau, Inc. v. Dorsey*, 150 Idaho 695, 249 P.3d 1150 (2011).

#### **Award.**

In an action on a credit card account, a

bank was not entitled to an award of attorney's fees on appeal because the bank failed to cite to any legal authority authorizing such an award. Idaho App. R. 41 merely set forth the procedure for awarding attorney's fees on appeal; neither Idaho App. R. 35 nor Idaho R. Civ. P. 54(e)(1) provide any authority for such an award, and the bank failed to provide any argument that the action fit within the provisions of I.C. § 12-120(3). *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 240 P.3d 583 (2010).

#### **Cross-Appeal Not Required.**

Even if a district court determined that defendant was not entitled to a Franks hearing after improperly hearing in-camera testimony, the district court's decision was correct because defendant should not have been granted a hearing in a prior order; therefore, the State did not seek affirmative relief and properly brought the issue of defendant's entitlement to a Franks hearing as an additional issue on appeal under I.A.R. 35(b)(4) instead of being required to cross appeal from the previous district court order under I.A.R. 15(a). *State v. Fisher*, 140 Idaho 365, 93 P.3d 696 (2004).

#### **Failure to Designate Issues.**

Failure to designate issues on appeal is cause for denying an appeal as it is not the duty of the appellate court to review the record for errors; however, the rule may be relaxed if the briefing addressed an issue through authority or argument. *Everhart v. Washington County Rd. & Bridge Dep't*, 130 Idaho 273, 939 P.2d 849 (1997).

Refusal to award attorney's fees on appeal in the parties' contract dispute action was appropriate because the lessee did not present any argument justifying an award of attorney fees. In fact, the lessee did not even state that it was entitled to attorney fees. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 137 P.3d 409 (2006).

#### **Failure to File Brief.**

Where defendant in fraud case, who was an attorney, appealed pro se and failed to file a brief under I.A.R. 34 and this rule, the judgment was affirmed since, absent compliance with the Appellate Rules, the Supreme Court of Idaho will not search the record for error. *Woods v. Crouse*, 101 Idaho 764, 620 P.2d 798 (1980).

#### **Failure to Raise Issue.**

The Supreme Court will not review the actions of a district court which have not been specifically assigned as error, especially where there are no authorities cited nor argument contained in the briefs upon the ques-

tion. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

The Supreme Court would not review an issue that neither party raised or argued in their briefs. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

Where the issue of whether an attorney signed a complaint was not raised in the trial court, the court would not address the award of attorney fees and costs against the attorney. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

Where defendant has not affirmatively shown how he was prejudiced by the court's jury instructions the court will not presume error. *State v. Walker*, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991).

Taxpayer appealed from the decision of the District Court determining the amount of tax, penalty, and interest taxpayer owed; in its initial brief presented to the court, taxpayer raised only issues concerning the correctness of the District Court's decision on the merits of the State Tax Commission's redetermination and concerning taxpayer's entitlement to attorney fees on appeal. In neither its initial brief nor in its reply brief did taxpayer cite authorities or present argument challenging the District Court's decision upholding the board's dismissal of taxpayer's appeal; therefore, the Idaho Supreme Court would not consider whether the District Court correctly upheld the board's dismissal of taxpayer's appeal. *Grand Canyon Dories, Inc. v. Idaho State Tax Comm'n*, 121 Idaho 515, 826 P.2d 476 (1992).

Because the statute of frauds is an affirmative defense that must be pled, where the defendants did not list the threshold issue of waiver with respect to their statute of frauds defense as an issue on appeal or otherwise address the issue in their opening brief, the issue was not preserved on appeal. *Rowley v. Fuhrman*, 133 Idaho 105, 982 P.2d 940 (1999).

Where the defendant failed to list violation of the state constitution as an issue on appeal from a summary judgment ruling that the school district violated teachers' due process rights in terminating extra day assignments, and where the defendant failed to argue the issue in its opening brief, the appellate court declined to consider the issue. *Lowder v. Minidoka County Joint Sch. Dist.*, 132 Idaho 834, 979 P.2d 1192 (1999).

The court refused to consider the issues of breach of contract and bad faith where the plaintiffs failed to raise them in their initial brief. *Rhead v. Hartford Ins. Co.*, 135 Idaho 446, 19 P.3d 760 (2001).

Defendant files an appellate brief challenging testimony from a DNA expert on Sixth

Amendment grounds, but did not raise his hearsay challenge until his reply brief. This rule did not prevent appellate review of the hearsay challenge, because the State had an adequate opportunity to respond. *State v. Watkins*, 148 Idaho 418, 224 P.3d 485 (2009).

An appellant's failure to include in his initial appellate brief a fair statement of an issue presented for review results in waiver of the issue. This rule will be relaxed when the issue is supported by argument in appellant's opening brief. Appellant may not raise an issue, including statute of limitations, in a reply brief. *Weisel v. Beaver Springs Owners Ass'n*, 152 Idaho 519, 272 P.3d 491 (2012).

Where a party requests attorney fees on appeal, but does not address the issue in the argument section of the party's brief, the court will not address the issue because the party has failed to comply with this rule. *Morrison v. Northwest Nazarene Univ.*, 152 Idaho 660, 273 P.3d 1253 (2012).

#### **Failure to Support.**

Bulk of the landowner's claims on appeal would not be considered by the Idaho Supreme Court because the landowner failed to support them with relevant argument and authority. *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146 (2010).

Property owner failed to provide any argument or authority to support his claim that the trial court abused its discretion by denying a motion to disqualify an irrigation district's counsel on grounds that the counsel and a member of the district board were father and son. Accordingly, the issue was waived on appeal. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Husband listed a claim of error in award of attorney fees in his appellate brief, but, because he did not provide any argument or authority on the issue, it could not be addressed on appeal. *Davidson v. Soelberg*, — Idaho —, 296 P.3d 433, 2013 Ida. App. LEXIS 9 (Jan. 24, 2013).

#### **Argument.**

##### **—Failure to Support.**

In a mother's challenge to a child custody decision, because many of her arguments had no citations to any evidence in the record or relevant legal authority, they were barred. *Michalk v. Michalk*, 148 Idaho 224, 220 P.3d 580 (2009).

#### **Relief Sought.**

Appellant's brief contained a sufficient statement of the relief sought and was in compliance with Idaho App. R. 35(a)(7). *SE/Z*

*Constr.*, *L.L.C. v. Idaho State Univ.*, 140 Idaho 8, 89 P.3d 848 (2004).

#### **Statement of Issue on Appeal.**

Where the appellant's statement of issue was really nothing more than a general invitation to search the record for error, in that it did not identify any findings of fact, statements of law, or application of law to facts, that were assertedly in error, the brief did not comply with the requirements of subdivision (a)(3) of this rule with respect to that issue and consequently the issue would not be considered on appeal. *Drake v. Craven*, 105 Idaho 734, 672 P.2d 1064 (Ct. App. 1983).

Contractor was awarded appellate attorney fees and costs in customers' appeal of an award of attorney fees and costs to the contractor as the prevailing party in a property damage action because the contractor properly raised the issue of attorney fees on appeal by listing it as a separate issue in the contractor's first appellate brief and addressing it in detail with supporting argument and authority. *Crump v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009).

#### **Statement of Issues.**

Where plaintiff's brief on appeal failed to denominate any issues to be reviewed as required by this rule, the Supreme Court of Idaho will not review the record for error. *Jensen v. Doherty*, 101 Idaho 910, 623 P.2d 1287 (1981).

The failure of appellant to include an issue in the statement of issues as required by subdivision (a)(4) of this rule will eliminate the consideration of that issue in the appeal; however, this rule might be relaxed where the issue was addressed by authorities cited or arguments contained in the briefs. *State v. Prestwich*, 116 Idaho 959, 783 P.2d 298 (1989), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Failure of the appellant to include an issue in the statement of issues required by subdivision (a)(4) of this rule will eliminate consideration of that issue on appeal. *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

Since the state of issues presented will be deemed to include every subsidiary issue fairly comprised therein, in divorce action in deciding issues of property valuation and division, a claim of failure to make sufficient findings respect to an issue of the valuation of community interest in a business, will be subsumed in the broader question of whether a trial court's findings with respect to that issue are in error. *Jensen v. Jensen*, 124 Idaho 162, 857 P.2d 641 (1993).

Although the failure to include an issue in



the statement of issues will generally eliminate the issue from consideration on appeal, this rule may be relaxed where the issue or issues were addressed by authorities cited or arguments contained in the briefs; thus, although growers bringing action against Department of Agriculture for negligent inspection of commodities warehouse failed to provide a statement of issues, their arguments and the authority presented in their brief were construed as raising certain issues for review. *Crown v. State, Dep't of Agric.*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994).

#### **Subsidiary Issue.**

Where defendant did not raise a particular issue in his appellate brief, but rather, he raised the issue for the first time during oral arguments before the Court of Appeals, although an issue which neither party has raised or argued in their briefs will usually not be considered on appeal, subdivision (a)(4) of this rule also provides that an appellant's statement of the issues will be deemed to include every subsidiary issue fairly comprised therein, and the issue was heard. *State v. Robison*, 119 Idaho 890, 811 P.2d 500 (Ct. App. 1991).

#### **Unspecified Errors.**

It is implicit in this rule that the Court of Appeals will not search a trial record for unspecified errors. *State v. Crawford*, 104 Idaho 840, 663 P.2d 1142 (Ct. App. 1983).

#### **Waiver.**

The failure to support an alleged assignment of error with argument and authority is deemed a waiver of the assignment. *State v. Burris*, 101 Idaho 683, 619 P.2d 1136 (1980).

Although an appellant bears the burden of showing error in its brief and noncompliance with the rule constitutes a waiver of that assignment of error, respondent's failure to address an issue in its brief does not mandate reversal of the district court's ruling. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).

Issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 207 P.3d 988 (2009).

**Cited in:** *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982); *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983); *Price v. Aztec Ltd.*, 108 Idaho 674, 701 P.2d 294 (Ct. App. 1985); *Wilson v. Hambleton*, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985); *Valley Bank v. Dalton*, 110 Idaho 87, 714 P.2d 56 (Ct. App. 1985); *Soria v. Sierra Pac. Airlines*, 111 Idaho

594, 726 P.2d 706 (1986); *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987); *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 739 P.2d 301 (1987); *Hickman v. Fraternal Order of Eagles*, 114 Idaho 545, 758 P.2d 704 (1988); *State v. Phillips*, 118 Idaho 27, 794 P.2d 297 (Ct. App. 1990); *State v. Oakley*, 119 Idaho 1006, 812 P.2d 313 (Ct. App. 1991); *Swain v. State*, 122 Idaho 918, 841 P.2d 448 (Ct. App. 1992); *State v. Rupp*, 123 Idaho 1, 843 P.2d 151 (1992); *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993); *Phipps v. Phipps*, 124 Idaho 775, 864 P.2d 613 (1993); *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994); *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995); *Saint Alphonsus Regional Medical Ctr. v. Bannon*, 128 Idaho 41, 910 P.2d 155 (1995); *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs*, 128 Idaho 761, 918 P.2d 1206 (1996); *Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996); *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 936 P.2d 1309 (1997); *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997); *Weaver v. Searle Bros.*, 131 Idaho 610, 962 P.2d 381 (1998); *Henman v. State*, 132 Idaho 49, 966 P.2d 49 (Ct. App. 1998); *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999); *State v. Barnett*, 133 Idaho 231, 985 P.2d 111 (1999); *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 999 P.2d 877 (2000); *Cheung v. Wasatch Elec.*, 136 Idaho 895, 42 P.3d 688 (2002); *Kohring v. Robertson*, 137 Idaho 94, 44 P.3d 1149 (2002); *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002); *Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003); *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005); *A & J Constr. Co. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005); *Craig Johnson Constr., L.L.C. v. Floyd Town Architects*, 142 Idaho 797, 134 P.3d 648 (2006); *Craig Johnson Constr., L.L.C. v. Floyd Town Architects*, 142 Idaho 797, 134 P.3d 648 (2006); *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009); *Griffith v. Clear Lakes Trout Co.*, 146 Idaho 613, 200 P.3d 1162 (2009); *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009); *Vavold v. State*, 148 Idaho 44, 218 P.3d 388 (2009); *State v. Korn*, 148 Idaho 413, 224 P.3d 480 (2009); *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010); *Woods v. Sanders*, 150 Idaho 53, 244 P.3d 197 (2010); *Doe v. Doe (in re Doe)*, 150 Idaho 432, 247 P.3d 659 (2011); *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 272 P.3d 534 (2012); *Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 275 P.3d 857, 2012 Ida. LEXIS 84 (2012); *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 273 P.3d 1284 (2012).



## DECISIONS UNDER PRIOR RULE OR STATUTE

**Specification of Errors.**

A specification of the insufficiency of the evidence to support the findings in the brief of appellant is required in order to bring before Supreme Court for review the question of such insufficiency. *Citizens Right of Way Co. v. Ayers*, 32 Idaho 206, 179 P. 954 (1919).

It is within province and power of court to make additional reasonable requirements tending to expedite and facilitate determination of matter submitted to it, and rule providing for distinct enumeration of errors relied upon is reasonable requirement. *Morton Realty Co. v. Big Bend Irrigation & Mining Co.*, 37 Idaho 311, 218 P. 433 (1923).

Assignment of insufficiency of evidence to support judgment will only be considered where specification of errors is made in appel-

lant's brief. *Hurt v. Monumental Mercury Mining Co.*, 35 Idaho 295, 206 P. 184 (1922); *McDonald v. North River Ins. Co.*, 36 Idaho 638, 213 P. 349 (1928); *Merrill v. Fremont Abstract Co.*, 39 Idaho 238, 227 P. 34 (1924).

Assignment that findings and conclusions as whole do not support judgment without specifying particulars is too general for consideration. *Lus v. Pecararo*, 41 Idaho 425, 238 P. 1021 (1925).

The Supreme Court will not review the actions of a District Court which have not been specifically assigned as error, especially where there are no authorities cited nor argument contained in the briefs upon the question. *Bolen v. Baker*, 69 Idaho 93, 203 P.2d 376 (1949).

**Rule 36. Preparation of briefs.**

All briefs shall be prepared in accordance with the following requirements:

(a) **Cover of Brief.** The cover of all briefs shall state the title of the Supreme Court, the title of the action designated on the certificate of appeal, whether it is appellant's or respondent's brief, the name of the district court or administrative agency appealed from, the name of the trial judge or chairman presiding at the trial or hearing, and the names and addresses of all counsel of record showing for whom they appear. The information on the cover shall be substantially in the following form:

## IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN DOE,

Plaintiff-Respondent (or Appellant)

v.

RICHARD DOE,

Defendant-Appellant (or Respondent)

## APPELLANT'S (OR RESPONDENT'S) BRIEF

Appeal from the District Court of the \_\_\_\_\_ Judicial District for  
\_\_\_\_\_ County. (Appeal from the \_\_\_\_\_ Commission)

(Honorable \_\_\_\_, District Judge) (Chairman \_\_\_\_ ) presiding.  
(Attorney's Name)

Residing at \_\_\_\_\_, for Appellant  
(Attorney's Name)

Residing at \_\_\_\_\_, for Respondent.

(Clear space of at least 1 ½ inches at bottom of cover)

(b) **Color and Material of Cover.** The cover of appellant's brief shall be light blue, the cover of respondent's brief shall be white, the cover of appellant's reply brief shall be tan or light brown, the color of cross-appellant's reply brief shall be light yellow, and the cover of any amicus curiae or intervenor's brief shall be light green. The color of respondent's/cross-appellant's shall be white. The color of appellant's reply/cross-respondent's brief shall be tan or light brown. The cover page must be sufficiently light in color to distinctly show the print. The cover of an appellate brief shall be 65 pound cover stock or heavier material, or a vinyl cover of equal weight, and shall not have a plastic or acetate cover.

(c) **Printing of Briefs.** All briefs shall be printed on unruled and untreated white paper 11 inches long by 8½ inches wide. The original brief filed with the court shall be typed with black ribbon or produced by a computer or word processor type printer of letter quality. The type shall be no smaller than 12 point Times New Roman. All lines must be double-spaced, except for quotations which may be indented and single spaced. There shall be a margin of 1½ inches at the top and at the bottom of each page, and 1 inch at each side of each page. The pages shall be numbered at the bottom and may be printed on both the front and back of each page. The brief must be bound on the left with comb binding only, except as provided by Rule 35(h) or upon permission granted by the court. Prisoners incarcerated or detained in a state prison or county jail may file documents under this rule that are legibly hand-printed in black ink, in whole or in part, that otherwise conform to the requirements of this rule. (Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986; amended March 23, 1990, effective July 1, 1990; amended March 26, 1992, effective July 1, 1992; amended February 10, 1993, effective July 1, 1993; amended August 31, 1994, effective September 1, 1994; amended March 18, 1998, effective July 1, 1998; amended March 1, 2000, effective July 1, 2000; amended January 30, 2001, effective July 1, 2001.)

### **Rule 37. Oral argument.**

(a) **When Appeal Submitted on Briefs.** There shall be oral argument in all appeals at such time and place scheduled by the Supreme Court, unless (1) all parties stipulate to submit the appeal upon the briefs and such stipulation is approved by order of the Supreme Court, or (2) the Supreme Court orders that the appeal will be submitted upon the briefs without oral argument, in which case any party may file a written objection to the order for submission on the briefs within twenty-one (21) days of the date of the order, setting forth the reasons for which the party desires oral argument. Any such objection to submission on the briefs shall be determined without oral argument.

(b) **Time Allotted for Argument.** Each side will be allowed 30 minutes for argument; provided, that for good cause shown the Supreme Court may extend or shorten the time. If argument is allowed on a preliminary motion,

one counsel on a side will be heard and each will be allowed ten (10) minutes. The Court may alter the procedure and shorten the time for oral argument of appeals and petitions placed upon the expedited calendar in order to provide a system of prompt and speedy hearing of all expedited appeals. If there are multiple parties, the parties on each side shall allocate the time for argument between and among themselves prior to the commencement of oral argument. In the absence of such agreement, on the request of any party at least 14 days before oral argument, an allocation of time will be made by the Supreme Court at least seven (7) days before argument. The Court may allocate the time for argument between and among co-parties or in its discretion allocate equal or unequal time for argument to each of the co-parties, or the Court may allot the full time for argument to each of the co-parties.

(c) **Order of Argument.** The appellant or the petitioner shall be entitled to open and close the argument; provided, in the event there are multiple parties or third parties, the Supreme Court shall determine the sequence and order of argument.

(d) **Non-Appearance of Parties.** If any party fails to appear for oral argument, the Court may hear the argument of any party appearing, may vacate the hearing, or may decide the appeal on the briefs. If no party appears, the case will be decided upon the briefs unless the Court orders otherwise. If counsel for a party fails to appear to present oral argument, the Supreme Court may assess penalties and sanctions including reasonable attorneys fees.

(e) **Non-Filing of Brief.** If no respondent's brief is filed, the appeal shall be submitted on the appellant's brief without oral argument, unless the appellant requests oral argument. Any party who has failed to file a brief shall not be permitted to present oral argument. (Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986; amended March 1, 2000, effective July 1, 2000.)

## JUDICIAL DECISIONS

### **Time for Argument.**

In divorce action where plaintiff contended that district judge was biased due to fact that judge allowed only fifteen minutes instead of thirty minutes for the appellate argument of each party per subsection (b) of this section as made applicable to appeals from magistrate division by I.R.C.P. 83 (x), where district judge relying on local rule allotted fifteen minutes per side for argument and plaintiff did not request additional time, nor did he

contend that any rule of court entitled him to additional time for argument and he used all of his allotted time without reserving any time for rebuttal and he had submitted a comprehensive appellate brief to the court covering the points he discussed, plaintiff failed to show how he was prejudiced by the procedure followed by the court. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

**Cited in:** *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

## **Rule 38. Opinions and remittiturs.**

(a) **Opinions.** The filing of an opinion of the Court shall be the announcement of the opinion. A certified copy of the opinion filed in an appeal or proceeding shall be transmitted forthwith by the Clerk of the Supreme



Court to the clerk of the district court or administrative agency from which the appeal was taken and copies of the opinion shall be transmitted to each party in the appeal or proceeding, to the presiding district judge or chairman of the administrative agency, and if the suit of proceeding originated in the magistrate division of the district court, to the presiding magistrate.

(b) **Finality of Opinions.** Opinions shall become final 21 days after the date of the last of the following events:

- (1) The announcement of the opinion;
- (2) The announcement of the opinion on rehearing;
- (3) The announcement of a modified opinion without a rehearing.

(c) **Remittiturs.** When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and to the presiding district judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

(d) **Costs and Attorney Fees.** The taxation of costs and attorney fees, if any, shall be included in the remittitur if the same have been determined, but the issuance of the remittitur shall not be delayed if the taxation of such items has not been determined. (Adopted March 25, 1977, effective July 1, 1977; amended January 30, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

**Sua Sponte Dismissal.**

Where an order dismissing an appeal has been entered sua sponte without prior notice and opportunity to be heard or to respond by

memorandum, justice requires an opportunity to seek the court's reconsideration. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

DECISIONS UNDER PRIOR RULE OR STATUTE

**Rehearing Denied.**

When rehearing is denied, the remittitur must issue forthwith and the judgment of the district court carrying into effect the provi-

sions for costs follows as a matter of course. *Fite v. French*, 54 Idaho 104, 30 P.2d 360 (1934).

**Rule 39. Remittitur following mandate from the Supreme Court of the United States.**

Upon receipt by the Clerk of the Supreme Court of a mandate from the Supreme Court of the United States, the Clerk shall immediately notify respective counsel in writing of such fact and the date thereof. Unless further proceedings are required in the Idaho Supreme Court, at the expiration of 21 days from said date the Clerk shall issue a remittitur to the district court in which the judgment was rendered commanding such court to take appropriate action. All of the costs subsequent to the appeal from



said district court shall be taxed in such remittitur. (Adopted March 25, 1977, effective July 1, 1977.)

**Rule 40. Taxation of costs.**

(a) **Costs to Prevailing Party.** Costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.

(b) **Items of Costs.** Costs shall, unless otherwise ordered, include the following items:

(1) Filing fees.

(2) Cost of reporter's transcript including the cost of computer-searchable disks filed with the Supreme Court under Rule 26.1(c), but excluding the cost of all other disks.

(3) Cost of clerk's or agency's record.

(4) Cost for the production of all appellant's briefs, respondent's briefs, reply briefs and briefs in support of or in opposition to petitions for rehearing or review, including covers but excluding appendixes, at the rate of \$6.00 per page. Recovery of this cost applies to only the original briefs and does not include copies.

(5) Cost of premiums of a supersedeas bond, unless the party taxed with costs had agreed in writing, within seven (7) days of the filing of the notice of appeal, not to execute pending appeal as provided in Rule 16(b).

(c) **Memorandum of Costs.** Within 14 days of the filing and announcement of the opinion on appeal, whether or not a petition for rehearing or petition for review is filed, any party who claims costs shall file with the Court and serve upon all adverse parties a memorandum of costs, itemizing each claimed expense. A memorandum of costs mailed to the Court shall be deemed filed upon the date of mailing. Failure to file a memorandum of costs within the period prescribed by this rule shall be a waiver of the right to costs.

(d) **Objections to Costs.** No later than fourteen (14) days after the date of service of the memorandum of costs, any party may object to the claim for costs of another party by filing and serving on the adverse party an objection to part or all of such costs, stating the reasons in support thereof. An objection to costs shall be deemed filed upon mailing and shall be heard and determined by the Court as an objection to the application for costs.

(e) **Number of Copies.** An original and six copies of the memorandum of costs, objections to costs, and briefs in support of or in opposition thereof shall be filed with the Clerk of the Supreme Court.

(f) **Clerk to Insert Costs in Remittitur.** The Clerk of the Supreme Court shall prepare an itemized statement of costs taxed in the Supreme Court and insert the same in the remittitur. If the remittitur has been issued before the final determination of costs, or any amendment thereto, an itemized statement of costs allowed shall be forwarded by the Clerk of the Supreme Court to the district court or administrative agency as soon as it is available and shall then be added to the judgment or order. The payment of costs on appeal shall be enforced in the district court or administrative

agency. (Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 20, 1991, effective July 1, 1991; amended January 30, 2001, effective July 1, 2001.)

## JUDICIAL DECISIONS

### ANALYSIS

Appeal Without Foundation.  
 Applicability.  
 Award to Amicus Curiae.  
 Compliance with Rule.  
 Conflicting Evidence.  
 Cost of Supersedeas Bond.  
 Costs Against State.  
 Costs Awarded.  
 Costs Denied.  
 Costs for State.  
 Lien Foreclosures.  
 Multiple Claims.  
 Prevailing Party.  
 Recovery by Criminal Appellant.  
 Sexual Harassment Action.

### Appeal Without Foundation.

Where the plaintiff's appeal of her dismissal for failure to prosecute did not raise a genuine issue as to the legal standards governing the district judge's discretion nor did it present a cogent challenge to the judge's reasoning powers in exercising that discretion, the appeal was brought without foundation, and the defendants were entitled to a reasonable award of attorney fees. *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986).

### Applicability.

Court erred in awarding costs to neighbors in their action against a county challenging the issuance of a zoning variance to an adjoining property owner because the filing of the neighbors' memorandum of costs was not in compliance with Idaho App. R. 40(c) as it was not filed within 14 days from the filing and announcement of the opinion on appeal. *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004), overruled on other grounds, *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).

### Award to Amicus Curiae.

Where the purchasers of property at a partition sale could not continue to effectively protect their interests absent involvement, as amicus curiae, in an appeal from a decision enforcing the partition judgment and finalizing the sale, the purchasers would be awarded costs and attorney fees. *Mendenhall v. Caine*, 101 Idaho 628, 619 P.2d 146 (1980).

### Compliance with Rule.

Request for attorney fees was denied where defendant failed to provide any proposition of law, authority or argument on the issue. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000).

Defendant shareholder was not entitled to an award of attorney fees where he did not cite any statutory or contractual provision authorizing such award; since Idaho R. App. P. 40 did not provide the authority for awarding attorney fees, the appellate court would not address the issue. *Gilman v. Davis*, 138 Idaho 599, 67 P.3d 78 (2003).

### Conflicting Evidence.

Respondents are entitled to an award of attorney fees on appeal where nonprevailing party invited the Court of Appeals to do no more than second-guess the trial court on conflicting evidence and where the law was well-settled. *Blaser v. Cameron*, 121 Idaho 1012, 829 P.2d 1361 (Ct. App. 1991).

### Cost of Supersedeas Bond.

Posting the letter of irrevocable credit was substantially equivalent to posting a supersedeas bond where no objection to the form of the security was made at the time of its posting; accordingly, this cost was allowable under subdivision (b)(5) of this rule. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

### Costs Against State.

Absent an explicit statutory authorization, costs of transcripts or briefs, incurred by a defendant who successfully prevails on an appeal in a criminal action, are not recoverable against the state. *State v. Peterson*, 113 Idaho 554, 746 P.2d 1013 (Ct. App. 1987).

Since the costs of a defendant who successfully prevails on an appeal in a criminal action are not recoverable as a matter of law, the state's alleged failure to timely file a formal objection under subsection (d) of this rule did not create any right of recovery under a theory of waiver. *State v. Peterson*, 113 Idaho 554, 746 P.2d 1013 (Ct. App. 1987).

Absent an explicit statutory authorization, attorney fees incurred by a defendant who prevails on appeal in a criminal action are not recoverable against the state. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

**Costs Awarded.**

Because company failed on appeal to present any significant issue regarding a question of law, had not shown that findings of fact made by lower court were arguably unsupported by substantial evidence, did not advance any new legal standards or seek modification of existing ones, attempted to relitigate matters put to rest by first appeal, complained of the admission of exhibits that plainly had no bearing on the judgment and whose admission could not possibly constitute reversible error, raised as issues pretrial rulings that after trial were ultimately found in its favor, and disingenuously claimed not to know what discovery order it had disobeyed and for which attorney fees were imposed as sanctions, the appeal was deemed to be unreasonable and without foundation and attorney fees were awarded pursuant to I.A.R. 41(a) and § 12-121 and costs pursuant to this rule. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

Where legal malpractice action based on medical malpractice action was brought based upon deliberate misstatements to a court of law by both the litigant and her counsel acting in concert, the appeal in such action was brought or defended frivolously, unreasonably, or without foundation and therefore attorney's fees should be awarded pursuant to I.A.R., Rule 41 and costs should be awarded pursuant to this rule. *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997).

As the defendants prevailed on the summary judgment issue on appeal, costs were awarded pursuant to this rule, but the court declined to award attorney's fees under § 12-121 because although the plaintiff's argument urging error in the grant of summary judgment as to these particular defendants was not persuasive, it was not unreasonable or frivolous. *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997).

In an action arising from the alleged breach of a contract to build a cabin, where the owner and the general contractor prevailed in part on appeal of a summary judgment motion, they were directed to bear their own costs. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Where a builder bought materials from a supplier to use on defendants' building project and the supplier was entitled to a lien on the buildings that the project produced, the supplier was entitled to costs and fees on appeal as the prevailing party. *BMC West Corp. v. Horkley*, 144 Idaho 890, 174 P.3d 399 (2007).

Costs incurred in defending against this appeal were awarded as a matter of course to the employees because they were prevailing

parties. *Butters v. Valdez*, 149 Idaho 764, 241 P.3d 7 (Ct. App. 2010).

**Costs Denied.**

Appellate court reversed the award of attorneys fees and costs granted to respondents, Idaho Commission of Pardons, and Parole, commissioners and hearing officer, after the intermediate appeal, as the appellate court determined that the inmate had valid points in his habeas corpus petition and it should not have been dismissed. *Dopp v. Idaho Comm'n of Pardons & Parole*, 139 Idaho 657, 84 P.3d 593 (Ct. App. 2004).

**Costs for State.**

In a murder and robbery case, where the post-conviction's petition was a civil matter and because the State was the prevailing party on appeal, the State was entitled to costs on appeal. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009).

**Lien Foreclosures.**

Since the limitation placed upon the recovery of attorney fees on appeal in a mechanic's lien action has not been extended to costs on appeal, the prevailing party was entitled to recover his costs in both the appeal and cross-appeal. *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (Ct. App. 1999).

**Multiple Claims.**

Defendants' claims and defenses were based upon the false testimony of one of the defendants. A claim or defense based upon false testimony is frivolous, unreasonable and without foundation. However, while defendants did not prevail on the issues raised in plaintiffs' cross-appeal, their defense to such cross-appeal was not frivolous, unreasonable or without foundation. Therefore, plaintiffs were entitled to their costs associated with the appeal and cross-appeal and were entitled to attorneys' fees on defendants' appeal, but not for fees resulting from their cross-appeal. *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

**Prevailing Party.**

If, on remand, the district court would find the partnership to be the prevailing party below, entitling it to attorney fees and a full award of costs, then the partnership would be deemed the prevailing party on appeal as well and entitled to cost and attorney fee awards pursuant to I.A.R. 41 and this rule. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

While landlord was not successful on his cross-appeal, he was the prevailing party on the underlying claim for breach of the lease agreement, both at trial and on appeal, and



based on the terms of the lease, which provided for the payment of all attorney's fees and court costs incurred in such litigation, landlord was entitled to an award of costs and fees incurred on the appeal but not on the cross-appeal. *Melton v. Lehmann*, 118 Idaho 61, 794 P.2d 650 (Ct. App. 1990).

Plaintiffs were entitled to an award of fees for appeal even though defendant could ultimately be found to be the prevailing party after trial on his counterclaim. *Bowen v. Heth*, 120 Idaho 452, 816 P.2d 1009 (Ct. App. 1991).

Seller's counterclaim was an action to recover on a contract for the sale of goods. Because the sellers prevailed on their claim below, and because the judgment of the district court on the contractual issue was affirmed, sellers were the prevailing parties on appeal and were thus entitled to an award of attorney fees and costs in both the lower court and on appeal. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

Costs are allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the court. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

Where judgment for plaintiffs was reversed on appeal, they were not entitled to costs or attorney fees. *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998).

Used car dealership and its owners were entitled to attorney's fees after prevailing on appeal in a buyer's action to revoke acceptance of a sale contract. *Haight v. Dale's Used Cars, Inc.*, 139 Idaho 853, 87 P.3d 962 (Ct. App. 2003).

Where it remained to be seen whether the prevailing party on appeal would be the prevailing party in the action, and, therefore, entitled to attorney fees under Idaho Code § 12-120(3) and Idaho App. R. 41, the district court, upon final resolution of the case, could consider fees incurred on appeal when it made an award to the prevailing party. As a matter of right, costs on appeal were awarded to the prevailing party on appeal under Idaho App. R. 40. *Cox v. City of Sandpoint*, 140 Idaho 127, 90 P.3d 352 (Ct. App. 2003).

Costs were awarded to respondent insurer where it prevailed on appeal, even though the basis of the appeal was well-founded and respondent was denied attorney fees. *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 47, 218 P.3d 391 (2009).

Where appellant insured's claims for breach of an insurance contract and declaratory relief were dismissed, the insured was not the prevailing party, and thus was not entitled to recover attorney fees under Idaho App. R. 40 or costs under I.C. § 10-1210. *Villa*

*Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

Because a physician and a clinic were the prevailing parties in a patient's appeal of an award of summary judgment in a medical malpractice action, they were awarded costs on appeal. *McCallister v. Dixon*, — Idaho —, — P.3d —, 2013 Ida. LEXIS 38 (Feb. 1, 2013).

### **Recovery by Criminal Appellant.**

A successful criminal appellant cannot recover attorney fees under §§ 12-120 and 12-121 which apply to only civil actions or under this rule or I.A.R. 41 absent an explicit statutory authorization. *State v. Roll*, 118 Idaho 936, 801 P.2d 1287 (Ct. App. 1990).

Where appellant insured's suit against respondent insurance company for breach of an insurance contract and declaratory relief was dismissed, and the Supreme Court of Idaho upheld the decision, the insurance company was entitled to costs on appeal under Idaho App. R. 40(a). *Villa Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

### **Sexual Harassment Action.**

While there were compelling arguments for awarding fees to employer whose favorable directed verdict in quid pro quo sexual harassment action was upheld on appeal, due to the sparse case law in Idaho involving sexual discrimination issues, court could not say that appeal was brought for improper purposes or in bad faith. *De Los Santos v. J.R. Simplot Co.*, 126 Idaho 963, 895 P.2d 564 (1995).

**Cited in:** *Pratt v. Pratt*, 99 Idaho 500, 584 P.2d 645 (1978); *Fouser v. Paige*, 101 Idaho 294, 612 P.2d 137 (1980); *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982); *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986); *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986); *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986); *Gem State Homes, Inc. v. Idaho Dep't of Health & Welfare*, 113 Idaho 23, 740 P.2d 65 (Ct. App. 1987); *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988); *Burnett v. Jayo*, 119 Idaho 1009, 812 P.2d 316 (Ct. App. 1991); *USA Fertilizer, Inc. v. Idaho First Nat'l Bank*, 120 Idaho 271, 815 P.2d 469 (Ct. App. 1991); *Hoff Cos. v. Danner*, 121 Idaho 39, 822 P.2d 558 (Ct. App. 1991); *Lambert v. Hasson*, 121 Idaho 133, 823 P.2d 167 (Ct. App. 1991); *Cox v. Department of Ins.*, 121 Idaho 143, 823 P.2d 177 (Ct. App. 1991); *Dante v. Golas*, 121 Idaho 149, 823 P.2d 183 (Ct. App. 1992); *Treasure Valley Bank v. Butcher*, 121 Idaho 531, 826 P.2d 492 (Ct. App. 1992); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (Ct. App. 1992); *Haag v. Pollack*, 122 Idaho 605,



836 P.2d 551 (Ct. App. 1992); *Figueroa v. Kit-San Co.*, 123 Idaho 149, 845 P.2d 567 (Ct. App. 1992); *Alcan Bldg. Prods. v. Peoples*, 124 Idaho 338, 859 P.2d 374 (Ct. App. 1993); *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995); *Crown v. State, Dep't of Agric.*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996); *Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382 (Ct. App. 1996); *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996); *Hawks v. EPI Prods. USA, Inc.*, 129 Idaho 281, 923 P.2d 988 (1996); *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994); *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997); *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997); *Idaho State Tax Comm'n v. Beacom*, 131 Idaho 569, 961 P.2d 660 (Ct. App. 1998); *Weaver v. Searle Bros.*, 131 Idaho 610, 962 P.2d 381 (1998); *West v. Sonke*, 132 Idaho 133, 968 P.2d 228 (1998); *Magic Valley Truck Brokers, Inc. v. Meyer*,

133 Idaho 110, 982 P.2d 945 (Ct. App. 1999); *Hummer v. Evans*, 132 Idaho 830, 979 P.2d 1188 (1999); *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000); *Eagle Water Co. v. Roundy Pole Fence Co.*, 134 Idaho 626, 7 P.3d 1103 (2000); *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001); *Beard v. George*, 135 Idaho 685, 23 P.3d 147 (2001); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 48 P.3d 1256 (2002); *Primary Health Network v. State*, 137 Idaho 663, 52 P.3d 307 (2002); *Hill v. Hill*, 140 Idaho 812, 102 P.3d 1131 (2004); *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 105 P.3d 700 (Ct. App. 2005); *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005); *VanVooren v. Astin*, 141 Idaho 440, 111 P.3d 125 (2005); *Thomson v. Olsen*, 147 Idaho 99, 205 P.3d 1235 (2009); *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos.*, 147 Idaho 84, 205 P.3d 1220 (2009); *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009); *Aguilar v. Coonrod*, 151 Idaho 642, 262 P.3d 671 (2011).

#### DECISIONS UNDER PRIOR RULE OR STATUTE

##### ANALYSIS

Cost of Brief.

Cost of Transcript.

Costs Against State.

Modification by Lower Court.

Modification of Judgment.

##### Cost of Brief.

Where custom of Supreme Court is to receive typewritten briefs in all original proceedings, it is not necessary to have a brief printed; hence cost of a printed brief is not a necessary disbursement and can not be taxes as a part of the costs in the case. *Cronan v. District Court*, 15 Idaho 462, 98 P. 614 (1908).

##### Cost of Transcript.

Appellate court will allow costs to be taxed for a printed transcript at rate fixed by rule of court. *Ulbright v. Baslington*, 20 Idaho 546, 119 P. 294 (1911).

##### Costs Against State.

Former statute authorized the allowance of costs to a successful plaintiff in an appeal by the former state tax collector and acting state tax collector to the Supreme Court from a judgment against them for refund of taxes paid by the plaintiff under protest as to their legality. *American Oil Co. v. Neill*, 90 Idaho 333, 414 P.2d 206 (1966), overruled on other grounds, *County of Ada v. Red Steer Drive-Ins*, 101 Idaho 94, 609 P.2d 161 (1980).

##### Modification by Lower Court.

Costs taxed by Supreme Court become part of judgment, and lower court is without authority to modify them. *Mountain Home Lumber Co. v. Swartwout*, 33 Idaho 737, 197 P. 1027 (1921).

##### Modification of Judgment.

Judgment having been modified on appeal, no costs of appeal are allowed. *Jardine v. Hawkes*, 44 Idaho 237, 256 P. 97 (1927).

## Rule 41. Attorney fees on appeal.

(a) **Application for Attorney Fees — Waiver.** Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

(b) **Oral Argument on Attorney Fees.** At the time of oral argument of an appeal, the parties may present argument as to whether or not the party claiming attorney fees has a legal right thereto.

(c) **Adjudication of Right to Attorney Fees.** The Supreme Court in its decision on appeal shall include its determination of a claimed right to attorney fees, but such ruling will not contain the amount of attorney fees allowed.

(d) **Amount of Attorney Fees.** If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40. The claim for attorney fees, which at the discretion of the court may include paralegal fees, shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. Attorney fees may include the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing the party's case. The opposing party may object to the amount of attorney fees claimed in the same manner as provided for objections to a memorandum of costs in Rule 40. The Court shall determine the amount of attorney fees or remand this question to the district court or agency to hear additional evidence and determine the amount of attorney fees to be allowed. Upon the determination of the amount of attorney fees, the Clerk shall insert the amount thereof in the remittitur in the same manner as the Clerk inserts costs pursuant to Rule 40(f).

(e) **Number of Copies.** An original and six copies of the claim or memorandum for attorney fees, objections to attorney fees, and briefs in support of or in opposition thereto shall be filed with the Clerk of the Supreme Court. (Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 23, 1990, effective July 1, 1990; amended March 19, 2009, effective July 1, 2009.)

## JUDICIAL DECISIONS

### ANALYSIS

Attorney Fees.  
Award Justified.  
Award to Amicus Curiae.  
Award to Appellees.  
Compliance with Rule.  
Criminal Action.  
Discretion.  
Divorce Action.  
Failure to Comply with Appellate Rules.  
Failure to Identify Authority for Reward.  
Failure to Provide Adequate Record.  
Failure to Raise Issue in Briefs.  
Frivolous Appeal.  
Genuine Issue.  
In General.  
Insufficient Grounds for Appeal.  
No Entitlement to Fees.  
—Failure to Identify Authority for Award.

—Habeas Corpus Action.  
—Sexual Harassment Action.  
Prevailing Party.  
Recovery by Criminal Appellant.  
Worker's Compensation Cases.

### Attorney Fees.

In a case involving the proposed enlargement of water rights by an irrigation district, attorney fees were not awarded as a sanction because the claim was not frivolous, unreasonable, or un-meritorious. *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.* (In re SRBA Case No. 39576), 141 Idaho 746, 118 P.3d 78 (2005).

Because of its failure to cite appropriate authority, the employer's successor was not granted attorney fees on appeal. *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005).

Where there was a genuine issue as to whether a driver had operated insured vehicle with the owner's permission, and where the existence of that permission governed the insurers' obligation, attorney fees were not awarded to respondent insurer, despite the fact that respondent prevailed on appeal. *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 47, 218 P.3d 391 (2009).

#### **Award Justified.**

Where plaintiffs presented no persuasive argument in support of the contention that the district court, in granting attorney fees to defendant, abused its discretion or misapplied the law, attorney fees on appeal were also awarded to defendant. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

Where plaintiffs employed clearly dilatory tactics throughout the pretrial stages of litigation, and appealed to the Supreme Court for relief from the sanctions they brought upon themselves, an award of attorney fees was justified. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

Because the jury's verdict was supported by substantial evidence, the court held that the real estate sales contract between the parties supported an award of attorney fees on appeal. *Haag v. Pollack*, 122 Idaho 605, 836 P.2d 551 (Ct. App. 1992).

Dairyman's action against farmer for non-delivery of hay was based entirely upon the existence of a contract. Although dairyman failed to prove a contract, that failure should not insulate dairyman from having to pay a reasonable award of attorney fees to the prevailing party. Because farmer prevailed in an action brought to recover damages for the breach of contract for the sale of hay, he was entitled to a reasonable award for attorney fees incurred in bringing the appeal. *Hilt v. Draper*, 122 Idaho 612, 836 P.2d 558 (Ct. App. 1992).

Where party had agreed in promissory note to pay all costs incurred in collecting the sums due, including attorney fees on appeal, and where the appeal merely presented an invitation to second-guess the trial court on conflicting evidence and issues not raised below, an award of attorney fees to the opposing party was appropriate. *Saint Alphonsus Regional Medical Ctr., Inc. v. Krueger*, 124 Idaho 501, 861 P.2d 71 (Ct. App. 1993).

Where the only serious question presented was whether the term "judicial proceeding" encompassed the letters written two weeks after the taking of a default judgment in which the attorney informed the trial court of a possible fraud and requested that the court inquire into the matter, in light of the case law and the clearly enunciated policy behind

the rule granting immunity for such communications, the appeal was unreasonable and without adequate legal foundation. Therefore, attorney fees were proper for the respondents on appeal. *Malmin v. Engler*, 124 Idaho 733, 864 P.2d 179 (Ct. App. 1993).

Because company failed on appeal to present any significant issue regarding a question of law, had not shown that findings of fact made by lower court were arguably unsupported by substantial evidence, did not advance any new legal standards or seek modification of existing ones, attempted to relitigate matters put to rest by first appeal, complained of the admission of exhibits that plainly had no bearing on the judgment and whose admission could not possibly constitute reversible error, raised as issues pretrial rulings that after trial were ultimately found in its favor, and disingenuously claimed not to know what discovery order it had disobeyed and for which attorney fees were imposed as sanctions, the appeal was deemed to be unreasonable and without foundation and attorney fees were awarded pursuant to subsection (a) of this rule and § 12-121 and costs pursuant to I.A.R. 40. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

The mere fact that an arbitrator's interpretation of a prior case is unsatisfactory to a party is not, of itself, a valid basis for appeal; thus where the nonprevailing party presented no cogent argument as to why settled law did not apply, the appeal was pursued frivolously and without foundation and attorney, prevailing in professional malpractice case, was entitled to attorney fees. *Chicoine v. Bignall*, 127 Idaho 225, 899 P.2d 438 (1995).

Where legal malpractice action based on medical malpractice action was brought based upon deliberate misstatements to a court of law by both the litigant and her counsel acting in concert, the appeal in such action was brought or defended frivolously, unreasonably, or without foundation and therefore attorney's fees should be awarded pursuant to this rule, and costs should be awarded pursuant to I.A.R., Rule 40. *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997).

Where plaintiff failed to provide argument or authority in support of the only issues on appeal that were properly before the court, the appeal was brought and pursued frivolously, unreasonably, and without foundation and thus defendants were entitled to attorney fees and costs on appeal pursuant to § 12-121, I.R.C.P. 54(e)(1), and this rule. *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997).

Where plaintiffs presented arguments that



were largely incomprehensible, unreasonable, and lacking foundation in law, it was proper to award attorney fees in favor of the respondents. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999).

Where the plaintiff's appellate argument asked the court to disregard the plainly governing civil rule, and where he had made no colorable argument that the criteria of the applicable rule were satisfied with respect to his claim against the decedent's estate, attorney fees on appeal were awarded to the defendant estate. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

Defendant was awarded attorney fees on appeal where plaintiff argued numerous issues which he failed to preserve for appeal by proper objection, argued with findings of fact and invited the appellate court to substitute its own judgment for that of the trial court, and urged the court to ignore firmly-established law. *Kirkman v. Stoker*, 134 Idaho 541, 6 P.3d 397 (Ct. App. 2000).

Where former husband presented no argument or authority to show that the magistrate abused its discretion in dividing and valuing retirement benefits under the reserved jurisdiction method by utilizing established time rule instead of the accrued benefits method, the district court properly awarded former wife attorney fees pursuant to the appeal. Moreover, the former wife was entitled to attorney fees and costs pursuant to former husband's appeal to the supreme court. *Hunt v. Hunt*, 137 Idaho 18, 43 P.3d 777 (2002).

On appeal, an award of attorney fees may be granted to the prevailing party pursuant to I.C. § 12-121 and Idaho App. R. 41; such an award is appropriate when the court is left with the abiding belief that the appeal has been brought, or defended frivolously, unreasonably, or without foundation. *Hagy v. State*, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).

Appellate court awarded attorney fees to a cow owner, a pasture owner, and the state in a personal injury action brought by injured parties who struck a cow on a highway, as the injured parties' arguments on appeal totally lacked foundation. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

#### **Award to Amicus Curiae.**

Where the purchasers of property at a partition sale could not continue to effectively protect their interests absent involvement, as amicus curiae, in an appeal from a decision enforcing the partition judgment and finalizing the sale, the purchasers would be awarded costs and attorney fees. *Mendenhall v. Caine*, 101 Idaho 628, 619 P.2d 146 (1980).

#### **Award to Appellees.**

Where in an action by a lender against the

guarantor of certain loans, the lender responded successfully to the principal appeal which was brought by the guarantor and the lender cross-appealed successfully on the question of entitlement to attorney fees for bringing its original cause of action, the lender was therefore entitled to reasonable attorney fees incurred in the appeal. *Industrial Inv. Corp. v. Rocca*, 102 Idaho 920, 643 P.2d 1090 (Ct. App. 1982).

#### **Compliance with Rule.**

Where a reply brief filed after July 1, 1977, contained a claim for attorney's fees, this rule was complied with. *Stanger v. Stanger*, 98 Idaho 725, 571 P.2d 1126 (1977).

When properly requested in the first appellate brief filed by a party, this Rule provides for an award of attorney fees on appeal. *Tentinger v. McPheters*, 132 Idaho 620, 977 P.2d 234 (Ct. App. 1999).

Defendant shareholder was not entitled to an award of attorney fees where he did not cite any statutory or contractual provision authorizing such award; since Idaho R. App. P. 41 did not provide the authority for awarding attorney fees, the appellate court would not address the issue. *Gilman v. Davis*, 138 Idaho 599, 67 P.3d 78 (2003).

Contractor was awarded appellate attorney fees and costs in customers' appeal of an award of attorney fees and costs to the contractor as the prevailing party in a property damage action because the contractor properly raised the issue of attorney fees on appeal by listing it as a separate issue in the contractor's first appellate brief and addressing it in detail with supporting argument and authority. *Crump v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009).

#### **Criminal Action.**

Absent an explicit statutory authorization, attorney fees incurred by a defendant who prevails on appeal in a criminal action are not recoverable against the state. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

#### **Discretion.**

Where the decision of the trial court is a matter of discretion under this section the appellants must present a cogent challenge with regard to the exercise of discretion under the holding of *Pass v. Kenny*, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990). *United States Nat'l Bank v. Cox*, 126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995).

#### **Divorce Action.**

Costs and attorney's fees were awarded to plaintiff-wife in a divorce action. *Stanger v. Stanger*, 98 Idaho 725, 571 P.2d 1126 (1977).

Where a plaintiff wife brought an appeal to



a district court from a magistrate's determination of property issues in a divorce action, the wife's failure to object to the memorandum of costs filed by the defendant husband in the district court did not constitute a waiver of all objections to the claimed attorney fees, because the district judge was sitting as an appellate court in this action and, therefore, the district judge was required to determine the appeal in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court; thus, this rule governed the procedure for applying for attorney fees on appeal. *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

#### **Failure to Comply with Appellate Rules.**

Where plaintiff was unprepared to proceed with proof on date of trial and on appeal failed to comply with a number of provisions of the Idaho Appellate Rules, Supreme Court was justified in awarding attorney fees to defendant on appeal under this rule and § 12-121. *Jensen v. Doherty*, 101 Idaho 910, 623 P.2d 1287 (1981).

#### **Failure to Identify Authority for Reward.**

Father was not entitled to attorney's fees in his wrongful death action against the Department of Health and Welfare and a social worker because he failed to provide the court with statutory authority allowing an award of attorney's fees. *Rees v. State*, 143 Idaho 10, 137 P.3d 397 (2006).

This rule did not provide a mechanism by which the Supreme Court of Idaho could award attorney fees because the rule provided the procedure for requesting attorney fees on appeal, but was not authority alone for awarding fees. *Commercial Ventures v. Lea Family Trust*, 145 Idaho 208, 177 P.3d 955 (2008).

In an action on a credit card account, a bank was not entitled to an award of attorney's fees on appeal because the bank failed to cite to any legal authority authorizing such an award. Idaho App. R. 41 merely set forth the procedure for awarding attorney's fees on appeal; neither Idaho App. R. 35 or Idaho R. Civ. P. 54(e)(1) provided any authority for such an award; and the bank failed to provide any argument that the action fit within the provisions of I.C. § 12-120(3). *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 240 P.3d 583 (2010).

#### **Failure to Provide Adequate Record.**

In petition by mother that child buried in Idaho be exhumed and reinterred in New Mexico, trial court denied father's motion to

dismiss on the basis of unclean hands, as the father had wrongfully removed child from New Mexico in violation of court order. As the record provided on appeal was inexcusably scant and clearly insufficient to conduct a review of the issues asserted by the father, the court imposed costs on the father's attorney on its own motion. *Garcia v. Pinkham* (In re Pinkham), 144 Idaho 898, 174 P.3d 868 (2007).

#### **Failure to Raise Issue in Briefs.**

The reviewing court did not consider a request for fees on appeal where the plaintiffs did not raise the issue in their first appellate brief. *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 987 P.2d 1035 (1999).

Idaho App. R. 41 was not the authority for the awarding of attorney fees on appeal as attorney fees were awardable only where they were authorized by statute or contract; because the witness did not support her request for attorney fees on appeal with any authority or argument, the appellate court would not consider the issue. *Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003).

#### **Frivolous Appeal.**

Where the appeal was brought frivolously, unreasonably and without foundation, attorney fees were awarded on appeal. *Keller v. Rogstad*, 112 Idaho 484, 733 P.2d 705 (1987).

Where the investor's appeal was frivolous and without foundation, the Court of Appeals awarded attorney fees on appeal to the futures commission merchant, the amount to be determined under I.A.R. 41(d). *Sinclair & Co. v. Gurule*, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988).

Where husband's appeal was brought frivolously and without foundation and merely has disputed the trial court's factual findings by pointing to conflicts in the evidence, wife was entitled to an award of a reasonable attorney fee on appeal, to be determined under this rule. *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988).

A taxpayer whose appeal from a decision awarding county payment of delinquent personal property taxes raised frivolous and non-frivolous issues was liable for attorney's fees only as to issues raised frivolously, unreasonably or without foundation. *Childers v. Wolters*, 115 Idaho 527, 768 P.2d 790 (Ct. App. 1988).

Where appellant failed on appeal to present any significant issue regarding a question of law, where no findings of fact made by the district court were clearly or arguably unsupported by substantial evidence, where the court was not asked to establish any new legal standards or modify existing ones, and where

the focus of the case was the application of settled law to the facts, the appeal was deemed to be unreasonable and without foundation and attorney fees were awarded the appellee. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989).

Appeal was brought frivolously and without foundation where appeal presented no meaningful issue on a question of law in a dispute between the wife and son of decedent, over the ownership of a community property beekeeping business. *Mundell v. Stellmon*, 121 Idaho 413, 825 P.2d 510 (Ct. App. 1992).

Respondents are entitled to an award of attorney fees on appeal where nonprevailing party invited the Court of Appeals to do no more than second-guess the trial court on conflicting evidence and where the law was well-settled. *Blaser v. Cameron*, 121 Idaho 1012, 829 P.2d 1361 (Ct. App. 1991).

Defendants' claims and defenses were based upon the false testimony of one of the defendants. A claim or defense based upon false testimony is frivolous, unreasonable and without foundation. However, while defendants did not prevail on the issues raised in plaintiffs' cross-appeal, their defense to such cross-appeal was not frivolous, unreasonable or without foundation. Therefore, plaintiffs were entitled to their costs associated with the appeal and cross-appeal and were entitled to attorneys' fees on defendants' appeal, but not for fees resulting from their cross-appeal. *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

An award of attorney fees on appeal in favor of the insurer was proper where the appeal was frivolous because the insured presented no substantial legal argument, Idaho. R. App. P. 41(a), I.C. § 12-121. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004).

Sellers appeal was brought or defended frivolously, unreasonably, or without foundation because the trial court's summary judgment was based upon alternative grounds and the fact that one of the grounds might have been in error was of no consequence and could be disregarded if the judgment could have been sustained upon one of the other grounds; thus, an award of attorney fees on appeal was granted to the escrow agent and the buyer pursuant to Idaho App. R. 41(a) and § 12-121. *Andersen v. Profl Escrow Servs.*, 141 Idaho 743, 118 P.3d 75 (2005).

Where plaintiff voluntarily dismissed some of his claims as to a defendant and then re-raised those claims on appeal, his appeal, as to those issues, was frivolous, and the defendant was entitled to an award of costs and attorney fees related to those claims.

*Davidson v. Davidson*, 150 Idaho 455, 248 P.3d 242 (2011).

### **Genuine Issue.**

Where the evidence showed that a wife's appeal to the district court, from a magistrate's determination of property issues in a divorce action, seriously addressed the then unresolved and genuine issue of the transmutation of her husband's property from separate to community property, the district judge improperly determined that the husband was entitled to attorney fees since the appeal was not brought or pursued frivolously, unreasonably or without foundation. *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

Although, with one exception, the issues raised by the defendant on appeal were frivolous and without foundation, the only exception was settled by a decision issued after the defendant's briefs had been filed; therefore, the defendant's appeal was nonfrivolous, and the Court of Appeals declined to award attorney fees on appeal to the tax commission. *Parsons v. Idaho State Tax Comm'n*, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986).

The appeal was brought without foundation and the appellee was entitled to a reasonable award of attorney fees to be determined under this rule, where the appeal did not raise a genuine issue as to the legal standards governing the trial court's discretion to award costs, nor did it present a cogent challenge to the judge's reasoning process in exercising that discretion. *McGill v. Lester*, 111 Idaho 841, 727 P.2d 1269 (Ct. App. 1986).

Where the issues presented by the appellant were entirely justified, the respondents were not entitled to attorney fees on appeal. *Ashe v. Hurt*, 114 Idaho 70, 753 P.2d 281 (Ct. App. 1988), *aff'd*, 117 Idaho 266, 787 P.2d 252 (1990).

Plaintiffs' request for fees was denied where the defendants raised serious issues about whether the district judge properly characterized the relationship between the defendants and the plaintiffs and whether the waiver and release provision of their rental agreement should have barred recovery. *Hanks v. Sawtelle Rentals, Inc.*, 133 Idaho 199, 984 P.2d 122 (1999).

Where the district court did not correctly apply the law with regard to the amount of credit to paid to the other driver's insurer, and the outcome of the case was mixed, attorney fees were inappropriate. *Schaffer v. Curtis-Perrin*, 141 Idaho 356, 109 P.3d 1098 (2005).

### **In General.**

An award of attorney fees may be granted under I.C. § 12-121 and this rule on appeal to the prevailing party; such an award is appro-

appropriate when this court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably or without foundation. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989).

An award of attorney fees will be made if an appeal does no more than simply invite the appellate court to second-guess a trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or — on review of discretionary decisions — no cogent challenge is presented with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990).

Attorney fees on appeal are appropriate under this rule and this section if the appellate court is left without an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation under the holding of *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634 (1990). *United States Nat'l Bank v. Cox*, 126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995).

This rule does not provide the Court with a basis for awarding attorney fees on appeal, rather, it simply allows the court to award fees if those fees are allowed by some other contractual or statutory authority. *Robbins v. County of Blaine*, 134 Idaho 113, 996 P.2d 813 (2000).

Idaho Appellate Rule 35(a)(5) and this rule merely set forth the procedural steps necessary for a party to seek attorney fees on appeal and do not provide an independent basis for an award of attorney fees. *Collection Bureau, Inc. v. Dorsey*, 150 Idaho 695, 249 P.3d 1150 (2011).

#### **Insufficient Grounds for Appeal.**

Where an appeal presented no meaningful issue on a question of law and, in regard to the trial court's findings, the appellant was unable to do more than dispute minor details and point to conflicts in the evidence, the appellate court was left with the abiding belief that the appeal was brought without foundation, and thus, the prevailing appellee was entitled to an award of a reasonable attorney fee on appeal. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982).

Where a dispassionate view of the record disclosed that there was no valid reason to anticipate reversal of the lower court's judgment on the factual grounds urged, the record contained abundant evidence supporting the determination of the judge and jury, and the arguments and authorities advanced in support of the two legal issues presented on appeal failed to establish how the discretion-

ary decisions of the district court not to bifurcate the issues involved in the trial or to act upon the motion for a view arose to the level of error, costs and attorney fees would be awarded to the appellees on appeal. *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

Where the narrow focus of appeal by landlord from judgment imposing materialman's lien was upon the application of settled law to undisputed facts and the landlord made no substantial showing that the district court misapplied the law, the court concluded that the appeal was brought and pursued without foundation and attorney fees would be awarded to the contractor in an amount to be determined as provided by subsection (d) of this rule. *Christensen v. Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P.2d 70 (Ct. App. 1983).

Where in appeal appellant did not show any findings of facts that were supported by the evidence and appellate court was not asked to establish any new legal standards, nor to modify or clarify any existing legal standards but the focus of the appeal was the application of settled law to facts, attorney's fees were awarded to appellee. *Scott v. Castle*, 104 Idaho 719, 662 P.2d 1163 (Ct. App. 1983).

Where appellants who were challenging order reducing attorney fees for administratrix of estate did not point to any findings of fact which were clearly, or even arguably, unsupported by substantial and competent evidence, presented no significant issue on a question of law, did not request that the court establish any new legal standards, nor that the court modify or clarify any existing standards, and where the narrow focus of the appeal was the application of settled law to the facts and there was no showing that the magistrate misapplied the law, the appeal from the district court was brought unreasonably and without foundation; hence, attorney fees on appeal were awarded to the respondent heirs in an amount to be determined as provided in subsection (d) of this rule. *Gatchel v. Butler*, 104 Idaho 876, 664 P.2d 783 (Ct. App. 1983).

Where appellant did not point to any findings of fact, with one exception, which was not supported by substantial and competent evidence and that exception did not affect the trial court's ultimate conclusions of law nor did he ask the court to establish any new legal standards, nor to modify or clarify any existing standards the appeal was brought frivolously, unreasonably and without foundation. Therefore, the court awarded attorney fees to the respondents. *Fairchild v. Fairchild*, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984).

Where the appeal presents no meaningful



issue on a question of law, but simply invites the appellate court to second-guess the trial judge on questions of fact, an award of attorney fees is appropriate. *DeMarco v. Stewart*, 107 Idaho 555, 691 P.2d 801 (Ct. App. 1984).

Although the defendant's arguments to the Supreme Court superficially read reasonably, its contentions in fact were unreasonably grounded; therefore, the district court correctly awarded attorney's fees to the plaintiff. *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 739 P.2d 301 (1987).

Landowner who brought an action against sublessee, seed supplier, and tenant farmers to recover the value of its share of wheat harvested from the landowner's property by the tenant farmers, was entitled to reasonable attorney fees on appeal, to be determined by the trial court pursuant to this rule, where the arguments forwarded by the seed supplier, although apparently sincere, were substantially without merit and the appeal was unreasonable. *NBC Leasing Co. v. R & T Farms, Inc.*, 114 Idaho 141, 754 P.2d 454 (Ct. App. 1988).

An award under I.C. § 12-121 is appropriate where an appeal presents no meaningful issue on a question of law but simply invites the appellate court to second-guess the trial judge on conflicting evidence; in such a case a reasonable attorney fee, to be determined under this rule, may be awarded. *Knowlton v. Mudd*, 116 Idaho 262, 775 P.2d 154 (Ct. App. 1989).

Where substantial and competent evidence supporting the district court's findings was minimally challenged by defendant's case, and appeal was brought without foundation, plaintiff was entitled to an award of reasonable attorney fees on appeal. *Tri-Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 829 P.2d 540 (Ct. App. 1992).

#### **No Entitlement to Fees.**

Neither party presented a sufficient showing of entitlement to attorney fees on appeal, where the appeal was not brought, pursued or defended frivolously, unreasonably or without foundation. *Siegel Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531, 757 P.2d 1250 (Ct. App. 1988).

Where the record did not reflect that the plaintiffs' claims were brought or pursued frivolously, but that their arguments had at least some foundation, attorney fees were not awarded on appeal. *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999).

The reviewing court declined to award attorney fees on appeal where the defendant brought some legitimate issues before the court and did not pursue its appeal "frivolously, unreasonably, or without foundation."

*Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Lien claimant presented a good faith argument for modification of I.C. § 45-506, albeit unsuccessfully, and given the divided nature of prior case law and the potential for an alternative construction of the statute, it could not be said that the lien claimant's argument was frivolous, unreasonable, or without foundation; the request for attorney fees was, therefore, denied. *Ultrawall, Inc. v. Washington Mut. Bank*, 135 Idaho 832, 25 P.3d 855 (2001).

Attorney fees were not awarded where plaintiff's challenge to the discovery sanction imposed by the trial court, though unsuccessful, was not frivolous. *Clark v. Raty*, 137 Idaho 343, 48 P.3d 672 (Ct. App. 2002).

Where no statutory or contractual authority authorized an award of attorney fees in quiet title action, an appellate court was unable to award the fees on appeal. *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525 (2003).

In an insured's bad faith breach of contract action against her insurer, the insurer's request under Idaho App. R. 41 for attorney's fees on appeal was denied because R. 41 did not authorize such an award. *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003).

No attorney fees were awarded to either party where neither party brought or defended an appeal frivolously, unreasonably, or without foundation; as the prevailing party, the ex-wife was awarded costs. *Pike v. Pike*, 139 Idaho 406, 80 P.3d 342 (Ct. App. 2003).

Department of Finance's request for attorney fees on appeal was denied where the central issues on appeal were the interpretation of the word "claim," as found in § 26-2223(2), and whether the corporation's agreement was an assignment for collection purposes or an assignment of the entire claim; there were issues of first impression and a case of first impression did not constitute an area of settled law. *Purco Fleet Servs. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 90 P.3d 346 (2004).

In an action arising from a breach of a contract to design and construct a cabin, a wholesale supplier who prevailed on summary judgment was properly awarded costs and attorney fees pursuant to § 12-121, and the supplier was not entitled to attorney fees on appeal under § 12-120, because it only prevailed in part. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

After determining that the State of Idaho DOT properly denied plaintiff's application to renew his driver's license for failing to provide



his social security number, an appellate court declined to award the state attorney's fees because the state conceded that plaintiff's religious beliefs and motivations were sincere. *Lewis v. State*, 143 Idaho 418, 146 P.3d 684 (2006).

Father was not entitled to attorney's fees in his wrongful death action against the department of health and welfare and a social worker because he failed to provide the court with statutory authority allowing an award of attorney's fees. *Rees v. State*, 143 Idaho 10, 137 P.3d 397 (2006).

After determining that the State of Idaho DOT properly denied plaintiff's application to renew his driver's license for failing to provide his social security number, an appellate court declined to award the State attorney fees because the State conceded that plaintiff's religious beliefs and motivations were sincere. *Lewis v. State*, 143 Idaho 418, 146 P.3d 684 (2006).

Therapist was not entitled to attorney fees on appeal where she failed to cite any statutory authority for such an award. *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007), overruled on other grounds, *City of Osburn v. Randel*, — Idaho —, 277 P.3d 353, 2012 Ida. LEXIS 105 (Idaho 2012).

Mother's request for an award of fees under this rule was denied because this rule only specifies the procedure for requesting an award of attorney fees on appeal. It did not serve as substantive authority for awarding fees. *Danti v. Danti*, 146 Idaho 929, 204 P.3d 1140 (2009).

Where appellant insured's suit against respondent insurance company for breach of an insurance contract and declaratory relief was dismissed, and the Supreme Court of Idaho upheld the decision, although the insurance company prevailed on appeal, I.C. § 41-1839(4) precluded an award of attorney fees. *Villa Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

Employee was not entitled to attorney's fees under I.C. § 72-804 and Idaho App. R. 41 because the Idaho Industrial Commission's decision to deny the employee workers' compensation benefits was affirmed on appeal. *Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 243 P.3d 666 (2010).

#### **—Failure to Identify Authority for Award.**

Reference to this rule is not sufficient by itself to properly request an award of attorney fees on appeal; no fees could be awarded because no statute or contractual provision authorizing such an award was identified.

*State v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005).

Lessor was not entitled to attorney fees on appeal because the lessor neither submitted a legal argument in support of its request nor specified the statute or contractual provision pursuant to which an award of fees was available. *Parkside Sch., Inc. v. Bronco Elite Arts & Ath., LLC*, 145 Idaho 176, 177 P.3d 390 (2008).

Where claimant sought benefits for a work-related injury, the Supreme Court of Idaho reversed the decision of the Idaho Industrial Commission which had denied the claim as untimely; because respondents, the employer and the Idaho State Insurance Fund, had reasonable grounds to contest the claim because case law on the "anniversary rule" was unclear, claimant was not entitled to attorney fees. *Nelson v. City of Bonners Ferry*, 149 Idaho 29, 232 P.3d 807 (2010).

#### **—Habeas Corpus Action.**

Where magistrate summarily dismissed defendant's petition for habeas corpus relief and where, on appeal, the district court did not remand to the magistrate for an evidentiary hearing, the full nature and extent of the state's defense to defendant's petition was unknown, and based on the current record it was not possible to determine if the state's actions met the criteria necessary under § 12-121 and this rule for an award of attorney fees to defendant, as such, the district court did not abuse its discretion in denying defendant his attorney fees in the intermediate appeal. *Rendon v. Paskett*, 126 Idaho 944, 894 P.2d 775 (Ct. App. 1995).

#### **—Sexual Harassment Action.**

While there were compelling arguments for awarding fees to employer whose favorable directed verdict in quid pro quo sexual harassment action was upheld on appeal, due to the sparse case law in Idaho involving sexual discrimination issues, court could not say that appeal was brought for improper purposes or in bad faith. *De Los Santos v. J.R. Simplot Co.*, 126 Idaho 963, 895 P.2d 564 (1995).

#### **Prevailing Party.**

Where the contractor in breach of contract suit prevailed on appeal by successfully responding to the issues raised by the plaintiff owners and the construction contract mandated an award of attorney fees to the prevailing party, the contractor was entitled to reasonable attorney fees to be determined in conformance with this rule. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Where insured prevailed on one issue and

also successfully met challenges on other issues, it was entitled to a reasonable attorney fee on appeal. *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. App. 1984).

If, on remand, the district court would find the partnership to be the prevailing party below, entitling it to attorney fees and a full award of costs, then the partnership would be deemed the prevailing party on appeal as well and entitled to cost and attorney fee awards pursuant to I.A.R. 40 and this rule. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

The decision of the Court of Appeals to uphold the award of attorney fees in the district court made the plaintiff the prevailing party on appeal; accordingly, the plaintiff was entitled to an award of a reasonable attorney fee on appeal, to be determined under this rule. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988).

While landlord was not successful on his cross-appeal, he was the prevailing party on the underlying claim for breach of the lease agreement, both at trial and on appeal, and based on the terms of the lease, which provided for the payment of all attorney's fees and court costs incurred in such litigation, landlord was entitled to an award of costs and fees incurred on the appeal but not on the cross-appeal. *Melton v. Lehmann*, 118 Idaho 61, 794 P.2d 650 (Ct. App. 1990).

Plaintiffs were entitled to an award of fees for appeal even though defendant could ultimately be found to be the prevailing party after trial on his counterclaim. *Bowen v. Heth*, 120 Idaho 452, 816 P.2d 1009 (Ct. App. 1991).

Seller's counterclaim was an action to recover on a contract for the sale of goods. Because the sellers prevailed on their claim below, and because the judgment of the district court on the contractual issue was affirmed, sellers were the prevailing parties on appeal and were thus entitled to an award of attorney fees and costs in both the lower court and on appeal. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

The plaintiff was not entitled to costs on appeal where it was the prevailing party on appeal but only prevailed partially on cross-appeal. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Where it remained to be seen whether the prevailing party on appeal would be the prevailing party in the action, and, therefore, entitled to attorney fees under Idaho Code § 12-120(3) and Idaho App. R. 41, the district court, upon final resolution of the case, could consider fees incurred on appeal when it made an award to the prevailing party. As a

matter of right, costs on appeal were awarded to the prevailing party on appeal under Idaho App. R. 40. *Cox v. City of Sandpoint*, 140 Idaho 127, 90 P.3d 352 (Ct. App. 2003).

Grant of summary judgment in favor of the purchasers pursuant to I.R.C.P. 56(c) was improper where the seller was not in breach of the sale agreement because the first amended covenants were simply void and thus, the purchasers were not deprived of any benefits under the contract; further, attorney fees and costs was proper pursuant to I.A.R. 41 because it was the prevailing party on appeal and the sale agreement further provided as such. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 93 P.3d 685 (2004).

Where a city did not prevail in a declaratory judgment action against several presenters regarding a proposed marijuana initiative, it was not entitled to attorney's fees; moreover, the presenters were not entitled to such fees on appeal either because the appeal had a reasonable basis since a pivotal case on the issue had not yet been decided. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006).

Where a city did not prevail in a declaratory judgment action against several presenters regarding a proposed marijuana initiative, it was not entitled to attorney fees; moreover, the presenters were not entitled to such fees on appeal either because the appeal had a reasonable basis since a pivotal case on the issue had not yet been decided. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006).

Investor was not entitled to attorney fees on appeal because the case presented an issue of first impression and the husband and wife, who brought the claim to recover profits paid to a fellow investor in an investment Ponzi scheme, prevailed on appeal. *Christian v. Mason*, 148 Idaho 149, 219 P.3d 473 (2009).

#### **Recovery by Criminal Appellant.**

A successful criminal appellant cannot recover attorney fees under §§ 12-120 and 12-121 which apply to only civil actions or under I.A.R. 40 and this rule absent an explicit statutory authorization. *State v. Roll*, 118 Idaho 936, 801 P.2d 1287 (Ct. App. 1990).

#### **Worker's Compensation Cases.**

There is no authority for the award of attorney fees against a worker's compensation claimant who unsuccessfully appeals to the Supreme Court of Idaho. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 775 P.2d 629 (1989).

**Cited in:** *Pratt v. Pratt*, 99 Idaho 500, 584 P.2d 645 (1978); *Levra v. National Union Fire Ins. Co.*, 99 Idaho 871, 590 P.2d 1017 (1979); *Idaho First Nat'l Bank v. Wells*, 100 Idaho

256, 596 P.2d 429 (1979); *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982); *Biggers v. Biggers*, 103 Idaho 550, 650 P.2d 692 (1982); *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982); *Fahrenwald v. LaBonte*, 103 Idaho 751, 653 P.2d 806 (Ct. App. 1982); *Goodwin v. Nationwide Ins. Co.*, 104 Idaho 74, 656 P.2d 135 (Ct. App. 1982); *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983); *Steiner v. Amalgamated Sugar Co.*, 106 Idaho 111, 675 P.2d 826 (Ct. App. 1984); *Andre v. Morrow*, 106 Idaho 455, 680 P.2d 1355 (1984); *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 681 P.2d 1010 (Ct. App. 1984); *Lind v. Perkins*, 107 Idaho 901, 693 P.2d 1103 (Ct. App. 1984); *Makin v. Liddle*, 108 Idaho 67, 696 P.2d 918 (Ct. App. 1985); *Miller Constr. Co. v. Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985); *Cheney v. Smith*, 108 Idaho 209, 697 P.2d 1223 (Ct. App. 1985); *Laight v. Idaho First Nat'l Bank*, 108 Idaho 211, 697 P.2d 1225 (Ct. App. 1985); *Centers v. Yehezkely*, 109 Idaho 216, 706 P.2d 105 (Ct. App. 1985); *Davis v. Gage*, 109 Idaho 1029, 712 P.2d 730 (Ct. App. 1985); *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986); *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986); *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct. App. 1986); *First Sec. Bank v. Mountain View Equip. Co.*, 112 Idaho 158, 730 P.2d 1078 (Ct. App. 1986); *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986); *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987); *Thomas v. John Hancock Mut. Life Ins. Co. (In re Death of Cole)*, 113 Idaho 98, 741 P.2d 734 (Ct. App. 1987); *Vanoski v. Thomson*, 114 Idaho 381, 757 P.2d 244 (Ct. App. 1988); *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988); *Pilcher v. Dattel*, 115 Idaho 79, 764 P.2d 446 (Ct. App. 1988); *Jennings v. Edmo*, 115 Idaho 391, 766 P.2d 1272 (Ct. App. 1988); *Parsons v. Beebe*, 116 Idaho 551, 777 P.2d 1224 (Ct. App. 1989); *Bell v. Golden Condor, Inc.*, 117 Idaho 21, 784 P.2d 351 (Ct. App. 1989); *Harter v. Products Mgt. Corp.*, 117 Idaho 121, 785 P.2d 685 (Ct. App. 1990); *Heirs & Devisees of Grover v. Roselle*, 117 Idaho 184, 786 P.2d 575 (Ct. App. 1990); *Andrews v. Idaho Forest Indus., Inc.*, 117 Idaho 195, 786 P.2d 586 (Ct. App. 1990); *Kinsela v. State, Dep't of Fin.*, 117 Idaho 632, 790 P.2d 1388 (1990); *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990); *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 794 P.2d 1389 (1990); *Needs v. State*, 118 Idaho 207, 795 P.2d 912 (Ct. App. 1990); *USA Fertilizer, Inc. v. Idaho First Nat'l Bank*, 120 Idaho 271, 815 P.2d 469 (Ct. App. 1991); *Hoff Cos. v. Danner*,

121 Idaho 39, 822 P.2d 558 (Ct. App. 1991); *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Dante v. Golas*, 121 Idaho 149, 823 P.2d 183 (Ct. App. 1992); *Ellibee v. Ellibee*, 121 Idaho 501, 826 P.2d 462 (1992); *Treasure Valley Bank v. Butcher*, 121 Idaho 531, 826 P.2d 492 (Ct. App. 1992); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (Ct. App. 1992); *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 831 P.2d 541 (1992); *Figuroa v. Kit-San Co.*, 123 Idaho 149, 845 P.2d 567 (Ct. App. 1992); *Suitts v. First Sec. Bank of Idaho, N.A.*, 125 Idaho 27, 867 P.2d 260 (Ct. App. 1993); *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994); *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994); *Parrott v. Wallace*, 127 Idaho 306, 900 P.2d 214 (Ct. App. 1995); *Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382 (Ct. App. 1996); *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996); *Hawks v. EPI Prods. USA, Inc.*, 129 Idaho 281, 923 P.2d 988 (1996); *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Idaho State Tax Comm'n v. Beacom*, 131 Idaho 569, 961 P.2d 660 (Ct. App. 1998); *Weaver v. Searle Bros.*, 131 Idaho 610, 962 P.2d 381 (1998); *Tupper v. State Farm Ins.*, 131 Idaho 724, 963 P.2d 1161 (1998); *Danz v. Lockhart*, 132 Idaho 113, 967 P.2d 1075 (Ct. App. 1998); *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000); *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000); *Perez v. Perez*, 134 Idaho 555, 6 P.3d 411 (Ct. App. 2000); *Weaver v. Stafford*, 134 Idaho 691, 8 P.3d 1234 (2000); *Stanley v. McDaniel*, 134 Idaho 630, 7 P.3d 1107 (2000); *Blaha v. Board of Ada County Comm'rs*, 134 Idaho 770, 9 P.3d 1236 (2000); *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 21 P.3d 918 (2001); *Kohring v. Robertson*, 137 Idaho 94, 44 P.3d 1149 (2002); *Primary Health Network v. State*, 137 Idaho 663, 52 P.3d 307 (2002); *Action Collection Serv. v. Seele*, 138 Idaho 753, 69 P.3d 173 (Ct. App. 2003); *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 69 P.3d 1035; *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004); *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004); *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 105 P.3d 700 (Ct. App. 2005); *VFP VC v. Dakota Co.*, 141 Idaho 326, 109 P.3d 714 (2005); *Gibson v. Bennett*, 141 Idaho 270, 108 P.3d 417 (Ct. App. 2005); *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005); *VanVooren v. Astin*, 141 Idaho 440, 111 P.3d 125 (2005); *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005); *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d



338 (2006); *Silva v. Silva*, 142 Idaho 900, 136 P.3d 371 (Ct. App. 2006); *Foster v. Kootenai Med. Ctr.*, 143 Idaho 425, 146 P.3d 691 (Ct. App. 2006); *Goodman v. Lothrop*, 143 Idaho 622, 151 P.3d 818 (2007); *C Sys. v. McGee*, 145 Idaho 559, 181 P.3d 485 (2008); *Youngblood v. Higbee*, 145 Idaho 665, 182 P.3d 1199 (2008); *Losser v. Bradstreet*, 145 Idaho 670, 183 P.3d 758 (2008); *Lawrence v. Hutchinson*, 146 Idaho 892, 204 P.3d 532 (2009); *Neighbors for Responsible Growth v. Kootenai County*, 147

Idaho 173, 207 P.3d 149 (2009); *Craig v. Gellings*, 219 P.3d 1208, 2009 Ida. App. LEXIS 109 (Nov. 4, 2009); *Butters v. Valdez*, 149 Idaho 764, 241 P.3d 7 (Ct. App. 2010); *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d. 972 (2010); *Moore v. Moore*, 152 Idaho 245, 269 P.3d 802 (2011); *Fazzio v. Mason*, 150 Idaho 591, 249 P.3d 390 (2011); *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 254 P.3d 36 (2011); *Aguilar v. Coonrod*, 151 Idaho 642, 262 P.3d 671 (2011).

## RESEARCH REFERENCES

**A.L.R.** Construction of contingent fee contract as regards compensation for services after judgment or on appeal. 13 A.L.R.3d 673.

### Rule 42. Petition for rehearing.

(a) **Time for Filing — Filing Fee.** Petitions for rehearing must be physically filed with the Clerk of the Supreme Court, together with the filing fee, within 21 days after the filing date of the Court's opinion, and must be served upon all parties to the appeal or proceeding. If the opinion is modified, other than to correct a clerical error, an aggrieved party may physically file another petition for rehearing within 21 days from the date of the modified opinion and serve all adverse parties in the appeal or proceeding. No response to any petition for rehearing shall be made except upon direction of the Court.

(b) **Briefs on the Petition.** A brief or memorandum in support of the petition must be filed within 14 days of the filing date of the petition and shall be typewritten on letter size paper. If the appeal was expedited pursuant to Rule 12.2, the brief in support of the petition shall be filed with the petition or the petition will be summarily dismissed. An original and six (6) copies of the petition and brief shall be filed with the Clerk of the Supreme Court.

(c) **Oral Argument on Petition for Rehearing.** There shall be no oral argument upon the petition for rehearing of an appeal or proceeding unless ordered by the Supreme Court.

(d) **Notice of Rehearing — Briefs.** Copies of an order granting or denying a rehearing shall be served by the Clerk of the Supreme Court upon all parties to the appeal or proceeding. The order may set forth the issues to be reheard, and shall direct the time and order for the filing of briefs. A brief in support of or in opposition to a petition for rehearing need not be bound nor have any colored cover.

(e) **Oral Argument on Rehearing.** If the Supreme Court grants a petition for rehearing, argument upon rehearing shall be scheduled by the Court in the same manner as argument on the merits of an appeal or petition. (Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended January 4, 2010, effective February 1, 2010; amended March



18, 2011, effective July 1, 2011; amended November 20, 2012, effective January 1, 2013.)

## JUDICIAL DECISIONS

### ANALYSIS

Denial of Petition.

Motion for Reconsideration.

Reconsideration of Affirmance of Magistrate.

Sua Sponte Dismissal.

### Denial of Petition.

Although petitions for rehearing are not required under the present rules before seeking further appellate review by a higher court, neither is the higher review limited, under the rules, solely to the question of whether the application for rehearing should or should not have been granted. Commonly, the denial of a petition for rehearing preserves for review, by the higher appellate court, the merits of the decision entered by the lower court on appeal. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

### Motion for Reconsideration.

Defendant's motion to "reinstate" his appeal essentially constituted a petition for rehearing, which was timely and extended the period within which to seek further appellate review of the district court's dismissal decision, until 42 days following determination of the motion for reinstatement of the appeal from the magistrate division. When the district court entered an order on April 8, 1991, denying defendant's petition for rehearing, defendant's only remaining remedy was to appeal to the Supreme Court within 42 days. He was not entitled to file another petition for rehearing or any similar motion labeled as a "Motion for Reconsideration." Defendant did not file a notice of appeal within 42 days of April 8, 1991. Instead, he waited until after the district court again refused to reinstate the appeal from the magistrate division, and

then he filed a notice of appeal on May 31. Because the time for filing a notice of appeal was not stayed by the filing of the unauthorized "Motion for Reconsideration," the motion was not only unauthorized, it was also untimely. As a result, the Court of Appeals had no jurisdiction to review the merits of the district court's decision to dismiss the appeal. *Dieziger v. Pickering*, 122 Idaho 718, 838 P.2d 321 (Ct. App. 1992).

### Reconsideration of Affirmance of Magistrate.

Where, 11 days after the district court filed its decision affirming the magistrate's judgment against him, the husband applied to the district court for reconsideration of its affirmance, the request of the husband for reconsideration was properly treated by the district court as a petition for rehearing timely filed under I.A.R. 42 as incorporated by I.R.C.P. 83(x), and it preserved the merits of the decision of the district court affirming the magistrate's judgment, for further appellate review. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

### Sua Sponte Dismissal.

Where an order dismissing an appeal has been entered sua sponte, without prior notice and opportunity to be heard or to respond by memorandum, justice requires an opportunity to seek the court's reconsideration. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

**Cited in:** *Neilsen & Co. v. Cassia & Twin Falls County Joint Class A Sch. Dist.* 151, 103 Idaho 317, 647 P.2d 773 (Ct. App. 1982); *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984).

## Rule 43. Special writs. [Repealed.]

## Rule 44. Extraordinary appellate procedure.

The Supreme Court by order may alter, shorten, or eliminate any step or procedure in the appeal from an order or judgment upon finding extraordinary circumstances; provided, however, the time within which a party can file a notice of appeal, a notice of cross-appeal, or a petition for rehearing will not be shortened or lengthened. (Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986; amended March 24, 2005, effective July 1, 2005; amended June 8, 2011, effective July 1, 2011.)

JUDICIAL DECISIONS

ANALYSIS

Prohibition Against Rehearing Petition.  
Sua Sponte Dismissal.

**Prohibition Against Rehearing Petition.**

Dismissing an appeal without prior notice and opportunity to be heard or to file a memorandum concerning the dismissal, represents an extraordinary circumstance under which an appellate court may alter appellate procedure, and the court erred where it plainly sought to foreclose such an opportunity after the dismissal with its prohibition against filing a petition for rehearing. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

**Sua Sponte Dismissal.**

Where an order dismissing an appeal has been entered sua sponte, without prior notice and opportunity to be heard or to respond by memorandum, concerning the reason for a contemplated dismissal; justice requires an opportunity to seek the court's reconsideration. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

**Cited in:** *Lindsey v. Cornell*, 103 Idaho 562, 650 P.2d 704 (Ct. App. 1982); *State v. Tisdale*, 103 Idaho 836, 654 P.2d 1389 (Ct. App. 1982); *Olds v. Cook*, 104 Idaho 935, 665 P.2d 699 (1983); *Evans v. Andrus*, 124 Idaho 6, 855 P.2d 467 (1993).

**Rule 44.1. Expedited review for appeals brought pursuant to I.C. 18-609A.**

This rule governs procedures for an expedited review of an appeal brought pursuant to I.C. § 18-609A from an order of the district court denying a minor's petition for judicial bypass of parental consent.

**(a) Notice of appeal.**

(1) An appeal from any order denying a petition filed pursuant to I.C. § 18-609A (6) shall be made only by physically filing a notice of appeal with the clerk of the district court within five days, excluding weekends and holidays, from the date of issuance of the order. This filing may be made by facsimile machine process.

(2) If the district court denies a petition filed under I.C. § 18-609A, the district court must serve on the minor a copy of the order denying relief with the date and time endorsed, along with a "Notice of Appeal" form. The notice of appeal form shall include a request for the record and audio recording of the proceedings and notice to the clerk that the record and audio recording are to be immediately forwarded to the Idaho Supreme Court for filing. The district court shall advise the minor that the minor has five days, excluding weekends and holidays, from the date of issuance of the order to file the notice of appeal.

(b) **Transmittal of record.** Upon the filing of the notice of appeal, the clerk of the district court shall immediately fax to the Supreme Court a copy of the notice of appeal and a copy of the district court order denying the petition, along with any other documents or exhibits filed in the case. Arrangements shall also be made for the audio recording of the hearing to be sent to the Supreme Court or for the Court to otherwise listen to the audio recording. A complete copy of the record in the case shall also be made immediately available to the minor and/or her counsel, including a copy of or access to the audio recording of the hearing. Absolutely no extension of time will be granted by the Supreme Court.

(c) **Fees.** No filing or other fees shall be charged for appeals brought pursuant to this section.

(d) **Briefing.** Briefing is not required but may be submitted prior to the hearing. Formal briefing requirements do not have to be met.

(e) **Assignment.** All appeals filed pursuant to I.C. § 18-609A shall be assigned to the Supreme Court.

(f) **Hearing.** When the notice of appeal is filed pursuant to I.C. § 18-609A, the clerk of the Supreme Court shall set the appeal for hearing within 48 hours of the filing of the notice of appeal, excluding weekends and holidays.

(g) **Decision.** The Supreme Court, acting through a majority of the justices participating in the hearing, shall issue its decision at the conclusion of the hearing. If the Court fails to issue a ruling at the conclusion of the hearing then the petition will be deemed granted. No application for rehearing shall be filed.

(h) **Confidentiality.** All proceedings in this appeal shall be conducted in a manner that will preserve the anonymity of the minor, and the identity of the minor involved and all records pertaining to the appeal shall be kept confidential.

(i) **Representation.** The attorney appointed to represent the minor at the hearing before the district court shall continue on appeal unless other counsel is substituted. Any document or notice required to be served upon the minor shall be served on counsel.

(j) **Guardian ad litem.** If a guardian ad litem was appointed for the district court hearing, then that person shall continue on appeal. (Adopted effective September 18, 2000; amended and effective November 20, 2001; repealed and readopted, effective March 19, 2007.)

#### **Rule 45. Withdrawal or substitution of appellate counsel.**

Appellate counsel may withdraw as the attorney of record for a party in a civil or criminal appeal only by order of the Supreme Court upon motion showing good cause. Provided, substitution of counsel may be made by notice without order of the Court if such substitution does not require any pending hearing or oral argument to be vacated. (Adopted March 24, 1982, effective July 1, 1982.)

#### **STATUTORY NOTES**

**Compiler's Notes.** By order of March 24, July 1, 1977, and replaced it with the present rule.  
1982, the Supreme Court of Idaho rescinded  
I.A.R. 45 as adopted March 25, 1977, effective

#### **Rule 45.1. Criminal appeals — Counsel on appeal.**

(a) **Right of Counsel on Appeal.** The determination of whether a defendant in a criminal prosecution is entitled to court appointed counsel on appeal shall first be made by the trial court upon application of the defendant, or upon the trial court's own motion, either before or after a notice of appeal has been filed. If the application is denied by the trial court, the defendant may apply to the Supreme Court for an order directing the



trial court to appoint counsel. An application for counsel on appeal may be treated as a notice of appeal.

(b) **Trial Defense Counsel to Continue Representation on Appeal.** A court appointed trial defense counsel of an indigent defendant shall continue to represent the defendant on an appeal, if any, unless granted leave to withdraw as counsel by order of the district court for good cause shown before the filing of a notice of appeal. In the event of the withdrawal of trial defense counsel, the district court shall appoint new counsel for the indigent defendant if the defendant desires to appeal. (Adopted March 24, 1982, effective July 1, 1982.)

**Rule 46. Extension of time generally.**

The time prescribed by these rules for any act, except the physical filing of a notice of appeal, a notice of cross-appeal, petition for rehearing, or a challenge to a final redistricting plan may be enlarged by the Court or any Justice thereof for good cause shown upon the motion of a party. Applications for extensions of time for filing briefs shall also be subject to the requirements of Rule 34(e). Any motion for the extension of time to do an act must be served upon all parties, but the order enlarging the time for performance may be issued immediately and ex parte in the discretion of the Court or any Justice thereof, subject to review upon any written objection filed within seven (7) days of service of the motion. Any order of extension of time to do an act shall be served by the Clerk on all parties. (Adopted March 25, 1977, effective July 1, 1977; amended March 24, 2005, effective July 1, 2005; amended November 20, 2012, effective January 1, 2013.)

**JUDICIAL DECISIONS**

**Cited in:** Nations v. Bonner Bldg. Supply,  
113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987).

**Rule 47. Service of court opinions, orders and other documents by the clerk.**

The Clerk of the Supreme Court shall serve by mail, electronic mail (e-mail), personal service or delivery, copies of all of the following documents upon all of the parties to an appeal or proceeding as soon as the documents are filed with the Supreme Court:

- (a) Certificate of Appeal.
- (b) All Supreme Court orders and notices.
- (c) Supreme Court opinions on appeal.
- (d) Remittiturs. With the exception of persons appearing pro se, all parties participating in an appeal must provide an email address that the Clerk of the Supreme Court may use for service and are responsible for updating this information. An attorney representing a party on appeal must provide a current email address to the Idaho State Bar. (Adopted March 25, 1977, effective July 1, 1977; amended March 1, 2004, effective July 1, 2004; amended March 19, 2009, effective July 1, 2009.)



**Rule 48. Practice not covered by rules.**

In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof. (Adopted March 25, 1977, effective July 1, 1977.)

**JUDICIAL DECISIONS**

**Cited in:** *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

**Rule 49. Appellate settlement conference.**

(a) **Submission for Conference.** Upon request, pursuant to a written agreement of all parties, a civil appellate case or an appeal from the Industrial Commission may be submitted for consideration for an appellate settlement conference before a person, who shall be known as the Conference Judge, and who shall be selected by the parties from the list of settlement justices and judges maintained by the Administrative Director of the Courts. The parties should direct the request for a settlement conference in writing to the Clerk of the Supreme Court. The Clerk shall then enter an order suspending the appeal for 49 days, after which the appeal process shall resume. The settlement conference shall be held at a place near the court from which the civil case is appealed, at a place near the place of employment in an Industrial Commission case, or at any other place agreed upon by the parties and the Conference Judge. The facility in which the conference is held shall be determined by the Conference Judge. In advance of the settlement conference, all parties shall deliver to the clerk of the Supreme Court, for submission to the Conference Judge, a settlement statement in a form prescribed by the Supreme Court. The parties are responsible for the payment of costs and for scheduling the settlement conference at a time convenient to all parties and the Conference Judge. The Conference Judge shall not participate in the determination of the appeal.

(b) **Settlement Statement.** The written settlement statement of each party, in the form prescribed by the Supreme Court, shall be a confidential statement which shall not be filed in the case file and shall be disclosed only to the Conference Judge. In no event shall the settlement statement, or the contents thereof, be disclosed to opposing counsel, and upon conclusion of the conference negotiations, it shall be destroyed by the Conference Judge. The Conference Judge shall use the settlement statement only for the purpose of acquainting the judge with the appeal, the positions of the parties and the possibility of settlement.

(c) **Settlement Conference.** The settlement conference shall be an informal confidential meeting presided over by the Conference Judge. The agenda and sequence of presentations shall be in the discretion of the Conference Judge who may deliver to the parties an agenda in advance of the conference. The Conference Judge may request additional information not contained in the settlement statements. All parties to the appeal, or

representatives of the parties empowered to enter into a binding settlement agreement, shall attend the settlement conference with their attorney. Provided, if the client or the client's representative is not able to be present, the attorney must be able to have immediate telephone contact with the client or the client's representative, who has authority to approve a settlement. The attorney who will argue the case on appeal, or the attorney who represented the client in the trial of the action, shall appear at the settlement conference. There shall be no recording of the discussions at the settlement conference, but the attorneys for the parties may make written notes. The seating at the settlement conference shall be in an informal manner, preferably around a table, and the conference shall not be conducted as a formal hearing. A settlement conference may be continued from time to time by agreement of all parties and the Conference Judge. The initial settlement conference, or any subsequent conference, may be held by conference telephone call when agreed upon by all parties and the Conference Judge.

(d) **Role of Conference Judge.** There shall be no duty upon the Conference Judge to make a recommendation for settlement of the appeal. The role of Conference Judge is to act as a mediator to assist the parties and their counsel to come to an agreement.

(e) **Settlement Agreement.** If the conference results in a settlement, the parties immediately will execute a settlement agreement and will file a stipulation for dismissal of the appeal with the Supreme Court.

(f) **Confidentiality.** The settlement conference and all documents prepared by the parties or the Conference Judge shall be confidential. Upon settlement of the appeal, or upon the determination by the Conference Judge that there can be no settlement, the Conference Judge shall destroy all records of the settlement conference including the settlement statements of the parties and the notes or other documents prepared by the Conference Judge. The Conference Judge shall not discuss the meeting with any other person and any written or oral statements made or submitted by an attorney or a party at the settlement conference shall not be admissible in evidence in any judicial proceeding for any purpose and shall not be subject to discovery. (Adopted effective October 26, 1989; amended effective March 27, 1997; amended January 4, 2010, effective February 1, 2010.)

## IDAHO COURT OF APPEALS

### **Rule 101. Rules applicable to the Idaho Court of Appeals.**

This Rule 101 and the following Idaho Appellate Rules are adopted specifically for and shall apply to the Idaho Court of Appeals, which is hereafter referred to as the Court of Appeals. The Idaho Appellate Rules shall apply to all proceedings in the Court of Appeals as well as the following rules. The Court of Appeals may adopt rules for its internal administration and operation subject to the approval of the Supreme Court. (Adopted April 17, 1981, effective July 1, 1981.)

### **JUDICIAL DECISIONS**

**Cited in:** State v. Rollins, 103 Idaho 48, 644  
P2d 370 (Ct. App. 1982).

### **Rule 102. Idaho Court of Appeals.**

The Judges of the Court of Appeals shall have resident chambers in Boise, Idaho, and shall hold sessions of court in such cities in the state of Idaho and at such times as prescribed by order of the Supreme Court. Three Judges, one or more of whom may be a judge pro tem appointed by the Supreme Court to substitute for an absent judge, shall be necessary to constitute a quorum, two of whom must concur to pronounce a decision or to render an opinion. (Adopted April 17, 1981, effective July 1, 1981.)

### **Rule 103. [Reserved.]**

### **Rule 104. Chief Judge.**

The Chief Judge of the Court of Appeals shall be appointed by the Chief Justice of the Supreme Court for a term of two (2) years. The Chief Judge shall preside over all sessions of court at which the judge is present, sign all orders of the court and shall be responsible for the management and administration of the court and its personnel subject to statutes, rules, orders, and administrative policies of the Supreme Court. The Chief Judge shall designate another judge of the court to serve as Acting Chief Judge in the absence of the Chief Judge. (Adopted April 17, 1981, effective July 1, 1981.)

### **Rule 105. [Reserved.]**

### **Rule 106. Clerk and officers of court.**

The Clerk of the Supreme Court shall be the Clerk of the Court of Appeals. (Adopted April 17, 1981, effective July 1, 1981.)



**Rule 107. [Reserved.]****Rule 108. Assignment of cases.**

(a) **Cases Reserved to Supreme Court.** The Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court; provided that the Supreme Court will not assign the following cases:

- (1) Proceedings invoking the original jurisdiction of the Idaho Supreme Court;
- (2) Appeals from imposition of sentences of capital punishment in criminal cases;
- (3) Appeals from the Industrial Commission;
- (4) Appeals from the Public Utilities Commission;
- (5) Review of the recommendatory orders of the Board of Commissioners of the Idaho State Bar;
- (6) Review of recommendatory orders of the Judicial Council.

(b) **Assignment of Cases to Court of Appeals.** Generally, cases which involve consideration of existing legal principles will be assigned to the Court of Appeals. In assigning cases to the Court of Appeals, due regard will be given to the workload of each court, and to the error review and correction functions of the Court of Appeals. In assigning cases to the Court of Appeals, the Supreme Court may order that the appeal is to be submitted upon the briefs without oral argument, in which case any party may file a written objection to the order for submission on the briefs within twenty-one (21) days of the date of the order, setting forth the reasons for which the party desires oral argument. Any such objection to submission on the briefs shall be determined without oral argument. Ordinarily, the Supreme Court will retain the following classes of cases:

- (1) Cases in which there is substantial public interest;
- (2) Cases in which there are significant issues involving clarification or development of the law, or which present a question of first impression;
- (3) Cases which involve a question of substantial state or federal constitutional interpretation;
- (4) Cases raising a substantial question of law regarding the validity of a state statute, or of a county, city, or other local ordinance;
- (5) Cases involving issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court.

(c) **Transfer of Assigned Cases.** The Supreme Court may order transfer of a case from the Court of Appeals to the Supreme Court when a case concerns an issue of imperative or fundamental public importance. (Adopted April 17, 1981, effective July 1, 1981; amended March 1, 2000, effective July 1, 2000.)

## JUDICIAL DECISIONS

## ANALYSIS

Exhaustion of State Remedies.  
Scope of Review.

**Exhaustion of State Remedies.**

The habeas corpus petitioner failed to exhaust state remedies when he did not petition the Supreme Court for review of the Court of Appeals' decision; under I.A.R. 118, he had a right to petition for Supreme Court review of the Court of Appeals' decision regardless of the fact that the case was originally appealed to the Supreme Court and then assigned to the Court of Appeals under this rule. *McNeeley v. Arave*, 842 F.2d 230 (9th Cir. 1988).

The state habeas petitioner failed to exhaust state remedies when he did not petition the Supreme Court for review of a Court of Appeals decision, even though he had originally appealed the denial of post-conviction relief to the Supreme Court, which had then

assigned the appeal to the Court of Appeals under this rule. *Roberts v. Arave*, 847 F.2d 528 (9th Cir. 1988).

**Scope of Review.**

This rule provides that the Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court of Idaho. Idaho Appellate Rules, Rule 118 allows any party to a proceeding aggrieved by an opinion or order of the Court of Appeals to petition the Supreme Court of Idaho to review the opinion or order. Review is granted, if a majority of the Supreme Court of Idaho votes to grant the petition. The court may also grant review of an opinion or order of the Court of Appeals on its own motion pursuant to Idaho Appellate Rules, Rule 120. *Sato v. Schossberger*, 117 Idaho 771, 792 P.2d 336 (1990).

**Cited in:** *State v. Lee*, 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990).

**Rule 109. Oral Argument.**

The Court of Appeals may, in its discretion, order that an appeal shall be submitted on the briefs without oral argument. Any party to the appeal may file a written objection to the order for submission on the briefs within twenty-one (21) days of the date of the order, setting forth the reasons for which the party desires oral argument. Any such objection to submission on the briefs shall be determined without oral argument. (Adopted January 7, 1997, effective February 1, 1997; amended March 1, 2000, effective July 1, 2000.)

**Rule 110. Case files.**

All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. There shall be no separate filings directed to or filed with the Court of Appeals. In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the case. All case files shall be maintained in the office of the Clerk of the Supreme Court. (Adopted April 17, 1981, effective July 1, 1981.)

**Rule 111. Argument by telephone conference call.**

Oral argument to the Court of Appeals may be held by telephone conference call of all members of the court, all attorneys for the parties and the clerk by stipulation of all parties and approval by the court. If oral argument has been held or waived by stipulation, the court, upon finding

that additional dialogue would be useful, may order argument by telephone conference call. Any argument under this rule shall follow the general format established for oral argument under Rule 37, to the extent practicable. The court may limit oral argument under this rule to particular questions or issues. The clerk shall record oral argument made by telephone conference call under this rule. (Adopted March 27, 1989, effective July 1, 1989.)

**Rule 112. Determination of appeals.**

The Court of Appeals may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had in the trial court. All opinions, decisions, orders and remittiturs of the Court of Appeals shall be as prescribed by the Idaho Appellate Rules. If a new trial be granted, the Court of Appeals shall pass upon and determine all questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. (Adopted April 17, 1981, effective July 1, 1981.)

**JUDICIAL DECISIONS**

**Cited in:** State v. Allen, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993).

**Rule 113. [Reserved.]**

**Rule 114. Re-transfer of case to Supreme Court.**

At any time the Supreme Court may order the assignment of a case to the Court of Appeals revoked. Upon the entry of an order revoking the assignment, the Court of Appeals shall take no further action in the case. (Adopted April 17, 1981, effective July 1, 1981.)

**Rule 115. [Reserved.]**

**Rule 116. Petition for rehearing before Court of Appeals.**

Any party to a proceeding aggrieved by opinion or order of the Court of Appeals may thereafter petition to that court for a rehearing in the same manner, within the same time limits, upon the same grounds, and with the same effect as a petition for rehearing to the Supreme Court under the Idaho Appellate Rules. The determination of whether to grant the rehearing, and the determination on rehearing if granted, shall be made by the Court of Appeals. (Adopted April 17, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982.)

**JUDICIAL DECISIONS**

**Cited in:** Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).



**Rule 117. [Reserved.]****Rule 118. Petition for review by the Supreme Court.**

(a) **Petition, Time for Filing, Ruling by Supreme Court.** Any party to a proceeding aggrieved by opinion or order of the Court of Appeals may physically file a petition for review with the Clerk of the Supreme Court within twenty-one (21) days after the announcement of the opinion or order, or after the announcement of an order denying rehearing, or after the announcement of an opinion on rehearing or after an opinion is modified without rehearing in a manner other than to correct a clerical error. It is not necessary to file a petition for rehearing with the Court of Appeals before filing a petition for review under this rule. A brief in support of the petition for review must be filed with the petition or within fourteen (14) days thereafter; however, if the appeal was expedited pursuant to Rule 12.2, the brief in support of the petition shall be filed with the petition or the petition will be summarily dismissed. Such petition shall be processed within the time limits and in the manner prescribed for a petition for rehearing of a Supreme Court opinion as provided by Rule 42. There shall be no response to a petition for review, unless the Supreme Court requests a party to respond to the petition for review before granting or denying the same. The filing of a petition for review under this rule does not preclude the filing of a timely petition for rehearing under Rule 116; and no action will be taken by the Supreme Court on a petition for review until the Court of Appeals has made a final ruling upon and determination of all petitions for rehearing. If a petition for review is granted, the Supreme Court will include in its order the sequence for the filing of briefs by the parties before oral argument. A brief in support of or in opposition to a petition for review need not be bound nor have any colored cover.

(b) **Criteria for Granting Petitions for Review by the Supreme Court.** Granting a petition for review from a final decision of the Court of Appeals is discretionary on the part of the Supreme Court, and will be granted only when there are special and important reasons and a majority of the Justices direct that the petition be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, are factors that will be considered in the exercise of the Court's discretion:

- (1) Whether the Court of Appeals has decided a question of substance not heretofore determined by the Supreme Court;
- (2) Whether the Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court or of the United States Supreme Court;
- (3) Whether the Court of Appeals has rendered a decision in conflict with a previous decision of the Court of Appeals;
- (4) Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of the Supreme Court's power of supervision;

(5) Whether a majority of the judges of the Court of Appeals, after decision, certifies that the public interest or the interests of justice make desirable a further appellate review. (Adopted April 17, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 28, 1986, effective July 1, 1986; amended March 23, 1990, effective July 1, 1990; amended January 4, 2010, effective February 1, 2010; amended March 18, 2011, effective July 1, 2011; amended November 20, 2012, effective January 1, 2013.)

## JUDICIAL DECISIONS

### ANALYSIS

Exhaustion of State Remedies.  
Ineffective Assistance of Counsel Claims.  
Matters Considered.  
Mootness.  
Scope of Review.  
Time Limitations.

#### Exhaustion of State Remedies.

The habeas corpus petitioner failed to exhaust state remedies when he did not petition the Supreme Court for review of the Court of Appeals' decision; under this rule, he had a right to petition for Supreme Court review of the Court of Appeals' decision regardless of the fact that the case was originally appealed to the Supreme Court and then assigned to the Court of Appeals under I.A.R. 108. *McNeeley v. Arave*, 842 F.2d 230 (9th Cir. 1988).

#### Ineffective Assistance of Counsel Claims.

In order to prevail on a claim a defendant has been denied his constitutional right to effective assistance of counsel, the defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. These principles also apply to claims of ineffectiveness in appeals. However, when the attorney's deficiency is a failure to file an appeal as requested by the client, the loss of the opportunity to appeal is itself sufficient prejudice to meet the second prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) test. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995).

Review by the Idaho Supreme Court of a decision by the Court of Appeals is not something to which a party is entitled as a matter of right; rather, granting a petition for review is discretionary with the Supreme Court. Where a defendant has no constitutional right to counsel in a discretionary appeal, he cannot be deprived of constitutionally mandated

effective assistance of counsel by his counsel's failure to timely file an application for review to the state Supreme Court. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995).

Appeal for post-conviction relief on ground of ineffective assistance of counsel in that counsel was not effective because he failed to file a petition for review to the Supreme Court following Court of Appeals' opinion arguing that his conviction should be reentered anew since he has not been denied an appeal as the stage of appellate process he challenges is the last discretionary step, not the first step, which is a matter of right. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995).

Petitioner suffered no prejudice from his appellate counsel's failure to consult with him about filing a petition for review within the time period specified in Idaho Appellate Rule 118, because the time period for filing a petition for review is not jurisdictional. *Pierce v. State*, 142 Idaho 32, 121 P.3d 963 (2005).

#### Matters Considered.

On a petition for review, the Supreme Court is not called upon to either affirm or reverse the decision of the Court of Appeals, but rather it must rule on the appropriateness of the sentence imposed by the trial court on the same record as that presented to the Court of Appeals. *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

#### Mootness.

Where defendant served his entire prison term following a sentence for possession of methamphetamine in violation of I.C. § 37-2732, State's jurisdictional challenge to lower court decision was moot since outcome would have no effect on defendant. *State v. Barclay*, 149 Idaho 6, 232 P.3d 327 (2010).

#### Scope of Review.

Idaho Appellate Rules, Rule 108 provides that the Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court of Idaho. This rule allows any party to

a proceeding aggrieved by an opinion or order of the Court of Appeals to petition the Supreme Court of Idaho to review the opinion or order. Review is granted, if a majority of the Supreme Court of Idaho votes to grant the petition. The court may also grant review of an opinion or order of the Court of Appeals on its own motion pursuant to Idaho Appellate Rules, Rule 120. *Sato v. Schossberger*, 117 Idaho 771, 792 P.2d 336 (1990).

#### **Time Limitations.**

Appeal for post-conviction relief on ground of ineffective assistance of counsel in that counsel was not effective because he failed to file a petition for review to the Supreme Court following Court of Appeals' opinion seeking an extension of the time limit for filing petition of

review with Supreme Court was denied for Court of Appeals could not waive the time constraints of I.A.R. 118 on behalf of the Supreme Court which alone has the authority to suspend the time limits surrounding the filing of a petition for review. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995).

**Cited in:** *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); *State v. Nield*, 106 Idaho 665, 682 P.2d 618 (1984); *State v. Rice*, 109 Idaho 985, 712 P.2d 686 (Ct. App. 1985); *Ernst v. Hemenway & Moser Co.*, 120 Idaho 940, 821 P.2d 995 (1991); *State v. Loomis*, 146 Idaho 700, 201 P.3d 1277 (2009); *State v. Wegner*, 148 Idaho 270, 220 P.3d 1089 (2009); *State v. Lampien*, 148 Idaho 367 223 P.3d 750 (2009).

### **Rule 119. [Reserved.]**

### **Rule 120. Review of decisions on initiative of Supreme Court.**

Within twenty-one (21) days after the announcement of an opinion or order of the Court of Appeals, or the announcement of an opinion or order on rehearing or a modified opinion or order without a rehearing, the Supreme Court may, on its own motion, enter an order directing a review of the case before the Supreme Court. The entry of such an order shall constitute and have the same effect as an order granting a petition for review before the Supreme Court. (Adopted April 17, 1981, effective July 1, 1981.)

## **JUDICIAL DECISIONS**

### **ANALYSIS**

Exhaustion of State Remedies.  
Scope of Review.

#### **Exhaustion of State Remedies.**

The power of the Supreme Court to review any decision of the Court of Appeals on its own motion does not relieve a habeas corpus petitioner of the duty to petition for review in order to exhaust his or her state remedies. *Roberts v. Arave*, 847 F.2d 528 (9th Cir. 1988).

#### **Scope of Review.**

Idaho Appellate Rules, Rule 108 provides that the Court of Appeals shall hear and

decide all cases assigned to it by the Supreme Court of Idaho. Idaho Appellate Rules, Rule 118 allows any party to a proceeding aggrieved by an opinion or order of the Court of Appeals to petition the Supreme Court of Idaho to review the opinion or order. Review is granted, if a majority of the Supreme Court of Idaho votes to grant the petition. The court may also grant review of an opinion or order of the Court of Appeals on its own motion pursuant to this rule. *Sato v. Schossberger*, 117 Idaho 771, 792 P.2d 336 (1990).

**Cited in:** *State v. Rice*, 109 Idaho 985, 712 P.2d 686 (Ct. App. 1985).

### **Rule 121. [Reserved.]**

### **Rule 122. Opinions and remittiturs.**

Opinions and remittiturs shall issue from the Court of Appeals in accordance with Rule 38 of these rules except in those cases in which the Supreme Court grants a petition for review of the opinion of the Court of Appeals. In the event the Supreme Court grants a petition for review, the



assignment of the case to the Court of Appeals shall terminate and no remittitur shall issue on the opinion of the Court of Appeals. Upon final determination of the appeal pursuant to the order granting review, the Supreme Court will enter an opinion and remittitur to the district court in accordance with Rule 38 of these rules, unless otherwise ordered by the Supreme Court. (Adopted March 24, 1982, effective July 1, 1982.)

#### **JUDICIAL DECISIONS**

**Cited in:** *Ustick v. Ustick*, 104 Idaho 215,  
657 P.2d 1083 (Ct. App. 1983).

## SRBA ADMINISTRATIVE ORDERS

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	) SRBA ADMINISTRATIVE ORDER 1
Case No. 39576	) RULES OF PROCEDURE
_____	) (Amended 10/10/97)

This order establishes procedures for the trial of claims or issues in the Snake River Basin Adjudication (SRBA) and is entered under the Presiding Judge's authority to effectively and expeditiously manage proceedings in this case and may be amended as needed. This order supersedes all previous administrative orders.<sup>1</sup>

DATED October \_\_\_\_\_, 1997.

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DANIEL C. HURLBUTT, Jr  
Presiding Judge  
Snake River Basin Adjudication

### CERTIFICATE OF MAILING

I certify that a true and correct copy of the **SRBA ADMINISTRATIVE ORDER 1, RULES OF PROCEDURE** was mailed on October \_\_\_\_\_, 1997, to the following:

Chief, Natural Resources Division  
Office of the Attorney General  
State of Idaho  
PO Box 44449

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<sup>1</sup>Superseded SRBA orders include 1) In re SRBA, Twin Falls County Case 39576, **SRBA Administrative Order 1, Rules of Procedure** (amended June 21, 1993); 2) In Re SRBA, Twin Falls County Case 39576, **SRBA Administrative Order 7, Caption for Pleadings** (January 28, 1994); 3) in Re SRBA, Twin Falls County Case 39576, **SRBA Administrative Order 8, Stipulation to Reset Hearing Date or Motion to Reset Hearing** (January 28, 1994); 4) In Re SRBA, Twin Falls County Case 39576, **Order Amending Standard Form 3 Standard Notice of Change of Address or Substitution of Party and Standard Form 4 Motion to File a Late Notice of Claim** (March 22, 1995); 5) In Re SRBA, Twin Falls County Case 39576, **Order Directing IDWR to Attend Hearings** (June 30, 1995); 6) In Re SRBA, Twin Falls County Case 39576, **Order Denying, in Part, and Granting, in Part, Motion to Modify Objection and Response Procedures** (October 3, 1995); 7) In Re SRBA, Twin Falls County Case 39576, **SRBA Amended Administrative Order 9, Establishing Mandatory Settlement Conferences** (amended May 14, 1996); 8) In Re SRBA, Twin Falls County Case 39576, **SRBA Administrative Order 11, Order Establishing Procedures for Incorporating Completed IDWR Administrative Proceedings in the SRBA** (May 21, 1996); 9) In Re SRBA, Twin Falls County Case 39576, **Order Amending Order 1, Rules of Procedure** (Amended 6/21/93) (July 17, 1996); and 10) in Re SRBA, Twin Falls County Case 39576, **Order Amending Section 20 SRBA Administrative Order 1, Rules of Procedure** (Amended 6/21/93) (July 22, 1996); **SRBA Administrative Order 1, Rules of Procedure (Amended September 30, 1996)**.

IDAHO APPELLATE RULES

Boise, ID 83711-4449

The United States Department of Justice  
Environment and Natural Resources Division  
550 West Fort Street, MSC 033  
Boise, ID 83724

IDWR Document Depository  
PO Box 83720  
Boise, ID 83720-0098

Court Certificate of Mailing for Expedited Hearings

By \_\_\_\_\_  
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	) ADMINISTRATIVE ORDER 13
Case No. 39576	) APPEALS IN THE SNAKE RIVER
_____	) BASIN ADJUDICATION

This order establishes additional procedures for appealing matters in the Snake River Basin Adjudication (SRBA) to the Idaho Supreme Court. This order is entered under the Presiding Judge's authority to effectively and expeditiously manage proceedings in this case and may be amended as needed. This order is intended to supplement the Idaho Appellate Rules.

**Rule 25. Reporter's transcript — Contents.**

If an appeal is filed in the Snake River Basin Adjudication and a transcript is requested by the appellant, the notice of appeal must state specifically the subcase number, the special master or judge presiding and the date of the hearing for the requested transcript. If a partial transcript is requested, the appellant must specifically indicate which portions of the hearings are to be included.

**Rule 27. Clerk's or agency's record — Number — Clerk's fees — Payment of estimated fees — Time for preparation — Waiver of clerk's fee.**

(a) Number and Use of Record. When an appeal involves multiple appellants and/or respondents, the parties must determine by stipulation which party shall be served with the appellant's copy of the record and which party shall be served with the respondent's copy. If no stipulation is received by the court prior to service of the record, the clerk of the court will provide the appellant's copy to the first appellant listed in the caption of the Clerk's Certificate of Appeal. The respondent's copy shall be provided to the first respondent listed in the caption of the Clerk's Certificate of Appeal.

(b) Clerk's Fee. When more than one party files a notice of appeal, the cost of preparing the clerk's record on appeal is divided among the parties.



The cost of those documents required under I.A.R. 28 and this supplement to I.A.R. 28 is divided equally among the parties. The cost of including any additional documents is paid by the party or parties requesting their inclusion.

**Rule 28. Preparation of clerk's or agency's record — Content and arrangement.**

Only documents filed or lodged in the subcase(s) at issue in the notice of appeal will be included in the clerk's record. Documents filed or lodged in other subcases may be included only by motion granted by the presiding judge.

In addition to the documents automatically included in a clerk's record, pursuant to I.A.R. 28(a)(1), the following SRBA documents will be automatically included in the clerk's record for any appeal:

- Notice of Claim to a Water Right
- Director's Report for Water Rights on Appeal
- Notice of Filing Director's Report which establishes the deadlines for filing objections and responses
- All Objections filed
- All Responses filed
- Standard Form 5 Stipulations
- Amended Director's Reports
- Special Master's Report and Recommendations
- Motion to a later or amend Special Master's Report and Recommendation
- Order on Motion to Alter or Amend
- Any motion for reconsideration or motion for permissive review
- Any order granting or order denying the motion for reconsideration or motion for permissive review
- Notice of Issuance of Special Master's Recommendation  
(reiterates deadline — 21 days from the date of service of the Docket Sheet — for filing motions to alter or amend)
- Notice of Challenge
- Order and/or Memorandum Decision on Challenge
- Order of Partial Decree
- Partial Decree

If the appellant requests the inclusion in the clerk's record of any briefs or memoranda, these documents will be included as exhibits to the clerk's record, not as part of the actual record.

Exhibits and attachments to motions or affidavits requested will be included as exhibits to the clerk's record and not as part of the clerk's record.

The clerk's record shall include those additional documents specifically requested in the notice of appeal. When requesting the inclusion of additional documents, the appellant must specify the document title and the date the document was filed, not the date it was signed.

**Filing a notice of appeal in multiple subcases or in consolidated subcases.** To file a notice of appeal for multiple subcases or for consolidated subcases, parties must consider how those subcases were decreed by the

IDAHO APPELLATE RULES

court. If the court treated the subcases as one group and issued on partial decree or one interlocutory decision for the group, the appellant need only file one notice of appeal listing all the subcases in the group. There would be only one appellate fee and one record on appeal. If the multiple subcases or consolidated subcases were treated as a group by the court, but were decreed individually or if an interlocutory decision was entered in each individual subcase, then the appellant must file an individual notice of appeal for each subcase. Each notice of appeal would require a separate appellate fee and record on appeal.

IT IS SO ORDERED

DATED June 25, 2001.

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ROGER BURDICK

Presiding Judge

Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ADMINISTRATIVE ORDER 13 APPEALS IN THE SNAKE RIVER BASIN ADJUDICATION was mailed on June 25, 2001, with sufficient first-class postage to the following:

IDWR Document Depository  
PO Box 83720  
Boise, ID 83720-0098

United States Department of Justice  
Environment & Nat'l Resources Div  
550 W Fort Street, MSC 033  
Boise, ID 83724

Chief, Natural Resources Division  
Office of Attorney General  
PO Box 44449  
Boise, ID 83711-4449

The Court Certificate of Mailing for Expedited Hearings

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Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

) AMENDED ADMINISTRATIVE  
ORDER 14

Case No. 39576

) ADMISSION *PRO HAC VICE* IN  
THE SNAKE

IDAHO COURT RULES

IT IS FURTHER ORDERED, that pursuant to I.C. § 42-1406B special jurisdiction for these general adjudications is confirmed and shall reside in the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

IT IS FURTHER ORDERED, that pursuant to I.C. § 42-1406B and I.C. § 42-1407 the Court does hereby designate the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, as the county and court of venue for these general adjudication proceedings and that all pleadings and documents with regard to these general adjudications shall be filed with the clerk of that court. Notwithstanding this designation of venue, hearings may be held by masters and the presiding district judge at such places within the State of Idaho as are designated by the masters or presiding judge for the convenience of the parties and witnesses.

IT IS FURTHER ORDERED, that this Provisional Order shall remain in full force and effect until further order of this Court.

DATED this 29th day of September 2006.

By Order of the Supreme Court

/s/ \_\_\_\_\_  
Gerald F. Schroeder, Chief Justice

ATTEST: /s/ \_\_\_\_\_  
Stephen W. Kenyon, Clerk

IN THE MATTER OF THE	)	PROVISIONAL ORDER RE:
GENERAL ADJUDICATIONS OF	)	APPOINTMENT OF DISTRICT
RIGHTS TO USE	)	JUDGE, CONFIRMATION OF
OF WATER FROM THE WATER	)	SPECIAL JURISDICTION AND
SYSTEM OF THE COEUR	)	DETERMINATION OF
D'ALENE-SPOKANE RIVER	)	VENUE FOR THE GENERAL
BASIN	)	ADJUDICATIONS OF THE
	)	COEUR D'ALENE-SPOKANE
	)	RIVER BASIN

WHEREAS pursuant to I.C. § 42-1406B, upon the filing of petitions by the Director of the Idaho Department of Water Resources, the district court is authorized to commence separate general adjudications of the water rights for the Coeur d'Alene-Spokane River Basin, the Palouse River Basin and the Clark Fork-Pend Oreille River Basins, and

WHEREAS pursuant to I.C. § 42-1406B, unless otherwise ordered by this Court, special jurisdiction for these general adjudications resides in the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho, and



IDAHO APPELLATE RULES

WHEREAS this Court is authorized and directed by I.C. § 42-1406B to assign by order a district judge to preside over the general adjudications and to determine venue of such general adjudications, and

WHEREAS on July 8, 2008, a petition to commence a general adjudication of the Coeur D'Alene-Spokane River Basin water system was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls,

NOW THEREFORE, IT IS HEREBY ORDERED, that the presiding judge of the Snake River Basin Adjudication District Court, an office held at present by District Judge John M. Melanson, be and is hereby, assigned as the presiding judge over the general adjudication of the water rights in the Coeur d'Alene-Spokane River Basin.

IT IS FURTHER ORDERED, that pursuant to I.C. § 42-1406B special jurisdiction for this general adjudication is confirmed and shall reside in the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

IT IS FURTHER ORDERED, that pursuant to I.C. § 42-1406B and I.C. § 42-1407 the Court does hereby designate the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, as the county and court of venue for this general adjudication proceeding and that all pleadings and documents with regard to this general adjudication shall be filed with the clerk of that court. Notwithstanding this designation of venue, hearings may be held by masters and the presiding district judge at such places within the State of Idaho as are designated by the masters or presiding judge for the convenience of the parties and witnesses.

IT IS FURTHER ORDERED, that this Provisional Order shall remain in full force and effect until further order of this Court.

DATED this 8th day of August, 2008.

By Order of the Supreme Court

/s/ \_\_\_\_\_  
Daniel T. Eismann, Chief Justice

ATTEST: /s/ \_\_\_\_\_  
Clerk

**SNAKE RIVER BASIN ADJUDICATION**  
**District Court**  
**RULES OF PROCEDURE**  
**(Amended 10/16/97)**  
**Daniel C. Hurlbutt, Jr.**  
**Presiding Judge**

**Compiler's Notes.** For additional procedural rules applicable to appeals of Snake River Basin Adjudication matters to the Idaho Supreme Court, see the supplementary provisions of Idaho Appellate Rules 25, 27, 28

and the unnumbered provision "Filing a notice of appeal in multiple subcases or in consolidated subcases" set forth in Administrative Order 13 (June 25, 2001) in this appendix.

## PROCEDURES IN THE SRBA

### 1. SCOPE AND PURPOSE

a. The litigation of the SRBA will be governed by the Idaho Rules of Civil Procedure (I.R.C.P.), Idaho Rules of Evidence (I.R.E.) and the Idaho Appellate Rules (I.A.R.).

b. These procedures supplement the I.R.C.P., I.A.R. and any other applicable laws or orders of this court only to the extent necessary to allow for the fair and expeditious resolution of all claims or issues in the SRBA.

c. Provisions setting forth the manner of service and notice are adopted under the authority granted by *Supplemental Order Granting Additional Powers to District Judge*, Idaho S.Ct. 99143 (February 20, 1988). (Adopted October 10, 1997.)

### 2. DEFINITIONS

a. **Abstract** — The abstract of each notice of claim or negotiated agreement for water rights under federal law.

b. **AO1** — SRBA Administrative Order 1, Rules of Procedure.

c. **Basin-Wide Issue** — An issue designated by the Presiding Judge as potentially affecting the interests of a large number of claimants to the sue of water within the SRBA and the resolution of which will promote judicial economy.

d. **Claimant** — Any person who has filed a claim to the use of water in the SRBA.

e. **Clerk of the Court** — The Clerk of the SRBA Court.

f. **Court** — The SRBA Court located at 253 Third Avenue North, Twin Falls, Idaho 83301. Mailing address PO Box 2707, Twin Falls, ID 83303-2707; Telephone (208) 736-3011; FAX (208) 736-2121; Internet [www.srba.state.id.us](http://www.srba.state.id.us).

g. **Director** — The Director of the Idaho Department of Water Resources.

h. **Docket Sheet Procedure** — The procedure established to give notice of proceedings on nonsubcase matters to SRBA claimants and parties.

i. **Domestic Use** — Domestic water use is defined by I.C. §§ 42-111 and 42-1401A(5).

j. **Error Correction Procedure** — The procedure established to correct errors in a Director's Report prior to the filing of that Director's Report with the court.

k. **IDWR** — The Idaho Department of Water Resources.

l. **Initial Hearing** — The first hearing before the court in a Class One Subcase.

m. **IWATRS** — The court's automated registry of actions that lists all pleadings and documents filed or lodged with the court, all orders entered by the Presiding Judge or Special Masters, and that provides additional information such as lists of upcoming hearings.

n. **Objector/Respondent** — Unless the context indicates otherwise, a party to the adjudication filing an objection or response to a water right recommendation reported in a Director's Report as provided by I.C. §§ 42-1411 and 42-1412 or claimed under federal law as provided by I.C. § 42-1411A.

o. **Partial Decree/Judgment** — The final determination of the elements of a water right.

p. **Party to a Subcase** — The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or a Special Master, and any party to the adjudication filing a *Motion to Alter or Amend the Special Master's Recommendation*.

q. **Party to the Adjudication** — Any claimant as defined in I.C. §§ 42-1401A(1) and (6).

r. **Pleadings** — All documents defined as pleadings by the I.R.C.P., objections, responses to objections, and notices of claims.

s. **Pro Se** — Claimants representing themselves without legal counsel.

t. **Recommendation** — The statements by the Director, as set out in a Director's Report, as to elements of a water right claim.

u. **Special Master** — A person appointed by the Presiding Judge through an *Order of Reference* to hear subcases or other matters and who reports to the Presiding Judge.

v. **Special Master's Recommendation** — A final written submission to the Presiding Judge containing the decisions and recommendations of the Special Master under the *Order of Reference*.

w. **SRBA** — The Snake River Basin Adjudication.

x. **Stock Watering Use** — Stock watering use as defined by I.C. § 42-1401A(12).

y. **Subcase** — A water right which is the subject of any post-Director's Report pleading.

(1) **Class One Subcase** — Subcases where the difference between the Director's Report and the claim is less than 40 acres and/or the difference in quantity is less than 0.80 cts and all claims where the objection relates only to owner identification, priority date, source or point of diversion.

(2) **Class Two Subcase** — Subcases not included in the definition of Class One Subcase.

NOTE: The purpose of separating subcases into two classifications is to expedite the SRBA and provide claimants a speedy and cost-effective method to litigate cases where the difference between the Director's Report and the claim is less significant, as in the Class One Subcases. This allows



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the court, the parties and IDWR to focus more time and resources on resolving the more significant issues associated with Class Two subcases. (Adopted October 10, 1997.)

3. **PLEADINGS**

a. All pleadings shall comply with the I.R.C.P. and these ***Rules of Procedure***.

b. Documents or pleadings filed in any courthouse other than the SRBA Courthouse will not be accepted and will not be deemed "filed" until received by the Clerk of the SRBA Court.

c. Pleadings shall be signed by counsel as required by I.R.C.P. 11(a)(1) or by *pro se* claimants.

d. **Caption** — The following caption shall be used on all pleadings in the SRBA and must begin 2 inches from the top of the page. Pleadings filed in the individual subcases shall include the subcase (water right) number inserted above the document name. Pleadings filed in the basin-wide issues shall include the basin-wide issue number inserted above the document name.

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(2" from the top of the page)

Leave this area blank for court file stamp

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Name of Party Filing Document:  
Attorney Name & Address

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	) (SUBCASE NUMBER)
	)
Case No. 39576	) (DOCUMENT NAME)
	)

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(Begin Document Text Here)

e. The document name shall identify the specific type of document and the action or relief requested.

f. All documents or pleadings shall include the name of the document typed at the bottom of each page, including all attachments or exhibits, pursuant to I.A.R. 28(e).

g. All attached exhibits must be legible and subject to reproduction or must be accompanied by a typewritten duplicate. All handwritten exhibits shall be accompanied by a typewritten duplicate. I.R.C.P. 10(a)(1)

h. **Filing By FAX** — Documents and pleadings may be filed by FAX pursuant to I.R.C.P. 5(e)(2):

(1) FAX filings are only accepted for filing during the normal working hours of the Clerk of the SRBA Court: 8 a.m. to 5 p.m., Monday through

Friday. Any FAX transmission not **completed** by 5 p.m. will be file stamped the next business day.

(2) Documents or pleadings filed by FAX are limited to 10 pages, **including** attachments and exhibits.

(3) The signature on the FAXed copy shall constitute the required signature under I.R.C.P. 11(a)(1). It is not necessary to send the original by mail.

(4) Except for Standard Form 5, SRBA Standard Forms **will not** be accepted for filing by FAX.

(5) The Clerk of the SRBA Court shall accept for filing a copy of any FAXed document or pleading not transmitted directly to the court. The signature on the FAXed copy shall constituted the required signature under I.R.C.P. 11(a)(1) and there is not limit to the number of pages filed I.R.C.P. 5(e)(3)

i. **Injunctive Relief** — Any action for injunctive relief brought pursuant to I.R.C.P. 65 or I.R.C.P. 74 shall be heard by the Presiding Judge or the Special Master who by **Order of Reference**, has been assigned the subcase(s) affected by the motion. The Presiding Judge, or a Special Master if assigned, will hear actions for injunctive relief in the SRBA generally or relating to uncontested recommendations.

On receipt of any motion or petition for injunctive relief, the Clerk of the Court shall assign a separate subcase file to the matter. This new subcase file number shall be included on all documents filed regarding the injunctive relief matter.

Injunctive relief matters will be handled on an expedited basis and will be reported in the Docket Sheet.

j. **Multiple Subcases** — When filing a pleading affecting multiple subcases, the filing party shall provide the court a copy of the pleading for each subcase affected. If the pleading is filed by FAX, the copies shall be mailed to the court the same day. When subcases are consolidated by court order and a lead subcase is designated, only one pleading needs to be filed in the lead subcase; however, service is still required on all parties in each subcase.

k. **IDWR Central Depositories** — IDWR shall maintain copies of all pleadings and other documents filed or lodged in the SRBA and which appear on the Docket Sheet. Copies shall be available for inspection and copying during normal business hours at its central office located at 1301 North Orchard, Boise Idaho. The mailing address is: IDWR Document Depository, PO Box 83720, Boise, Idaho 83720-0098; telephone (800) 451-4129; FAX (208) 327-5400).

l. **IDWR Regional Depositories** — IDWR's regional offices shall maintain copies of objections, responses and supporting documents, if any, for all water rights reported in that region. These pleadings and IDWR's investigative files for reported water rights shall be available for inspection and copying during normal business hours. IDWR claim files for Reporting Area 22, Clearwater River Drainage, are maintained at IDWR's central office. (Adopted October 10, 1997.)

#### 4. STANDARD PLEADING FORMS

a. Parties must use the following standard forms:

- (1) Objection (Standard Form 1)
- (2) Response to Objection (Standard Form 2)
- (3) Motion to File a Late Notice of Claim or a Motion to File an Amended Notice of Claim (Standard Form 4)
- (4) Stipulated Elements of a Water Right (Standard Form 5)

b. The standard forms may be obtained from IDWR or the SRBA Court. A copy of each standard form is attached to these rules.

c. A party may copy or reproduce any standard form. The form may be electronically modified to include only those sections being used. The text of the forms must be on the front and back of each page (see attachments). No other portion of the forms may be modified unless ordered by the court. The court will not accept incorrect or incomplete forms. Refiling of returned incorrect or incomplete forms must be made under the original filing deadline or pursuant to a motion and order for a late filing.

d. Use of standard forms:

(1) ***Objection (Standard Form 1) and Response to Objection (Standard Form 2) —***

(a) Objections and responses to a recommendation or abstract in a Director's Report shall be on SRBA Standard Forms 1 and 2. No other form of objection or response may be filed with the court.

(b) A claimant **may not** amend a claim by filing an objection or a response (see Section 4d(2)).

(c) The Director shall notify claimants that the court requires the use of standard objection or response forms. This notice may be included in the *Notice of Filing the Director's Report*.

(d) **Deadlines for Filing an Objection or a Response Form —** The *Notice of Filing the Director's Report*, filed by IDWR, shall set out the dates when objections and responses are due and shall be computed to include weekends and holidays. The objection or response must be **received** by the court by the deadline specified.

(e) Any party filing 25 or more objections or responses must make an appointment with the Clerk of the SRBA Court at least 14 days prior to the deadline for filing their pleadings.

(f) **Service of an Objection or a Response Form —** A party filing an objection or a response must send the original with supporting documents, if any, to the Clerk of the SRBA Court and a copy, including supporting documents, to each individual identified on that form's certificate of mailing.

(2) ***Motion to File a Late Notice of Claim or a Motion to File an Amended Notice of Claim (Standard Form 4) —***

(a) In reporting areas where a Director's Report **has not** been filed, a late notice of claim or an amended notice of claim shall be filed with IDWR. A Motion to File a Late Notice of Claim or a Motion to File an Amended Notice of Claim with the court is not required.



(b) In reporting areas where a Director's Report **has** been filed, a *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim* must be filed with the court.

(c) A *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim* must be filed using Standard Form 4 and must be used for a single water right only.

(d) A *Motion to File a Late Notice of Claim* shall proceed before the Presiding Judge and shall follow the Docket Sheet Procedure (Section 6) and will be reviewed under the criteria of I.R.C.P. 55(c).

(e) A *Motion to File an Amended Notice of Claim* shall proceed before the Presiding Judge or the Special Master assigned to the subcase and will be reviewed under the criteria of I.R.C.P. 55(c).

(f) A *Motion to File a Late Notice of Claim* shall have attached:

1) A completed Notice of Claim (available from IDWR) and

2) The claim filing fee and late claim fee for claims other than a domestic or stock watering use for which a notice of claim was not filed. Payment shall be in the form of a check made payable to: State of Idaho Department of Water Resources. To determine the exact amount of these fees, call IDWR at (800) 451-4129.

(g) When a *Motion to File a Late Notice of Claim* is granted, the Clerk of the Court shall forward the check and completed Notice of Claim to IDWR. If the motion is denied, the Clerk of the Court shall return the claim filing fee and the late claim fee.

(h) IDWR shall file a Director's Report for all late-filed claims within 60 days following the granting of the *Motion to File a Late Notice of Claim*.

(i) Notice of the filing of the Director's Report for a late claim shall be reported in the Docket Sheet.

(j) Objections or responses to Director's Reports for late claims must be received by the court as follows:

(1) Objections must be filed within 21 days from the appearance of the filing of the Director's Report in the Docket Sheet.

(2) Responses must be filed within 14 days following the close of the objection period.

(k) Leave to amend a notice of claim shall be freely given when justice so requires.

(l) The Presiding Judge or Special Master shall determine how to proceed when an amendment is granted and whether a supplemental Director's Report is required.

(m) Pursuant to I.C. §§ 42-1414 and 42-1415, additional costs may apply to late notices of claim or to amended notices of claim other than for domestic and stock watering rights.

(3) *Stipulated Elements of a Water Right* (Standard Form 5) —

Where parties reach an agreement on a contested water right recommendation, they shall file either a stipulation with the court using Standard Form 5 or some other stipulation acceptable to the court. Subcases may also be resolved orally on the record.

(a) Standard Form 5 may only be used if **all** parties have stipulated to **all** elements of **one** water right and may be submitted at any time following the close of the statutory response period.

(b) Standard Form 5 is used to report the stipulated elements of **one** water right acquired under state law or **one** federal reserved water right.

(c) When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right as stipulated in the Standard Form 5 or proposed settlement. (Adopted October 10, 1997.)

## 5. EVIDENCE AND DOCUMENT PRESERVATION

a. After a Director's Report has been filed, employees or contractors of IDWR may go on a claimant's property in that reporting area to further investigate a reported claim only with permission from the claimant or leave of the SRBA Court.

b. No party to the SRBA may destroy any document or evidence kept in any medium which relates to a pending claim in the SRBA or has been prepared for use in the SRBA, except on motion and order by the SRBA Court. This order is intended to override any records management or document destruction program used by any party. This order does not apply to documents protected by the attorney-client privilege or to attorney work product.

c. IDWR may not destroy any document or evidence, in any medium, relating to a water right or which has been used or relied upon in making a recommendation in a Director's Report. Further, IDWR shall keep all policies and procedures, past or current, in draft or final form, which were actually relied upon by IDWR, its employees or agents in making any recommendation in a Director's Report. (Adopted October 10, 1997.)

## 6. DOCKET SHEET PROCEDURE

a. The Docket Sheet Procedure shall be used to give notice to parties in the adjudication about matters not a part of a subcase and shall be used when required by these ***Rules of Procedure***.

b. The Docket Sheet shall include the following sections:

(1) A chronological list of all orders, pleadings (except objections, responses, pleadings or orders filed in subcases) and other documents (i.e., motions for late or amended claims or motions for late objections) filed with the court since the last docket sheet including:

- (a) The SRBA case number;
- (b) The document name;
- (c) The name of the party and the party's attorney, if any; and
- (d) The date the document was filed.

(2) A chronological list of all objections and responses filed since the last Docket Sheet including:

- (a) The subcase number;

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- (b) The name of the claimant, objector or respondent;
  - (c) The address of the objector or respondent if not represented by an attorney;
  - (d) The name and address of the attorney representing the objector or respondent;
  - (e) The box number(s) checked on the objection or response form;
  - (f) The date the document was filed; and
  - (g) The source of the water right as stated in the Director's Report.
- (3) A chronological list of the hearings scheduled for the next three months (except hearings in subcases) including:
- (a) The SRBA case number;
  - (b) The date and time of the hearing;
  - (c) The subject; and
  - (d) The names of the parties.
- (4) A list of all Special Master's Reports and Recommendations since the last Docket Sheet;
- (5) A list of all Amended Director's Reports; and
- (6) A list of all Partial Decrees issued since the last Docket Sheet.
- c. The SRBA Court shall compile the Docket Sheet and send copies to:
- (1) The Clerk of the District Court in each county located within the boundaries of the SRBA. The Docket Sheet shall be posted by the Clerk of the District Court in each county or the clerk shall post a notice telling where in the county building the Docket Sheet is available for inspection.
  - (2) One copy to IDWR for inclusion in the document depository:

IDWR

Document Depository

PO Box 83720

Boise, ID 83720-0098

IDWR shall make the Docket Sheet available for inspection at its central and regional offices.

d. The court charges an annual subscription fee based on the actual cost of copying and mailing. The court shall maintain a Docket Sheet mailing list.

e. Service of pleadings and other documents under the Docket Sheet Procedure.

(1) The original of any pleading or other document shall be filed with the Clerk of the SRBA Court, 253 Third Avenue North, PO Box 2707, Twin Falls, Idaho 83303-2707.

(2) Copies of any pleading or other document shall be delivered or mailed to:

(a) IDWR Document Depository, PO Box 83720, Boise, Idaho 83720-0098;

(b) Chief, Natural Resources Division, Office of the Attorney General, State of Idaho, PO Box 44449, Boise, Idaho 83711-4449;

(c) The United States Department of Justice, Environment and Natural Resources Division, 550 West Fort Street, MSC 033, Boise,



Idaho 83724. Documents served by messenger or overnight delivery service should be sent to the U.S. Department of Justice, 380 Park Center Blvd., Suite 330, Boise, ID 83706; and

(d) All parties identified in the pleading from whom relief is sought. If relief is sought against a class or group, service shall be made on the representative of that class or group.

f. Motion practice under the Docket Sheet Procedure.

(1) **Hearing Date** — Unless otherwise ordered, a motion will be heard on the third Tuesday of the second month following its appearance on the Docket Sheet. Any motion filed with the court before 5 p.m. of the last working day of a month will be placed on the Docket Sheet for that month. (For example, a document filed before 5 p.m. on September 30, 1997 will appear on the Docket Sheet on October 7. The hearing will be held on Tuesday, December 16, 1997.)

(2) **Expedited Hearings** — Any party moving for an order to expedite a hearing shall send a copy of the motion and supporting documents to all parties listed in Section 6e(2) and each person on the current copy of the *Court Certificate of Mailing for Expedited Hearings* which is available from the Clerk of the SRBA Court.

(3) Notice of hearings under the Docket Sheet Procedure:

(a) Service of a notice of hearing shall be made pursuant to Section 6e(2). A party requesting and receiving an expedited hearing shall meet the service requirements of Section 6f(2).

(b) Compliance with the Docket Sheet Procedure constitutes notice to all parties to the adjudication.

(4) Briefing schedule under the Docket Sheet Procedure.

(a) **Documents in Support of a Motion** — All documents and briefs in support of motion shall be filed with the motion and served on the parties listed in Sections 6e(2) or 6f(2).

(b) **Responses to Motions** — Parties may file documents and briefs supporting or opposing a motion by the fifteenth day of the month following the motion's first appearance on the Docket Sheet. Service shall be made on the movant and the parties identified in Sections 6e(2) or 6f(2). If a motion is to be heard on an expedited basis, a response shall be filed with the court at least one day prior to hearing and served on the *Court Certificate of Mailing for Expedited Hearings*.

(c) **Replies to Responses** — Documents or briefs in reply to responses must be filed before the last working day of the month following the motion's first appearance on the Docket Sheet, unless the matter is set on an expedited basis. Service shall be made on the party who filed the response and on the parties identified in Sections 6e(2) or 6f(2). A matter set on an expedited basis will rarely allow time for a reply to be filed prior to hearing.

(d) **Extensions** — For good cause a party may move for an extension of time to file a response or reply to a motion. A *Motion for*

*Extension of Time* shall be filed with the court and served as provided in Sections 6e(2) or 6f(2), prior to the date the brief is due. If the motion is granted, the movant shall serve a copy of the order as provided in Sections 6e(2) or 6f(2). (Adopted October 10, 1997.)

## 7. COURT FEES

The following fees apply in the SRBA. You must contact the Clerk of the SRBA Court for the amount of the fee.

a. **Transcript fee** — A per-page fee is charged for the preparation of any transcript of any SRBA hearing. Arrangements for transcripts must be made through the SRBA Court Reporter. Fees must be paid **prior** to preparation of the transcript.

b. **Appellate fees** —

(1) The Idaho Supreme Court requires payment of a filing fee for all appeals. This fee must accompany any notice of appeal.

(2) All appeals to the Idaho Supreme Court must include a clerk's record. Payment of a per-page fee for the preparation of the clerk's record is required. An estimate of this fee must be paid at the time the notice of appeal is filed.

c. **Fees for services** — The following fees are required for services (I.C. § 31-3201):

- (1) Copying of files or records ..... \$ 1 per page
- (2) Certifying of files or records ..... \$ .50 per page
- (3) Affixing court certificate and seal ..... \$ 1 per document
- (4) Copying an audiotape of any SRA hearing ..... \$ 2 per tape

(Adopted October 10, 1997.)

## 8. ERROR CORRECTION PROCEDURE

This section is reserved.

## 9. SPECIAL MASTERS

a. The Presiding Judge may refer matters, including subcases, to a Special Master by an **Order of Reference** pursuant to I.R.C.P. 53.

b. Subcases referred to a Special Master will proceed in accordance with the I.R.C.P. and these **Rules of Procedure**. Each subcase shall proceed in the same manner as any court case. Special Masters are exempt from the time requirements of I.R.C.P. 53(d)(1).

c. A Special Master shall file reports with the Presiding Judge on the matters submitted by the **Order of Reference** and, if required, shall include findings of fact and conclusions of law. I.R.C.P. 53(e)(1). Service shall be made on the parties to the subcases covered. Notice of the filing of the **Special Master's Recommendation** shall be reported in the Docket Sheet.

d. The form of water rights included in the **Special Master's Recommendation** will be consistent with the **Order of Reference**. The grouping of water rights in the **Special Master's Recommendation** is left to the discretion of the Special Master. No water right claim which has not had full resolution of every element of the right shall be included in a

***Special Master's Recommendation***, unless the Special Master, simultaneously with the filing of the report, certifies to the Presiding Judge that there has been an express determination that there is no just reason for delay for submission to the Presiding Judge. Notice of the filing of such certification shall be reported in the Docket Sheet.

e. **Permissive Review** — A Special Master or any party to the subcase may seek permissive review by the Presiding Judge of the Special Master's interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation following the procedures set forth in I.A.R. 12. The Special Master shall review the motion and responses and recommend, with findings, whether it should be granted or denied. The motion and the Special Master's recommendation shall be forwarded to the Presiding Judge for determination. (Adopted October 10, 1997.)

#### **10. PROCEDURE FOR WATER RIGHTS WHERE AN OBJECTION HAS BEEN FILED**

a. When the first objection to a recommendation or abstract is filed, a subcase file shall be opened and separately docketed on IWATRS. The water right number becomes the subcase number. All subsequent filings for that water right, including objections and responses, will be docketed under that subcase.

b. Subcases will generally be referred to a Special Master by an ***Order of Reference***.

c. Unless otherwise ordered by the Presiding Judge or a Special Master, each subcase shall proceed separately from other subcases or matters at issue in the SRBA.

d. No later than 30 days after the objection period has expired, IDWR shall file a case management report with the court dividing each reporting area into Class One and Class Two Subcases.

e. Scheduling

(1) **Class One Subcases** —

(a) At the end of the objection period, the court may hold an Initial Hearing for each subcase. At the Initial Hearing, each claimant and/or objector shall be given an opportunity to meet with IDWR in an attempt to reconcile the difference between the Director's Report, the claim and the objection(s) for each subcase. If the objection(s) cannot be reconciled, the court shall set the matter for trial. The claimant and objecting party, if any, must be present at the Initial Hearing.

(b) The trial should be held within 45 days of the Initial Hearing unless otherwise ordered by the Special Master.

(2) **Class Two Subcases** — At the end of the objection period, the court shall hold a Scheduling Conference under I.R.C.P. 16(b). These subcases shall proceed under the court's scheduling or pre-trial order.



(3) **Discretion of the Presiding Judge or Special Master** — On motion of any party to the subcase or as ordered by the Presiding Judge or Special Master, a subcase may be reclassified and proceed accordingly.

f. Amendment of Claims

(1) **Class One Subcases** — Absent leave of court, claims shall be amended at or before the Initial Hearing except for the name and address of the claimant which may be amended at any time.

(2) **Class Two Subcases** — Absent leave of court, claims shall be amended no later than 14 days after the Scheduling Conference except for the name and address of the claimant which may be amended at any time.

(3) **IDWR investigation of amended claim** — The court may request that IDWR prepare an Amended Director's Report for any amended claim, including claims amended at trial to conform to the evidence. The claimant may be ordered to pay all necessary costs associated with investigating and reporting the amended claim.

g. IDWR Involvement

(1) **Class One Subcases** — Except where a party calls a representative of IDWR as its own witness, the role of IDWR will be limited to presenting geographic information (GIS) in the form of an illustration depicting the place of use and point of diversion. IDWR may also provide any documents such as permits, licenses, decrees or transfers which may be relevant to a claim. A party calling IDWR as its own witness must notify IDWR, in writing, 7 days prior to trial.

(2) **Class Two Subcases** —

(a) Within 14 days following the Scheduling Conference, IDWR shall serve on each party an affidavit setting forth the factual basis of IDWR's recommendation on the disputed element(s). IDWR shall file the affidavit with the court. The court may consider the affidavit for any pre-trial matter or in lieu of any direct testimony by the IDWR affiant at trial.

(b) IDWR must be notified, in writing, at or before the pre-trial conference, should any party choose to cross-examine the IDWR affiant or call a witness from IDWR at trial.

(3) **Discretion of the Presiding Judge or Special Master** — Nothing herein shall prevent the Presiding Judge or Special Master from calling a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two Subcases.

h. Service of documents in a subcase need be made only on parties to the subcase and IDWR. When a document is filed in a subcase, the Docket Sheet Procedure is **not required to be followed**, except for: motions and notices of hearings to designate basin-wide issues; proceedings on basin-wide issues; ***Special Master's Recommendations***; notices of challenge to a ***Special Master's Recommendation***; motions and notices of hearings for entry of partial decrees; proceedings by the Presiding Judge on



decrees; motions or orders for I.R.C.P. 54(b) certification or permissive review; notices of appeal; and any other matter ordered by the court to follow the Docket Sheet Procedure.

i. The Director of IDWR or a representative shall attend all hearings in contested subcases to serve as a disinterested, nonparty fact witness consistent with the I.R.C.P. and as directed by the Presiding Judge or Special Master.

j. When a *Motion to File a Late Objection* is filed to a previously “unobjected-to” recommendation or abstract:

(1) The motion shall be reported in the Docket Sheet; and

(2) A hearing on the motion shall be scheduled by the Special Master assigned to that reporting area and notice of the hearing shall be reported in the Docket Sheet.

k. Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

l. **Resetting Subcase Hearing Dates** — All hearing dates will be set by the SRBA Court. Any party to the SRBA who requests that a hearing be reset shall comply with the following requirements at least 21 days prior to the scheduled hearing:

(1) Contact the Clerk of the SRBA Court to obtain alternative dates and times;

(2) Contact each party to the subcase(s) or their attorney, if any, and reach an agreement on an alternative date and time provided by the clerk; and

(3) Prepare and file with the court a *Stipulation to Reset* the hearing. The hearing must be reset on one of the dates and times provided by the clerk or it will not be accepted for filing. The stipulation must specify the agreed upon date and time and must contain a statement that the party moving to reset the hearing has contacted each party or their attorney and that all have agreed on the alternate date and time. If granted, the court will send a notice resetting the hearing.

(4) If the parties cannot reach agreement, the party wishing to change the date and time must file an *Expedited Motion to Reset* at least 14 days prior to the scheduled hearing.

m. **Participation in Hearings by Telephone** — Permission to participate in a hearing by telephone must be given in advance by the Presiding Judge or Special Master.

(1) Telephone participation will not be allowed in summary judgment hearings or trials.

(2) Telephone participation in settlement conferences, scheduling conferences and other hearings is discouraged and only allowed with leave of the court.

(3) No oral testimony will be allowed by telephone.

(4) For hearings before the Presiding Judge, the first person to request participation by telephone will be responsible for initiating the call to the court and for making certain all parties are connected.

(5) For hearings before the Special Masters:

(a) The order/notice setting the hearing will state if telephone participation is allowed.

(b) The parties must decide among themselves who will initiate the call.

(c) The Clerk of the SRBA Court must be notified at least 24 hours **prior** to the hearing as to who will be participating by telephone and who will be initiating the call.

(6) Place your call to the court at least 5 minutes prior to the scheduled start of your hearing. No hearing will be delayed or interrupted because of telephone participation. If you have not called by the time the Presiding Judge or Special Master is ready to begin, your call will not be connected to the courtroom.

(7) When initiating a call to the court which involves more than one party from different locations, you must use the services of a teleconference operator. Do not use your telephone system conference call feature. (Check with your telephone service or long-distance provider.)

(8) Speaker phones are not recommended. Many times there is too much background noise or the signal is too weak to be transmitted clearly in the courtroom.

n. If all parties to a subcase stipulate to the dismissal of any objection to a water right recommendation, a *Stipulation for Dismissal of Objection* shall be filed; and, if accepted, the dismissal shall be with prejudice.

o. If **all** parties to a subcase stipulate to **all** elements of **one** water right, a Standard Form may be submitted at any time following the close of the statutory response period.

p. If a party must correspond with the SRBA Court, the party shall identify the subcase involved and must include a statement that all parties to the subcase have been sent a copy of the correspondence and any attachments. If these procedures are not followed, the correspondence will not be accepted by the court. (Adopted October 10, 1997.)

## **11. CONSOLIDATION OR SEPARATION OF SUBCASES AND ISSUES**

Any matter at issue in any proceeding in the adjudication, including portions of or entire subcases, may be consolidated with or separated from any other matter at issue in the adjudication. Any party to a subcase may move for consolidation or separation of claims or issues. The Presiding Judge or Special Master may order consolidation or separation on the basis of such motion or on their own. I.R.C.P. 42. If a motion to consolidate

concerns issues from subcases which are all before the same Special Master, it shall be served only on parties to those subcases and shall be decided by the Special Master. If such a motion concerns basin-wide issues or issues from subcases which are not all before the same Special Master, it shall be served on all parties to those subcases, noticed through the Docket Sheet Procedure and decided by the Presiding Judge or a Special Master by ***Special Order of Reference***.

**NOTE:** A motion to consolidate subcases is appropriate in situations where common issues of law or fact present themselves in more than one subcase and resolution of those issues can be most expeditiously and effectively achieved through presentation to the Presiding Judge or a Special Master in consolidated hearings. (Adopted October 10, 1997.)

## 12. SETTLEMENT CONFERENCES

Settlement conferences may be held at the discretion of the court. Such conferences shall be held in conformance with any pre-trial or scheduling order issued by the court. Parties and their attorney(s) of record must be personally present. No one may attend by proxy or by telephone. Each party is required to be present with the individual(s) possessing full settlement authority on every aspect of the contested subcase. (Adopted October 10, 1997.)

## 13. PROCEEDINGS ON A SPECIAL MASTERS RECOMMENDATION

a. The Special Master shall prepare and file with the court a ***Special Master's Recommendation*** which shall be served on the parties to the subcase and notice of its entry shall be reported in the Docket Sheet. Any party to the adjudication, including parties to the subcase, may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in the *Motion to Alter or Amend*. **Failure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend* the *Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.** This waiver shall also apply to further proceedings in the subcase if remanded back to the Special Master.

b. Where a *Motion to Alter or Amend* is filed in a subcase, notice will be reported in the Docket Sheet and the motion will be decided by the Special Master with or without hearing. No second *Motion to Alter or Amend* may be filed on the decision granting or denying a *Motion to Alter or Amend*.

c. Any party who first filed or participated in a *Motion to Alter or Amend* before the Special Master may file a *Notice of Challenge to the decision on a Motion to Alter or Amend*. A *Notice of Challenge* shall be filed within 14 days following the date of the filing of the decision on a *Motion*



to *Alter or Amend*. The *Notice of Challenge* shall include a detailed statement of the issue(s) and a detailed description, including hearing dates and times, of any transcript(s) requested. Once raised and detailed, the issue(s) on challenge **may not** be amended to include additional issue(s) not specifically identified in the *Notice of Challenge* except on motion and leave of court. The *Notice of Challenge* shall be reported in the Docket Sheet and shall be served on all parties to the subcase(s) challenged, the SRBA court reporter and the parties listed in Section 6e(2).

d. If a transcript is requested in a *Notice of Challenge*, the party filing the *Notice of Challenge* must contact the court reporter for an estimate of the cost for preparation of the transcript. The estimated fee must accompany the *Notice of Challenge*.

(1) The transcript shall be lodged with the court within 35 days following the deadline for filing a *Notice of Challenge*.

(2) There will be no time for settlement of the transcript. If the transcript is incomplete or erroneous, the requesting party may file the appropriate motion to correct the transcript.

(3) One copy of the transcript shall be served on the challenger and the opposing party. When multiple parties are involved, the parties are required to submit a stipulation to the court stating which parties are to receive the transcript copies.

e. At the close of the time period for filing a *Notice of Challenge*, the court will issue a scheduling order. Unless otherwise ordered, the following schedule for briefing and oral argument shall be set:

(1) Opening briefs shall be filed simultaneously within 21 days following the deadline for filing *Notice of Challenge*. If a reporter's transcript is requested, opening briefs shall be filed simultaneously within 21 days following lodging of the transcript. Briefs shall be limited to 25 pages and shall be served on the parties to the subcase and any party filing a *Notice of Challenge*.

(2) Rebuttal briefs shall be filed within 14 days after the deadline for filing responsive briefs. Rebuttal briefs shall be limited to 25 pages and shall be served on the parties to the subcase and any party filing a *Notice of Challenge*.

(3) All parties lodging briefs in response to a *Notice of Challenge* are required to submit an original and one copy to the court.

(4) Oral argument on a challenge to a ***Special Master's Recommendation*** shall be held not earlier than 7 days after the deadline for filing rebuttal briefs. Only those parties filing briefs will be allowed oral argument and each party will be limited to 30 minutes.

f. The court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(e)(2). (Adopted October 10, 1997.)

#### 14. ENTRY OF PARTIAL DECREES

a. The Presiding Judge shall enter a partial decree for uncontested water rights or any water right not referred to a Special Master by an **Order of Reference**.

b. Following review of a **Special Master's Recommendation** and the resolution of any challenges, the Presiding Judge shall enter a partial decree. The partial decree shall be served only on parties to the subcase and notice of its entry shall be reported in the Docket Sheet. A certified copy of the partial decree shall be served on IDWR in compliance with I.C. §§ 42-1403 and 42-1412(6).

c. The form of the partial decrees and the maintenance of partial decrees as the sole legal record of title to the water right shall be decided by the Presiding Judge.

d. Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b). Partial decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222. (Adopted October 10, 1997.)

#### 15. APPEALS FROM PARTIAL DECREES

a. Appeals from a partial decree by a party to a subcase may be brought pursuant to I.R.C.P. 54(b) or I.A.R. 12.

b. Motions and proceedings for certification of a judgment as final shall follow motion practice rules. (Adopted October 10, 1997.)

#### 16. BASIN-WIDE ISSUES

##### a. Designation —

(1) Any party to the adjudication may file a *Motion to Designate Basin-Wide Issue* if that party believes an issue materially affects a large number of parties to the adjudication. The motion to designate shall be decided by the Presiding Judge or a Special Master by **Special Order of Reference**. A motion to designate shall state:

- (a) The issue, in 20 words or less;
- (b) Why the issue is broadly significant and is better resolved as a basin-wide issue;
- (c) The need for its early resolution;
- (d) The type of right(s) affected by the issue; and
- (e) A description of how those rights will be affected.

(2) The Presiding Judge may enter a **Notice of Intent to Designate Basin-Wide Issue**.

(3) Unless otherwise ordered, a motion or notice of intent to designate shall follow the Docket Sheet Procedure.

(4) Any party to the adjudication may respond to a motion or notice of intent to designate. The response shall be served on the movant, if any, and the parties listed in Section 6e(2) or, if being heard on an expedited basis, to the addresses on the **Court Certificate of Mailing for Expedited Hearings** which is available from the Clerk of the SRBA Court.

(5) A motion or notice of intent to designate may be filed at any time after the filing of a Director's Report which raises the issues that are the

subject of the motion. The motion shall not be heard until after the objection and response periods to the Director's Report have run.

(6) On receipt of a motion or notice of intent to designate, the Clerk of the Court shall assign a separate subcase number to the basin-wide issue. This new subcase file number shall be included on all documents filed in the basin-wide issue and all entries reported on the Docket Sheet.

(7) When basin-wide issues are designated by the Presiding Judge, hearings may be expedited, and all parties to the adjudication will be given notice of proceedings through the Docket Sheet Procedure.

b. Service —

(1) When the Presiding Judge issues an ***Order Designating Basin-Wide Issue***, a separate certificate of mailing shall be created for each basin-wide issue. This basin-wide issue certificate of mailing will consist of the parties who filed the motion to designate or a response thereto, a response to the notice of intent or a brief in response to the order designating. Parties to the adjudication may also become parties to the basin-wide issue by filing a *Notice of Intent to Participate* no later than 30 days after publication of the order designating in the Docket Sheet or within the time specified on the order designating.

(2) Any pleading filed in the basin-wide issue shall be served on the parties listed on the basin-wide issue certificate of mailing. Parties to the adjudication will be given notice of further proceedings through the Docket Sheet.

(3) Only those parties listed on the basin-wide issue certificate of mailing will be permitted to file pleadings or participate in oral argument on the basin-wide issue.

c. **Proceedings on Basin-Wide Issues to be Heard by the Presiding Judge** — A basin-wide issue will proceed as specified in the order designating, which will state the briefing schedule and the date for oral argument. Once the hearing has been held, the Presiding Judge will issue a memorandum decision.

d. **Proceedings on Basin-Wide Issues Assigned to a Special Master** —

(1) A basin-wide issue, once designated, may be assigned by the Presiding Judge to a Special Master by a ***Special Order of Reference***. The Special Master shall:

(a) Issue a scheduling order stating the briefing schedule and the date for oral argument and

(b) After hearing, file a ***Special Master's Recommendation*** with the Presiding Judge.

(2) **Challenges to a Special Master's Recommendation on a Basin-Wide Issue** — Any party to the basin-wide issue may file a *Notice of Challenge* within 30 days after the issuance of the ***Special Master's Recommendation***. When a challenge has been filed, the Presiding Judge shall issue a scheduling order setting a briefing schedule and the date for oral argument. (Adopted October 10, 1997.)



## 17. IDWR ADMINISTRATIVE PROCEEDINGS TO CHANGE REPORTED WATER RIGHTS

a. In a reporting area where a Director's Report **has not** been filed or where a partial decree has been issued, a claimant requesting an administrative change to their water right claim(s) must contact IDWR. Notice to the SRBA Court is not required.

b. In a reporting area where a Director's Report **has** been filed and prior to the issuance of the partial decree, claimants seeking to change their address or the ownership of a water right claim shall follow the procedures outlined under subsections (1) and (2) below. Claimants seeking to change point of diversion, place of use and period of use shall follow the procedures outlined under subsection (3).

(1) **Change of Address, Change of Ownership** (Idaho Code §§ 42-248 and 42-1409(6)) — Unless the court orders otherwise, water right claimants are required to notify IDWR of any change of address or ownership. When notified of such a change, IDWR shall file with the court a *Notice of Completed Administrative Proceeding* and shall attach a copy of the Amended Director's Report reflecting the change of address or ownership.

(2) **Split Water Rights** — Unless the court orders otherwise, when notice is given to IDWR for a change in ownership of a water right proposing to split a water right, IDWR shall immediately notify the court by submitting a *Notice of Administrative Proceeding*. Upon receipt of the *Notice of Administrative Proceeding*, the court may stay SRBA proceedings for that water right during the pendency of the administrative proceeding. Once the administrative proceeding is complete and all appeal times have run, IDWR shall file with the court a *Notice of Completed Administrative Proceeding* with an attached Amended Director's Report reflecting the division or split that has occurred. IDWR must also attach a copy of an Amended Director's Report for any and all overlapping water right claims. This procedure cannot be used to accomplish an enlargement as provided by I.C. §§ 42-1425, 1426 or 1427.

(3) **Other Changes - Period/Place/Purpose of Use/Nature of Use and Point of Diversion Proceedings Under I.C. § 42-222** — Claimants seeking a change in their claimed water right under I.C. § 42-222 shall contact IDWR. When an application is made with IDWR for a change **pursuant to I.C. § 42-222** for a water right which has been reported in a Director's Report but where a partial decree has not been entered, IDWR shall immediately notify the court by submitting a *Notice of Administrative Proceeding* stating the type of change sought. Upon receipt of the *Notice of Administrative Proceeding*, the court may stay SRBA proceedings for that water right during the pendency of the administrative proceeding. Once the administrative proceeding is complete and all appeal times have run, IDWR shall submit a *Notice of Completed Administrative Proceeding* with an attached Amended Di-

rector's Report which shall report all administrative changes made pursuant to I.C. § 42-222. IDWR shall include Amended Director's Reports for any and all overlapping water right claims.

c. Amended Director's Reports shall be docketed in the subcases indicating the type of amendment made and will be reported in the Docket Sheet. Any party wishing to file an objection to an Amended Director's Report may do so by filing a *Motion to File a Late Objection* within 21 days following the notice of filing the Amended Director's Report in the Docket Sheet. (Adopted October 10, 1997.)

**18. COURT INFORMATION FOR THE PUBLIC AND PARTIES**

The IWATRS computerized register of actions (ROA) is available to the parties to the adjudication and the public. The SRBA Court's home page and electronic records can be accessed via the Internet at URL: [www.srba.state.id.us](http://www.srba.state.id.us). (Adopted October 10, 1997.)





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# LOCAL RULES OF PROCEDURE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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## PART 1. CIVIL RULES AND GENERAL PROVISIONS.

### I. SCOPE OF RULES — ONE FORM OF ACTION.

#### Rule 1.1. Scope of the Rules.

(a) **Title and Citation.** These rules will be known as the Local Rules of Civil and Criminal Practice before the United States District Court for the District of Idaho. They may be cited as “Dist. Idaho Loc. Civ. R. \_\_\_\_\_” or “Dist. Idaho Loc. Crim. R. \_\_\_\_\_.”

(b) **Effective Date.** These rules became effective on January 1, 2005. Any amendments to these rules become effective on the date approved by the Court.

(c) **Scope of Rules.** These rules must apply in all proceedings in civil actions. Rules governing proceedings before magistrate judges are incorporated herein. Additionally, the general provisions of these rules apply to criminal proceedings as set forth in Dist. Idaho Loc. Crim. R. 1.1.

(d) **Relationship to Prior Rules; Actions Pending on Effective Date.** These rules supersede all previous rules promulgated by this District or any judge of this Court. They must govern all applicable proceedings brought in this Court after they take effect. They also must apply to all proceedings pending at the time they take effect, except to the extent that in the opinion of the Court the application thereof would not be feasible or would work an injustice, in which event the former rules must govern.

(e) **Rule of Construction and Definitions.**

(1) Title 1, United States Code, Sections 1 to 5, must, as far as applicable, govern the construction of these rules.

(2) The following definitions must apply:

(A) **“Court.”** As used in these rules, the term “Court” refers to the United States District Court for the District of Idaho, to the Board of Judges for the District of Idaho, or to a particular judge or magistrate judge of the Court before whom a proceeding is pending unless the rule expressly refers to a district judge only or to the full Court.

(B) **“Clerk.”** As used in these rules, the term “Clerk” refers to the Clerk of Court or any deputy clerk designated by the Clerk of Court to act in the capacity of the Clerk. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## **Rule 1.2. Availability of the Local Rules.**

When amendments to these rules are proposed, notice of such proposals and of the ability of the public to comment shall be provided on the Court’s Internet web site and may be provided in The Advocate or other periodicals published by the Idaho State Bar.

When amendments to these rules are made, notice of such amendments shall be provided on the Court’s Internet web site, and may be provided in The Advocate or other periodicals published by the Idaho State Bar. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## **Rule 1.3. Sanctions.**

The Court may sanction for violation of any Local Rule governing the submission of pleadings filed with the Clerk of Court, electronically or otherwise, only by the imposition of a fine against the attorney or a person proceeding pro se. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS.

### Rule 3.1. Venue.

The Divisions of the United States District Court for the District of Idaho consist of the following counties:

- |    |                    |            |            |
|----|--------------------|------------|------------|
| 1. | Northern Division: | Benewah    | Kootenai   |
|    |                    | Bonner     | Shoshone   |
|    |                    | Boundary   |            |
| 2. | Central Division:  | Clearwater | Lewis      |
|    |                    | Idaho      | Nez Perce  |
|    |                    | Latah      |            |
| 3. | Southern Division: | Ada        | Gooding    |
|    |                    | Adams      | Jerome     |
|    |                    | Blaine     | Lincoln    |
|    |                    | Boise      | Owyhee     |
|    |                    | Camas      | Payette    |
|    |                    | Canyon     | Twin Falls |
|    |                    | Elmore     | Valley     |
|    |                    | Gem        | Washington |
| 4. | Eastern Division:  | Bannock    | Franklin   |
|    |                    | Bear Lake  | Fremont    |
|    |                    | Bingham    | Jefferson  |
|    |                    | Bonneville | Lemhi      |
|    |                    | Butte      | Madison    |
|    |                    | Caribou    | Minidoka   |
|    |                    | Cassia     | Oneida     |
|    |                    | Clark      | Power      |
|    |                    | Custer     | Teton      |

Cases that have venue in one of the above divisions will be assigned by the Clerk upon the filing of the complaint or petition to the appropriate division, unless otherwise ordered by the presiding judge. Juries will be selected from the divisions in accordance with the Jury Management Plan adopted by the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### Rule 5.1 Electronic Case Filing.

(a) **Official Records of the Court.** The docketing and case management system for the District of Idaho shall be the judiciary's Case Management and Electronic Case Files (CM/ECF) Program. The official record of the Court consists of: (1) all documents filed electronically; (2) all documents converted to electronic format; and (3) all documents filed and not capable of conversion to electronic format.

(b) **Establishment of Electronic Case Filing Procedures.** The Clerk of Court for the United States District Court for the District of Idaho is



authorized to establish and promulgate Electronic Case Filing Procedures (“ECF Procedures”), including the procedure for registration of attorneys and other authorized users, and for distribution of passwords to permit electronic filing and notice of pleadings and other papers. The Clerk may modify the ECF procedures from time to time, after conferring with the Chief Judges. The ECF Procedures shall be available to the public on the Court’s web site: [www.id.uscourts.gov](http://www.id.uscourts.gov).

(c) **Scope of Electronic Filing.** Unless expressly prohibited, the filing of all documents required or permitted to be filed with the Court in connection with a civil or criminal case shall be accomplished electronically as specified in the Electronic Case Filing (ECF) Procedures.

(1) Documents filed conventionally with the Court may be converted into an electronic format by the Court and in such cases, such documents will be treated for all purposes as if they had been electronically filed, except that conversion of a conventionally filed document to electronic format by the Court will not affect the original filing date and time of that document.

(2) On a case by case basis, the presiding judge may direct that paper copies of any documents filed electronically be sent directly to the judge’s chambers.

(d) **Court Retention of Records-Copies.** Where a document filed conventionally is converted to an electronic format by the Court, the document originally filed shall be maintained as a copy only. Such copies of documents will be retained by the Court only so long as required to ensure that the information has been transferred to the Court’s data base, for other Court purposes or as required by other applicable laws or rules. It shall be the responsibility of any party who has filed a document conventionally who desires to have the document returned by the Clerk, to specifically request and arrange for its return or the Clerk is authorized to dispose of the document after electronic conversion.

(e) **Retention of Conventionally Signed Documents.** The original of all conventionally signed documents that are electronically filed shall be retained by the filing party for a period of not less than the maximum allowed time to complete any appellate process, or the time the case of which the document is a part, is closed, whichever is later. The document shall be produced upon an order of the Court.

Anyone who disputes the authenticity of any signature on electronically-filed documents shall file an objection to the document within ten days of receipt of the document or notice of its filing, whichever first occurs.

(f) **Eligibility.** Only a Registered Participant or an authorized employee of the Registered Participant may file documents electronically. To become a Registered Participant, or to act as an authorized employee of the Registered Participant, a person must satisfy the registration requirements established by the Court and participate in training as required by the Court unless the Clerk is satisfied that training is not necessary.

(g) **Consequences of Electronic Filings.** The electronic transmission of a document to the Court via an electronic filing system authorized by the

Court and consistent with the administrative and technical requirements established by the Court, constitutes filing of the document for all purposes. The filing date and time of a document filed electronically shall be the date and time the document is electronically received by the Court, which for the purposes of this Rules shall be Mountain Time.

(h) **Entry of Court Issued Documents.** The Court shall enter all orders, decrees, judgments and proceedings of the Court in accordance with the electronic filing procedures, which shall constitute entry of the order, decree, judgment, or proceeding on the docket kept by the Clerk of Court.

(i) **Large Documents, Exhibits and Attachments.** The parties are directed to refer to the Electronic Case Filing Procedures, which may be amended from time to time.

(j) **Signatures.** The electronic filing of any document by a Registered Participant shall constitute the signature of that person for all purposes provided in the Federal Rules of Civil and Criminal Procedure. For instructions regarding electronic signatures, refer to the Electronic Case Filing Procedures.

(k) **Notice and Service of Documents.** Participation by a Registered Participant in the Court's CM/ECF system by registration and receipt of a login and password from the Clerk of Court shall constitute consent by that Registered Participant to the electronic service of pleadings and other papers under applicable Federal Rules of Civil, Criminal and/or Bankruptcy Procedure.

(l) **Technical Failures.** Any Registered Participant or other person whose filing is made untimely or who is otherwise prejudiced as a result of a technical failure at or by the Court, may seek appropriate relief from the Court. The Court shall determine whether a technical failure has occurred or whether relief should be afforded on a case by case basis. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)

**Rule 5.2. General Format of Documents Presented for Filing Electronically or, Where Permitted, in Conventional Format.**

(a) All pleadings, motions, and other papers presented for filing must be in 8½ x 11 inch format, flat and unfolded, without back or cover, and must be plainly typewritten, printed, or prepared on one side of the paper only by a clearly legible duplication process, and doublespaced, except for quoted material and footnotes. Each page must be numbered consecutively. The top, bottom, and side margins must be at least one inch, and the font or typeface for all text, including footnotes, must be at least 12 point.

If pleadings are filed in paper form, it is the responsibility of the filer to ensure that the paper document can be scanned with a legible image. All pleadings must be affixed by a fastener (i.e., paper clip) and NOT staples. The court requires that such documents be submitted in black print on

white paper, for maximum contrast. The Court may return filings that are not legible.

(b) The following information must appear in the upper left-hand corner of the first page of each paper presented for filing, except that in multiparty actions or proceedings, reference may be made to the signature page for the complete list of parties represented:

- (1) Name of the Attorney (or, if in propria persona, of the party)

(2) E-mail address (if available)

(3) State Bar Number

(4) Office Mailing Address

(5) Telephone Number

(6) Facsimile Number

(7) Specific identification of the party represented by name and interest in the litigation (*i.e.*, plaintiff, defendant, etc.)

Following the counsel identification and commencing four inches below the top of the first page, (except where additional space is required for identification) the following caption must appear:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Plaintiff,

vs.

Defendant.

)

) Case No. \_\_\_\_\_

)

)

) TITLE DESCRIBING THE

) DOCUMENT OR ACTION

) (*i.e.* Response, Motion, *etc.*)

)

- (1) The title of the court;

(2) The title of the action or proceeding;

(3) The file number of the action or proceeding as it appears in CM/ECF, (*i.e.* 1:10-cv-043-XYZ, representing the Division (1=Southern; 2=Northern; 3=Central; 4=Eastern), year of filing, designation as civil or criminal, case number, and assigned judge’s initials);

(4) The category of the action or proceeding as provided hereinafter in these rules;

(5) A title describing the pleading. If the pleading is a response to a motion, that particular motion should be reflected in the title; and

(6) Any other matter required by this rule.
- (c) Documents submitted for filing, electronically or conventionally, must be accompanied by the appropriate fee, if any. In the event of a failure to comply with these rules, the Clerk may bring the failure to comply to the attention of the filing party and of the judge to whom the action or proceeding is assigned.

(d) **Removing Cases from State Court.**

- (1) A copy of the entire state court record and the docket sheet must be provided at the time of filing the notice of removal.

(2) **Civil Cover Sheet for Notices of Removal:** Attorneys are required to complete a civil cover sheet when a notice of removal is filed in the District of Idaho. The form is available from the Clerk of Court. This form is used by the Clerk of Court to identify the status of all parties and attorneys. *See* Dist. Idaho Loc. Civ. R. 7.1, Motion Practice and Dist. Idaho. Loc. Civ. R. 81.

(d)[e] Every complaint or other document initiating a civil action must be accompanied by a completed civil cover sheet, on a form available from the Clerk. This requirement is solely for administrative purposes, and matters appearing only on the civil cover sheet have no legal effect in the action.

If the complaint or other document is submitted without a completed civil cover sheet or civil cover sheet for notices of removal, the Clerk must file the complaint or the notice of removal as of the date received and promptly give notice of the omission of the respective civil cover sheet to the party filing the document. When the respective civil cover sheet has been received, the Clerk must process the complaint or notice of removal as of the original date of filing the complaint. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)

**Publisher's note.** The [e] was added by the publisher.

### **Rule 5.3. Sealed and In Camera Documents.**

This Rule applies to documents filed electronically or those filed in paper format.

#### **(a) General Provisions.**

(1) **Motion to File Under Seal.** Counsel seeking to file a document under seal shall file motion to seal, along with supporting memorandum and proposed order, and file the document with the Clerk of Court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading.

(2) **Public Information.** Unless otherwise ordered, the motion to seal will be noted in the public record of the Court. However, the filing party or the Clerk of Court shall be responsible for restricting public access to the sealed documents, as ordered by the Court.

#### **(b) Electronic Filing of Sealed Documents.**

(1) Sealed documents and sealed cases will be filed in electronic format, with access restricted to the Court and authorized staff, unless otherwise ordered by the court.

(2) A motion to seal a document or case shall be submitted electronically in CM/ECF. If a party wishes to file a document under seal in CM/ECF, they shall first contact the clerks office for instructions regarding how to file the document and how to maintain the confidentiality of the information. The document submitted under seal shall be filed separately from the motion to seal.



(3) Documents submitted to the Court for *in camera* review shall be submitted in the same fashion as sealed documents.

(4) It is the attorney's responsibility to ensure that the documents submitted for *in camera* review are not accessible to other parties. On a case-by-case basis, the presiding judge may request that paper copies of documents submitted for *in camera* inspection be sent directly to the judge's chambers.

(5) Additional instructions for the electronic submission of sealed and *in camera* documents are contained in the Electronic Case Filing Procedures.

**(c) Documents Submitted in Paper Format.**

(1) **Format of Documents Filed Under Seal.** If the material to be sealed is presented in paper format, counsel lodging the material shall submit the material in an UNSEALED 8½ x 11 inch manilla envelope. The envelope shall contain the title of the Court, the case caption, and case number.

(2) Absent any other Court order, sealed documents submitted in paper format will be returned to the submitting party after the case is closed and the appeal time has expired, or if appealed, after the conclusion of all appeals. (Amended December 31, 2004, effective January 3, 2005; amended March 7, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended December 30, 2010, effective January 1, 2011.)

**Rule 5.4. Non-Filing of Discovery or Disclosures and Discovery Materials Not to be Filed With Court.**

The following discovery documents must be served upon other counsel and parties but must not be filed with the Clerk of Court unless on order of the Court or for use in the proceeding:

- (1) Initial Disclosures
- (2) Disclosure of Expert Reports or Testimony
- (3) Interrogatories
- (4) Requests for Documents and Entry of Land
- (5) Requests for Admission
- (6) Notice of Taking Deposition
- (7) Answers to Interrogatories and Responses to Requests for Documents
- (8) Privilege Logs

Any certificates of service related to discovery documents must not be filed with the Clerk. The party responsible for service of the discovery material must retain the original and become the custodian. The original transcripts of all depositions upon oral examination shall be retained by the party taking such deposition. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**Rule 5.5. Protection of Personal Privacy.**

(a) In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including or shall partially redact, where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:

(1) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.

(2) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

(4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

(5) **Home addresses.** Only the city and state shall be identified.

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the Court record is critical to the case. The document must contain the following heading in the document, "SEALED DOCUMENT PURSUANT TO E-GOVERNMENT ACT OF 2002". This document shall be retained by the Court as part of the record until further order of the Court. The party must also electronically file a redacted copy of this document for the official record.

(c) The redaction requirement in section(a) shall not apply to in rem forfeiture actions or to the lodging of the state court record in habeas corpus cases brought under 28 U.S.C. § 2241 or § 2254, to the extent that the state court record is lodged with the Court in paper format.

(d) In order to comply with the Judicial Conference Policy, in addition to the items listed in section (a) above, the Court shall not provide public access to the following documents: unexecuted warrants of any kind; pretrial bail or presentence investigation reports; statement of reasons in the judgment of conviction; juvenile records, documents containing identifying information about jurors or potential jurors; financial affidavits filed in seeking representation pursuant to the Criminal Justice Act; ex parte requests for expert or investigative services at Court expense; and sealed documents.

(e) In addition to the redaction procedures outlined above, the Judicial Conference policy requires Counsel to redact the personal identifiers noted in (a), which are contained in any transcripts filed with the Court. Counsel should follow the transcript redaction procedures outlined on the Court's web site. <http://www.id.uscourts.gov/CourtReporter/Transcripts.pdf>

(f) You are advised to exercise caution when filing documents that contain the following:

- (1) Personal identification number, such as driver's license number;
- (2) Medical records, treatment and diagnosis;
- (3) Employment history;
- (4) Individual financial information;
- (5) Proprietary or trade secret information;
- (6) Information regarding an individual's cooperation with the government;
- (7) Information regarding the victim of any criminal activity;
- (8) National security information;
- (9) Sensitive security information as described in 49 U.S.C. section 114(s).

(g) Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that the redaction of personal identifiers is done. The clerk will not review each pleading for redaction. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009; amended December 30, 2010, effective January 1, 2011.)

### III. PLEADINGS AND MOTIONS.

#### **Rule 6.1. Requests and Orders to Shorten or Extend Time or Continue Trial Dates.**

When by these rules or by notice given thereunder an act is required or allowed to be done at or within a specified time, the Court, for cause shown, may at any time, with or without motion or notice, order the period be shortened or extended.

(a) **Requests for Time Extensions Concerning Motions.** All requests to extend briefing periods or to vacate or reschedule motion hearing dates must be in writing and state the specific reason(s) for the requested time extension. Such requests will be granted only upon a showing of good cause. A mere stipulation between the parties without providing the reason(s) for the requested time extension will be deemed insufficient. The requesting party must apprise the Court if they have previously been granted any time extensions in this particular action.

(b) **Requests for Trial Continuance.** All requests to vacate, continue, or reschedule a trial date must be in the form of a written motion, must be approved by the client, and must state the specific reason(s) for the requested continuance. A mere stipulation between the parties without providing the specific reason(s) for the requested continuance will be deemed insufficient. Client approval can be satisfied either by the client's actual signature or by the attorney certifying to the Court that the client knows about and agrees to the requested continuance. The requesting party must apprise the Court if they have previously been granted a trial date



continuance in this particular action. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 7.1. Motion Practice.**

#### **(a) General Requirements.**

(1) The moving and responding parties are not required to submit an additional copy of any motion, memorandum of points and authorities, and supporting materials, including affidavits and/or declarations, unless required by the judge assigned to the matter.

(2) No memorandum of points and authorities in support of or in opposition to a motion shall exceed twenty (20) pages in length, nor shall a reply brief exceed ten (10) pages in length, without express leave of the Court which will only be granted under unusual circumstances. The use of small fonts and/or minimal spacing to comply with the page limitation is not acceptable.

(3) Documents being submitted in response to, in support of, or in opposition to other documents shall be clearly labeled with the docket number of the motion or response in the caption.

(4) Parties shall submit proposed orders concerning routine or uncontested matters only via e-mail in accordance with ECF Procedures.

(5) Any party, either proposing or opposing a motion or other application, who does not intend to urge or oppose the same must immediately notify opposing counsel and the Clerk of Court by filing a pleading titled "Non-Opposition to Motion."

(6) The time periods specified herein and automatically generated by CM/ECF for service do not supersede, alter or amend any otherwise applicable Federal or Local Rule specifying a different time period for service or method of computing time.

#### **(b) Requirements for Submission — Moving Party.**

(1) Each motion, other than a routine or uncontested matter, must be accompanied by a separate brief, not to exceed twenty (20) pages, containing all of the reasons and points and authorities relied upon by the moving party. In motions for summary judgment under Federal Rule of Civil Procedure 56, in addition to the requirements contained in Federal Rule of Civil Procedure 56(c)(1), the moving party shall file a separate statement of all material facts, not to exceed ten (10) pages, which the moving party contends are not in dispute.

(2) The moving party shall serve and file with the motion affidavits required or permitted by Federal Rule of Civil Procedure 6(c), declarations submitted in accordance with 28 U.S.C. § 1746, copies of all photographs, documentary evidence and other supporting materials on which the moving party intends to rely.

(3) The moving party may submit a reply brief, not to exceed ten (10) pages, within fourteen (14) days after service upon the moving party of the responding party's memorandum of points and authorities.

(4) If relief is sought under any of the Federal Rules of Civil Procedure dealing with discovery practices, the party seeking or opposing such relief



shall comply with the specific practices and procedures governing discovery motions found in Local Rules 37.1 and 37.2.

**(c) Requirements for Submission — Responding Party.**

(1) The responding party shall serve and file a response brief, not to exceed twenty (20) pages, within twenty-one (21) days after service upon the party of the memorandum of points and authorities of the moving party. The responding party shall serve and file with the response brief any affidavits, declarations submitted in accordance with 28 U.S.C. § 1746, copies of all photographs, documentary evidence, and other supporting materials on which the responding party intends to rely.

(2) In responding to a motion for summary judgment under Federal Rule of Civil Procedure 56, in addition to the requirements contained in Federal Rule of Civil Procedure 56(c)(1), the responding party shall also file a separate statement, not to exceed ten (10) pages, of all material facts which the responding party contends are in dispute.

(3) The response brief, should be clearly identified as a “Response to the Motion to \_\_\_\_\_ filed on \_\_\_\_\_” and must contain all of the reasons and points and authorities relied upon by the responding party.

**(d) Determination of Motions by the Court and Scheduling for Oral Argument, if Appropriate.**

**(1) Hearings.**

(i) If the presiding judge determines that oral argument on the motion is appropriate, then the courtroom deputy, after considering appropriate time frames to respond to the motion, will promptly advise the attorney for the moving party of a hearing date for oral argument on the motion. The courtroom deputy will then prepare and file a notice of hearing.

The attorney for the moving party is required to resolve any conflicts regarding the hearing date with opposing counsel and then contact the courtroom deputy for a new hearing date if conflicts develop over an initial hearing date. The courtroom deputy will then serve a notice of the new hearing date within five (5) days.

(ii) If the presiding judge determines that oral argument will not be necessary, then the courtroom deputy will notify counsel for the moving party, who will then be responsible for notifying the other parties that the matter will be decided on the briefs.

If the presiding judge later determines that oral argument would be of assistance, then the moving party will be so notified by the courtroom deputy.

(2) Attorneys are encouraged to communicate with the courtroom deputies regarding the status of any motion.

(3) The parties may request that the hearing be conducted telephonically or by video conference by contacting the courtroom deputy. Video conferencing is available in Boise, Pocatello, Moscow and Coeur d’Alene.

**(e) Effects of Failure to Comply with the Rules of Motion Practice.**

(1) Failure by the moving party to file any documents required to be filed under this rule in a timely manner may be deemed a waiver by the moving party of the pleading or motion. Except as provided in subpart (2) below, if an adverse party fails to timely file any response documents required to be filed under this rule, such failure may be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application. In addition, the Court, upon motion or its own initiative, may impose sanctions in the form of reasonable expenses incurred, including attorney fees, upon the adverse party and/or counsel for failure to comply with this rule.

(2) In motions brought under Federal Rule of Civil Procedure 56, if the non-moving party fails to timely file any response documents required to be filed, such failure shall not be deemed a consent to the granting of said motion by the Court. However, if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Federal Rule of Civil Procedure 56(c) or Local Rule 7.1(b)(1) or (c)(2), the Court nonetheless may consider the uncontested material facts as undisputed for purposes of consideration of the motion, and the Court may grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the moving party is entitled to the granting of the motion.

**(f) Requests to Extend Motion Briefing Period or to Vacate or Reschedule Motion Hearing Dates.** (See Dist. Idaho Loc. Civ. R. 6.1.) (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended December 30, 2010, effective January 1, 2011; amended effective January 1, 2012.)

### **Rule 7.2. Ex Parte Orders.**

All applications to a judge of this Court for ex parte orders may be made by a party appearing in propria persona or by an attorney of this Court. All applications must be accompanied by a memorandum and/or affidavit outlining the necessity and authority for issuance of the order ex parte. When the opposing party is represented by counsel, the application must recite whether opposing counsel has been notified of the application for an ex parte order or set forth the reasons why opposing counsel has not been notified. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 7.3. Stipulations.**

Oral stipulations made in open court are binding on the parties. Written stipulations are binding on the parties when approved by the judge. The party filing the stipulation must submit a proposed order via e-mail in accordance with ECF Procedures.

Stipulations between the parties to commence discovery prior to making their initial disclosures do not have to be approved by the Court. (Amended December 31, 2004, effective January 3, 2005; technical amendments made

March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)

**Rule 9.1. Non-Capital Case Habeas Petitions (State Custody).**

(a) All petitions for a writ of habeas corpus in non-capital cases filed pursuant to 28 U.S.C. § 2254 must be subject to the provisions of this rule unless otherwise ordered by the court.

(b) The petition must be in writing, and if presented pro se, the petition must be upon the form and in accordance with the instructions approved by the court. Copies of the forms and instructions will be supplied by the Clerk of Court upon request.

(c) All petitions for writ of habeas corpus will be subject to an initial review by the court pursuant to Rule 4 of the Rules Governing § 2254 Cases. Petitions accompanied by an application to proceed in forma pauperis are also subject to the initial review provisions of 28 U.S.C. § 1915.

(d) Upon completion of the initial review of the petition, the court may summarily dismiss the petition, or it may direct the Clerk of Court to serve the appropriate respondent with the petition or motion, together with a copy of the court's order requiring the respondent to file an answer, pre-answer motion, or other briefing in response to the initial review order and to file those portions of the records as may be ordered by the court, within a time period fixed by the court.

(e) If the petitioner had previously filed a petition for relief or for a stay of enforcement in the same matter in this court, then, where practicable the new petition must be assigned to the judge who considered the prior matter.

(f) If relief is granted on the petition of a state prisoner, the Clerk of Court must forthwith notify the state authority having jurisdiction over the prisoner of the action taken. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 9.2. Special Requirements for Habeas Corpus Petitions Involving the Death Penalty.**

(a) **Applicability.** This rule governs the procedures for a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which a petitioner seeks relief from a judgment imposing the penalty of death. The application of this rule may be modified by the judge to whom the petition is assigned. These rules supplement the Rules Governing Section 2254 Cases and do not in any way alter or supplant those rules.

(b) **Initiation of Proceedings and Request For a Stay of Execution.** When a death warrant has been issued, and after the Idaho Supreme Court has decided the consolidated direct appeal/post-conviction appeal and the United States Supreme Court has acted on a petition for writ of certiorari, if any, a petitioner may seek relief from a state court conviction and capital sentence in this court by filing a federal habeas corpus petition.

(1) **Preliminary Steps.** At his or her option, a petitioner may take the following steps preliminary to filing a federal habeas corpus petition by filing an original and a copy of the following:



- (A) Application for a stay of execution;
- (B) Application to proceed in forma pauperis with supporting affidavit, if applicable;
- (C) Application for the appointment of counsel or to proceed pro se, if applicable;
- (D) Statement of issues re: petition for writ of habeas corpus.

(2) **Statement of Issues.** The statement of issues re: petition for writ of habeas corpus must:

- (A) state whether petitioner has previously sought relief arising out of the same matter from this court or any other federal court, together with the ruling and reasons for denial of relief;
- (B) state that petitioner intends to file a petition for writ of habeas corpus;
- (C) list the issues to be presented in the petition for writ of habeas corpus; and
- (D) certify that the issues outlined raise substantial questions of constitutional law, are non-frivolous, and are not being raised simply for the purpose of delay.

(c) **Review of Petition or Preliminary Initial Filings by Court.**

Upon receipt of the petition or initial filings, the Clerk of Court must immediately assign the matter to a district judge. When an application for the appointment of counsel and other preliminary initial filings have been submitted before a petition for writ of habeas corpus has been filed, the matter must be assigned to a district judge in the same manner that a petition would be assigned. The district judge must immediately review the petition or preliminary initial filings, and, if the matter is found to be properly before the court, the court will issue an initial review order (1) staying the execution for the duration of the proceedings in this court, (2) setting an initial case management conference, and, if applicable, (3) granting or denying the application to proceed in forma pauperis; and (4) granting or denying the application for the appointment of counsel.

(1) **Notice of Stay.** Upon the granting of any stay of execution, the Clerk of Court will immediately notify the following: counsel for the petitioner; the Idaho Attorney General; the warden of the Idaho Maximum Security Institution; and, when applicable, the clerks of the Idaho Supreme Court and the Ninth Circuit Court of Appeals. The Idaho Attorney General is responsible for providing the Clerk of Court with a telephone number where he or she or a designated deputy attorney general can be reached twenty-four (24) hours a day.

(d) **Counsel.**

(1) **Appointment of Counsel.** Each indigent capital case petitioner must be represented by counsel unless petitioner has clearly elected to proceed pro se and the court is satisfied, after a hearing, that petitioner's election is knowing and voluntary. Unless petitioner is represented by retained counsel, counsel must be appointed in every such case at the earliest practicable time.



(2) **Qualifications of Appointed Counsel.** Upon application by petitioner for the appointment of counsel, the court must appoint the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho as lead counsel. Upon request of the Capital Habeas Unit, the court must also appoint an attorney from the Criminal Justice Act (CJA) Capital Habeas Panel as second counsel. In the event the Capital Habeas Unit is unable to provide representation because of conflicts, existing workload, or other special factors, it must recommend the attorneys from the CJA Capital Habeas Panel to be appointed. The court will either accept the recommendation or select other attorneys from the CJA Capital Habeas Panel.

(e) **Case Management Conferences.** After a capital habeas corpus proceeding has been assigned to a judge and counsel has been appointed, the assigned judge shall conduct an initial case management conference to discuss anticipated proceedings in the case. In all cases where payment for attorneys' fees and investigative and expert expenses are requested under the CJA, the petitioner's counsel will be required to prepare phased budgets for submission to the Court at the beginning of each of the following applicable phases: Phase I, Appointment of Counsel, Record Review and Preliminary Investigation; Phase II, Petition Preparation or Amendment; Phase III, Procedural Defenses, Discovery related to Procedural Defenses, Motion for Evidentiary Hearing, and Briefing of Claims; and Phase IV, Discovery related to Merits, Evidentiary Hearing, and Final Briefing. After the initial case management conference, the assigned judge may schedule additional case management conferences in advance of each of the budgeting phases. The assigned judge also may schedule one or more ex parte conferences with the petitioner's counsel to implement the budgeting process.

(f) **Procedures for Considering the Petition for Writ of Habeas Corpus.** The following schedule and procedures apply, subject to modification at the discretion of the assigned district judge.

(1) **Petition for Writ of Habeas Corpus.** Petitioner must file a final petition for writ of habeas corpus no later than the date set in the court's initial scheduling order.

(2) **State Court Record.** The respondent must, as soon as practicable after the initiation of the habeas corpus proceeding, but in any event no later than when respondent files an answer or pre-answer motion in response to the petition, file with the court one copy of the following:

(A) Transcripts of the state court proceedings.

(B) Clerk's records to the state court proceedings.

(C) The briefs filed on consolidated appeal to the Idaho Supreme Court and on any petition for rehearing.

(D) Copies of all motions, briefs and orders in any post-conviction relief proceeding.

(E) An index to all materials described in paragraphs (A) through (D) above.

If any items required to be filed in paragraphs (A) through (D) above are not available, the respondent must so state and indicate when, if at all, such missing material(s) will be filed.

If counsel for the petitioner finds that the respondent has not complied with the requirements of this section, or if the petitioner does not have copies of all of the documents filed with the court, the petitioner must immediately notify the court in writing with a copy to the respondent. Thereafter, the respondent must provide copies of any missing documents to the petitioner.

(3) **Procedural Defenses.** At the initial case management conference, or at a reasonable time thereafter, the Court may authorize the respondent to file a pre-answer motion to dismiss, alleging that the petitioner's claims are barred by a failure to exhaust, a state procedural bar, the statute of limitations, or *Teague v. Lane*, 489 U.S. 288 (1989). If authorized, such motions must be filed within 60 days after the petition is filed. The petitioner's response brief must be filed within 60 days after the motion to dismiss is filed. If a party believes that discovery is needed, the party must file a motion for discovery and briefly outline the particular discovery needed and explain how he or she anticipates the discovery will aid the claim or defense. If the Court grants a motion for discovery, it will issue an order extending the petitioner's response time accordingly. The respondent's reply in support of the motion to dismiss must be filed within 20 days after the petitioner's response is filed.

(4) **Unexhausted Claims.** If a petition is found to contain unexhausted claims for which a state remedy may still be available, the court may:

(A) dismiss the petition without prejudice; or

(B) upon motion, grant a petitioner's request to withdraw the unexhausted claims from the petition, and grant a temporary stay of execution to allow a petitioner to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the federal habeas case will be stayed, and the petitioner must file a quarterly report about the status of the state court case in the federal habeas case. After the state court proceedings have been completed, petitioner may amend the federal petition to add the newly exhausted claims.

(5) **Answer.** The respondent's answer to the petition shall be filed within 60 days after a decision on the respondent's motion to dismiss, or within 60 days after the petition has been filed if the court has not authorized the respondent to file a pre-answer motion.

(6) **Traverse and Motion for Discovery on Merits.** Within 60 days after the answer is filed, the petitioner may file a traverse, if necessary. If a party wishes to seek authorization to conduct discovery related to the merits of any claim or defense, the party shall file a motion for discovery within 60 days after the answer is filed. Any motion for discovery must contain a brief outline of the particular discovery needed, explain how the

party anticipates the discovery will aid the claim or defense, and prove entitlement to discovery under 28 U.S.C. § 2254(e)(2), Rule 6 of the Rules Governing Section 2254 Cases, or any other applicable standard.

(7) **Motion for Evidentiary Hearing on Merits.** Any motion for an evidentiary hearing must be made within 60 days after the answer is filed. The motion must specify which factual issues require a hearing.

(A) If the court determines that an evidentiary hearing is necessary, it will set a schedule for the hearing, order preparation of the transcript after hearing, and provide copies of the transcript to the parties. In its discretion, the court may order posthearing briefing and argument.

(B) If the court determines that an evidentiary hearing is not necessary, it may take the matter under advisement on the pleadings or order briefing on the merits.

(g) **Court's Final Decision.** The court will issue a written decision granting or denying the petition.

The Clerk of Court will immediately notify the counsel for the petitioner, the Idaho Attorney General, the warden of the Idaho Maximum Security Institution, and the Clerk of the Idaho Supreme Court of the court's decision or ruling on the merits of the petition.

The Clerk of Court will immediately notify the Clerk of the United States Court of Appeals for the Ninth Circuit, and if applicable, the Clerk of the United States Supreme Court, by telephone of:

(1) any final order denying or dismissing a petition without a certificate of appealability; or

(2) any order denying or dissolving a stay of execution.

If the petition is denied and a certificate of appealability is issued, the court will grant a stay of execution which will continue in effect until the Ninth Circuit Court of Appeals acts upon the appeal or the order of stay.

When a notice of appeal is filed, the Clerk of Court must immediately transmit the record to the Clerk of the United States Court of Appeals for the Ninth Circuit.

(h) **Pleadings, Motions, Briefs, and Oral Argument.**

(1) **Caption.** Every pleading, motion, or other application for an order from the court which is filed in these matters must contain a notation in the caption which indicates that it is a capital case. The notation "CAPITAL CASE" must appear in bold, capital letters to the right of the case entitlement and directly beneath the Case Number. The following is provided as an example:

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

John Doe,	)	
	)	Case No. _____
Petitioner,	)	
	)	<b>CAPITAL CASE</b>
vs.	)	
	)	
A.J. ARAVE,	)	APPLICATION FOR
	)	STAY OF EXECUTION
Respondent.	)	
	)	

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(2) **Motion Practice.** Unless this rule or an order of the court provides otherwise, motion practice must comply with the applicable local rules of the court.

(3) **Briefs.**

(A) Briefs in support of and in opposition to motions must be no longer than 30 pages. If a reply brief is permitted, it must be no longer than 15 pages.

(B) Principal briefs addressing the merits of the claims set forth in the petition must be no longer than 60 pages, and the reply brief must be no longer than 25 pages.

(C) A motion for permission to exceed page limits must be filed on or before the brief's due date and must be accompanied by a declaration stating the reasons for the motion.

(D) No brief may be filed unless permitted by an applicable rule or leave of court.

(4) **Discovery.** The parties may not conduct discovery without first obtaining leave of court.

(5) **Oral Argument.** Motions and petitions shall be deemed submitted and shall be determined upon the pleadings, briefs, and record. The court, at its discretion, may order oral argument on any issue or claim. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 15.1. Form of a Motion to Amend and Its Supporting Documentation.**

A party who moves to amend a pleading must describe the type of the proposed amended pleading in the motion (i.e., motion to amend answer, motion to amend counterclaim). Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must reproduce the entire pleading as amended. Failure to comply with this rule is not grounds for denial of the motion. The proposed amended document will be filed at the time of filing the motion and submitted to the Court for approval. However, typographical errors in briefs or other documents shall be brought to the attention of the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)



**Rule 16.1. Scheduling Conference, Voluntary Case Management Conference (VCMC) and Litigation Plans.**

As a general rule, scheduling conferences will not be held in the following type of cases, unless otherwise ordered by the court:

- (1) A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence.
- (2) An action to enforce or quash an administrative summons or subpoena.
- (3) An action by the United States to recover a benefit payment.
- (4) An action by the United States to collect on a student loan.
- (5) A proceeding ancillary to proceedings in other courts.
- (6) Petition to review a decision denying social security benefits.
- (7) Farm Service Administration Foreclosure Actions.

In all other civil cases, unless otherwise ordered by the Court, a scheduling conference will be conducted within ninety (90) days after the complaint has been filed. The Court, in its discretion, may use telephonic/video conferencing with the parties for this purpose. The Court will notify all parties of the date and time of the scheduling conference.

When the Clerk provides notice to the parties of the time and date of the scheduling conference, counsel will also be provided with a scheduling conference/litigation plan form used by the trial judge who has been assigned the case. This form also contains requests for discovery information that counsel will discuss at their Federal Rule of Procedure 26(f) conferences. Each judge's litigation plan form is available on the Court's website.

At least twenty-one (21) days before the time and date set for the scheduling conference, counsel must confer and discuss each of the following items contained on the scheduling conference/litigation plan form. These include, but are not necessarily limited, to the following:

- (1) Discuss the requirement to make initial disclosures within fourteen (14) days.
  - (2) Expert witness reports/testimony cutoff dates.
  - (3) Number and length of depositions.
  - (4) Discovery cutoff dates.
  - (5) Joinder of parties and amendment of pleadings cutoff date.
  - (6) Dispositive motions filing cutoff date.
  - (7) Availability of Voluntary Case Management Conference (VCMC).
  - (8) Alternative Dispute Resolution: (Dist. Idaho Loc. Civ. R. 16.4)
    - (A) Settlement Conferences
    - (B) Arbitration
    - (C) Mediation
  - (9) Status conference date, if counsel believe one will be necessary.
  - (10) Pretrial conference date (to be entered by the Court).
  - (11) Estimated length of trial.
  - (12) Trial date (to be entered by the Court).
- (a) Voluntary Case Management Conference.

(1) **Definition.** Voluntary Case Management Conference (VCMC) is a tool whereby a Magistrate Judge hosts an informal meeting with counsel in civil cases to identify areas of agreement, clarify and focus the issues, and encourage the parties to enter procedural and substantive stipulations. The VCMC conference is not a settlement conference; it is an effort to: (1) assist in the reduction of expense and delay; and (2) enhance direct communication between the parties about their claims.

(2) **Timing.** During the Scheduling Conference, the trial judge will discuss with the parties whether the case would benefit from a VCMC conference before a designated Magistrate Judge. If the trial judge and the parties agree that a VCMC conference is warranted, the parties will be ordered to appear at a VCMC conference within 45 days after the Scheduling Conference.

(a) Counsel for any party may request an earlier VCMC conference by contacting the court's ADR Coordinator. The ADR Coordinator will discuss the request with the assigned trial judge, who will determine whether it is appropriate to refer the action to an earlier VCMC conference.

(b) The Magistrate Judge conducting the VCMC conference may order the VCMC conference be conducted by telephone upon request by counsel for any party.

(3) **Process.** At the VCMC conference, the Magistrate Judge will discuss the parties' claims and defenses in order to suggest stipulations and pretrial procedures that may reduce the expense and delay in the case. The Magistrate Judge assigned to the VCMC conference will generally be the same Magistrate Judge assigned to conduct a judicially supervised settlement conference in the case, although he or she will not be the trial judge assigned to the case or designated for referrals by a District Judge in the same case.

(a) All communications during the VCMC conference shall be privileged and confidential.

(b) If necessary, the Magistrate Judge conducting the VCMC conference may, after consultation with the trial judge, modify the scheduling order based on agreements reached at the VCMC conference.

Fourteen (14) days after counsel have conferred on the scheduling conference/litigation plan form, counsel must make their initial disclosures as required by Federal Rule of Civil Procedure 26(a)(1).

After counsel have conferred on the scheduling conference and litigation plan form, counsel must forward to the Court the scheduling conference and litigation plan form which they have jointly stipulated to or, in the event counsel are unable to agree, their proposed plan within the time period prescribed by the judge conducting the scheduling conference.

After the scheduling conference, the court will prepare and enter an order which will provide time frames and dates for the items contained on the scheduling/litigation plan form. Upon the Court's determination, certain

cases can be exempted from these requirements and the parties will be so notified.

(b) **Electronically Stored Information.** The parties shall discuss the parameters of their anticipated e-discovery at the Rule 26(f) conference, as well as at the Rule 16 scheduling conference. More specifically, during the Rule 26(f) conference, the parties shall exchange the following information and discuss the following e-discovery issues:

(1) the names of the most likely custodians of relevant electronically stored information, as well as a brief description of each person's title and responsibilities;

(2) a list of each relevant electronic device or system that has been in place at all relevant times and a general description of each device or system including, but not limited to, the nature, scope, character, organization, and formats employed in each device or system. The parties should also discuss whether their electronically stored information is reasonably accessible. Electronically stored information that is not reasonably accessible may include information created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval otherwise involves undue burden or substantial cost;

(3) a brief description of the steps each party has taken to segregate and preserve all potentially relevant electronically stored information;

(4) the potential for conducting discovery of electronically stored information in phases as a method for reducing costs and burden;

(5) the methodology the parties shall employ to conduct an electronic search for relevant electronically stored information and any restrictions as to the scope and method of the search;

(6) the format for production (e.g., text searchable image files such as PDF or TIFF) of electronically stored information; and

(7) any problems reasonably anticipated to arise in connection with e-discovery (e.g., email duplication).

If the parties fail to reach agreement on any of the e-discovery issues addressed in subparts (4) through (7) above prior to the Rule 16 scheduling conference, the parties shall bring this fact to the Court's attention at the Rule 16 scheduling conference and discuss whether the Court's intervention on those topics is necessary. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended effective January 1, 2013.)

### **Rule 16.2. Pretrial Conferences.**

At the scheduling conference, a time and date will normally be set for a pretrial conference. The Court may also conduct periodic status conferences to monitor how the case is proceeding to trial.

The assigned judge or magistrate judge may make such pretrial order or orders, at or following the pretrial conference, as may be appropriate. Such order will control the subsequent action or proceeding as provided in



Federal Rule of Civil Procedure 16. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**Rule 16.3. Trial Submissions.**

(a) **Trial Submissions.** Unless otherwise ordered, the parties must, not less than thirty (30) calendar days prior to the date on which the trial is scheduled to commence, provide to the other parties and *promptly file with the Court* the following information regarding evidence that it may present at trial, other than solely for impeachment:

(1) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(2) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and a transcript of the pertinent portions of the deposition testimony;

(3) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(b) **Trial Memorandum and Objections to Trial Submissions.** Within fourteen (14) calendar days before the scheduled trial date, each party shall serve and *promptly file with the Court* a trial memorandum, not to exceed twenty (20) pages, which should discuss the party's position, with supporting arguments and authorities, and any significant legal or evidentiary issues. The trial memorandum should contain a separate section that clearly states the objections to the other parties' trial submissions, including:

(1) Any objection to the use under Federal Rule of Civil Procedure 32(a) of a deposition designated by another party.

(2) Any objections, together with the grounds therefor, that may be made to the admissibility of materials identified as exhibits by the opposing party.

Objections not so disclosed, other than objections under Federal Rules of Evidence 402 and 403, shall be deemed waived unless excused by the Court for good cause shown.

(c) **Response to Trial Memoranda.** Within seven (7) days, a party may file a response memorandum, not to exceed ten (10) pages, to the opposing parties' trial memoranda, particularly addressing objections to trial submissions.

(d) **Ruling on Objections to Trial Submissions.** The listing of a potential objection does not constitute the making of that objection or require the Court to rule on the objection; rather, it preserves the right of the party to make the objection when, and as appropriate, during trial. However, this does not preclude any party from filing a motion in limine as to any particular item of evidence prior to trial.



(e) **Voir Dire and Jury Instructions.** In jury cases, serve and file proposed voir dire and jury instructions and form of verdict in conformance with Dist. Idaho Loc. Civ. R. 47.1 and 51.1.

(f) **Exhibit Lists.** All parties must furnish a list of their intended trial exhibits. A standard form may be obtained from the Court's website. In addition to physical and documentary exhibits, this list will include any deposition or document containing answers to interrogatories and requests for admissions to be offered or used in trial. The completed exhibit list must contain a brief description of each intended trial exhibit. To the extent possible, exhibits are to be listed in the sequence in which the parties propose to offer them. No exhibit is to be assigned a number without first contacting the Clerk. After assignment of numbers, the exhibit list is to be furnished to the opposing party or parties and three copies submitted to the Clerk. Unless electronically submitted or otherwise agreed among counsel or ordered by the Court, each party must also prepare and provide sufficient copies of their documentary exhibits to provide copies to the opposing party or parties. Additionally, each party must present the Clerk with an original and two copies of their documentary trial exhibits. All copies must be presented in a notebook or bound with metal paper fasteners and tabulated for marking. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

#### **Rule 16.4. Alternative Dispute Resolution.**

##### **(a) Purpose and Scope.**

(1) **Purpose.** Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 et seq., the primary purpose of this local rule is to provide parties to civil cases and proceedings in bankruptcy in this district with an opportunity to use alternative dispute resolution (ADR) procedures. This rule is intended to improve parties' access to the dispute resolution process that best serves their needs and fits their circumstances, to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services. Through this rule, the court authorizes and regulates the use of mediation and arbitration.

##### **(2) Scope.**

(A) **Cases Pending Before a District Judge or Magistrate Judge.** This local rule applies to all civil cases pending before any district judge or magistrate judge in this district.

(B) **Proceedings Pending Before a Bankruptcy Judge.** Under 28 U.S.C. § 651, et seq., and the court's inherent authority, proceedings pending before any bankruptcy judge in this district also may be afforded an opportunity to participate in mediation and arbitration.

##### **(b) ADR Procedures and Rules.**

##### **(1) Judicial Settlement Conference.**

(A) **Definition.** A Judicial Settlement Conference is a process in which a Magistrate Judge (Settlement Conference Judge) is made

available in order to facilitate communication between the parties and assist them in their negotiations, e.g., by clarifying underlying interests, as they attempt to reach an agreed settlement of their dispute. Whether a settlement results from a Judicial Settlement Conference and the nature and extent of the settlement are within the sole control of the parties.

(B) **Initiation of a Judicial Settlement Conference.** At any time after an action or proceeding is commenced, any party may request, or the assigned judge on his or her own initiative may order, a Judicial Settlement Conference. As a general rule, the judge assigned to the matter will not conduct the Judicial Settlement Conference. None of the matters or information discussed during the conference will be communicated to any judge assigned to matter, unless all parties expressly stipulate to such communications.

(C) **Procedure for Judicial Settlement Conference.** After the initiation of the Judicial Settlement Conference process, the Settlement Conference Judge will issue an order governing the process and procedure utilized by that Judge for the Judicial Settlement Conference.

(D) **Report of Settlement Conference Judge.** At the conclusion of a Judicial Settlement Conference, a docket entry order with the court will reflect whether settlement was or was not achieved.

(2) **Mediation.**

(A) **Definition.** Mediation is a process in which a private, impartial third party (the “Mediator”) is hired or retained by the parties to facilitate communication between them to assist in their negotiations, e.g., by clarifying underlying interests, as they attempt to reach an agreed settlement of their dispute. Whether a settlement results from a Mediation and the nature and extent of the settlement are within the sole control of the parties.

(B) **Initiation of a Mediation.** At any time after an action or proceeding is at issue, any party may request, or the assigned judge on his or her own initiative may order, a Mediation. None of the matters or information discussed during the conference will be communicated to any judge assigned to matter.

(C) **Selection of a Mediator.** The parties may either select from the list of approved Mediators found on the Court’s website or select someone not on the Court’s list through mutual agreement. The parties may contact the Court’s ADR Coordinator for facilitation of selection of a mediator from the Court’s list.

(D) **Report of Mediator.** Within five days of the conclusion of a Mediation, the Mediator shall file a report with the Court’s ADR Coordinator indicating when mediation occurred and merely whether settlement was or was not achieved.

(3) **Arbitration.**

(A) **Definition.** Arbitration is a process whereby an impartial third party (the “Arbitrator”) is hired or retained by the parties to hear and

consider the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The Arbitrator makes an award on the issue(s) presented for decision. The Arbitrator's award is binding or non-binding as the parties may agree in writing.

(B) **Cases Eligible for ADR Arbitration.** No civil action, or proceeding in bankruptcy, shall be referred to Arbitration as the parties' ADR method, except upon written consent of all parties. Additionally, no matter will be referred to arbitration if the court finds that:

(i) The action is based upon an alleged violation of a right secured by the Constitution of the United States;

(ii) Jurisdiction is based in whole or in part on 28 U.S.C. § 1343;

(iii) The relief sought includes money damages in an amount greater than \$150,000.00; or

(iv) The objectives of arbitration would not be realized for any other reason.

(C) **Initiation of an Arbitration.** At any time after an action or proceeding is at issue, any party may request an Arbitration. Both parties must, consent in a writing, signed by all parties and their counsel, before an Arbitration will be ordered by the judge assigned to the matter.

(D) **Selection of an Arbitrator.** The parties may select from the list of approved Arbitrators found on the Court's website. The parties, for good cause, may select an Arbitrator not on the Court's approved Panel of Arbitrators only with the approval of the judge assigned to the case.

(E) **Procedure for Arbitration.** After the initiation of Arbitration, the Arbitrator will issue to the parties a document setting forth the process and procedure utilized and to be followed.

(F) **Award.** At the conclusion of an Arbitration, the Arbitrator shall issue to the parties a written Award.

(c) **Selection of ADR Procedure.**

(1) **Mandated Early ADR Selection Process.**

(A) **The Parties' Duty to Consider ADR, Confer and Report.** No later than five (5) days prior to the Rule 16 scheduling conference, unless otherwise ordered, in every case to which this rule applies, the parties must meet and confer about (i) whether they might benefit from participating in some ADR process; (ii) which type of ADR process is best suited to the specific circumstances in their case; and (iii) when the most appropriate time would be for the ADR session to be held. In their litigation plan or proposed scheduling order, the parties must report their shared or separate views about the utility of ADR, which ADR procedure would be most appropriate, and when the ADR session should occur.

(B) **Designation of Process.** After considering the parties' submissions, the court may order the parties, on appropriate terms and in conformity with this rule, to participate in ADR. The court may refer the

case to Judicial Settlement Conference, Mediation or, with written consent of all parties, to an ADR procedure which, by stipulation of all parties, has been tailored to meet the specific needs of the parties and the case.

(2) **Referral to ADR during Pretrial Period.** Notwithstanding the provisions of paragraph (c)(1) above regarding the early selection process, at any time before entry of final judgment, the court may, on its own motion or at the request of any party, order the parties to participate in a Judicial Settlement Conference or Mediation or, with the written consent of all parties, Arbitration.

(3) **Protection Against Unfair Financial Burdens.** Assigned judges shall take appropriate steps to assure that no referral to ADR results in an imposition on any party of an unfair or unreasonable economic burden.

(4) **Right to Secure ADR Services Outside the Programs Sponsored by the Court.** Nothing in this rule precludes the parties from agreeing to seek ADR services outside the court's program. Parties remain free to use any form of ADR and any neutral they choose. To the extent resources permit, court staff may assist mediators outside of the court's ADR program.

(d) **Process Administration.**

(1) **ADR Coordinator.** The ADR Coordinator is responsible for implementing, administering, overseeing and evaluating, along with the Board of Judges, the ADR program and procedures covered by this local rule. The ADR Administrator may be contacted through the court's website: [www.id.uscourts.gov](http://www.id.uscourts.gov) or as follows:

U.S. District Court  
ADR Administrator  
550 W Fort St  
Boise ID 83724  
(208) 334-9067 (telephone)  
(208) 334-9202 (facsimile)

(2) **ADR Resources.** The ADR Administrator maintains the requirements for, and roster of, available neutrals and information regarding the ADR process and procedures set forth in this rule. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)



#### IV. PARTIES.

##### **Rule 17.1. Infants and Incompetent Persons.**

###### **(a) Infants and Incompetent Persons.**

(1) No claim of an infant or incompetent person will be settled or compromised without leave of the Court, embodied in an order approving the stipulation of settlement.

(2) Whenever an infant or incompetent person has recovered a sum of money, whether by settlement or judgment, such money, whether collected upon execution or otherwise, shall be deposited with the Clerk, unless otherwise ordered by the Court, to abide the further order of the Court in the premises. Such money shall not be withdrawn except as hereinafter provided.

(3) Upon production of a certified copy of letters of guardianship of the property of the infant or incompetent person, or like commission, or of an order approving the compromise of a disputed claim of a minor, as contemplated by Idaho Code § 15-5-409a, issued out of any court of competent jurisdiction of the state, county, or district where the infant or incompetent person resides, an application may be made on behalf of the infant or incompetent person for an order directing the Clerk to pay over to such guardian or other named or authorized person the amount so deposited. Such application must be made either by the attorney of record of the infant or incompetent person, or on notice to such attorney.

(4) On such application, the amount of the attorney's lien on the fund, if any, must be fixed and determined by the Court, which determination will be embodied in the order directing the disposal of the fund. The Clerk shall thereupon pay out the monies as directed.

**(b) Bond of Guardian Ad Litem.** In cases in which an infant or incompetent person is represented by a next friend or by a guardian ad litem, as required by Idaho Code § 16-1618, no such next friend or guardian ad litem will receive money or other property of the infant or incompetent person until the next friend or guardian ad litem has given such security for the faithful performance of such duties as the Court prescribes. If such next friend or guardian ad litem does not desire to receive any such money or property, the same may be paid or delivered to the Clerk, or to such persons as may be directed by the judge, with like effect as if paid or delivered to the next friend or guardian ad litem, subject to payment of the Clerk's fees. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

#### V. DEPOSITIONS AND DISCOVERY.

##### **Rule 26.1. Form of Certain Discovery Documents.**

The party answering, responding, or objecting to written interrogatories, requests for production of documents or things, or requests for admission must quote each such interrogatory or request in full immediately preceding

the statement of any answer, response, or objection thereto. The parties must also number each interrogatory, request, answer, response, or objection sequentially, regardless of the number of sets of interrogatories or requests. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 26.2. Disclosures.**

There is a duty to supplement all disclosures. These disclosures will be served upon the respective parties and not filed with the Court.

For good cause shown, the court can excuse parties from compliance with the disclosure requirements.

(a) **Initial Disclosures.** Parties are required to complete initial disclosures as set forth in Federal Rule of Civil Procedure 26(a)(1). Unless otherwise agreed to between the parties, a party may not seek discovery from any source before the parties have met and conferred as required by Federal Rule of Civil Procedure 26(d) and (f). However, by stipulation or order from the Court, the parties may proceed with discovery prior to the meet-and-confer conference.

(b) **Disclosure of Expert Testimony.** The disclosure of expert testimony must be in conformance with Federal Rules of Civil Procedure 26(a)(2)(B) in the form of a written report prepared and signed by any witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

As a general rule, the Court will set the time for the disclosure of expert testimony during the Rule 16.1 scheduling conference.

Except for good cause shown, the scope of subsequent testimony by an expert witness must be limited to those subject areas identified in the disclosure report or through other discovery such as a deposition. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)

### **Rule 30.1. Limitation of Deposition.**

In conformance with Federal Rule of Civil Procedure 30, there is a presumption that no more than ten (10) depositions per party will be taken by the parties. The parties should, however, be prepared at the scheduling conference to discuss whether the presumptive level should be decreased or increased due to the nature of the litigation.

Each deposition is limited to one (1) day of seven (7) hours unless otherwise stipulated between the parties or authorized by the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 33.1. Limits on Interrogatories.**

No party may serve upon any other single party to an action more than twenty-five (25) interrogatories, including subparts (which will be counted

as separate interrogatories), without first obtaining a stipulation of such party to additional interrogatories or, in the event the parties are unable to agree, obtaining an order of the Court upon showing of good cause granting leave to serve a specific number of additional interrogatories. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 37.1. Discovery Disputes — Meet and Confer Requirement.**

Unless otherwise ordered, the Court will not entertain any discovery motion, except those brought pursuant to Federal Rule of Civil Procedure 26(c) by a person who is not a party, unless the moving party through counsel or the self represented litigant, files with the Court, at the time of filing the motion, a statement showing that the party making the motion has made a reasonable effort to reach agreement with opposing attorneys or self represented litigant on the matters set forth in the motion. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**Rule 37.2. Form of Discovery Motions.**

(a) Any discovery motion filed pursuant to Federal Rule of Civil Procedure 26 and 37 must include a verbatim recitation of each interrogatory, request, answer, response, and objection which is the subject of the motion.

(b) The party filing the motion must specify separately and with particularity each issue that remains to be determined at the hearing, and the contentions and points and authorities of each party as to each issue. The supporting memorandum must be set forth in one document and contain all such issues in dispute and the contentions and points and authorities of each party.

Depending on the number of discovery matters at issue, the moving party has the option of reproducing them in the memorandum or attaching them as an addendum to the memorandum. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**VI. TRIALS.**

**Rule 38.1. Notation of “Jury Demand” in the Pleading.**

If a party demands a jury trial by endorsing it on a pleading, as permitted by Federal Rule of Civil Procedure 38(b), a notation must be placed on the front page of the pleading, immediately following the title of the pleading, stating “Demand For Jury Trial” or an equivalent statement. This notation will serve as a sufficient demand under Rule 38(b). Failure to use this manner of noting the demand will not result in a waiver under Rule 38(d). (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)



**Rule 39.1. Opening Statements, Closing Arguments, and Examination of Witnesses.**

(a) **Opening Statements.** Prior to offering any evidence, counsel for the plaintiff must make a statement of the facts which counsel intends to establish in support of plaintiff's claim, unless such statement is waived with permission of the Court. Such waiver or statement must be made as a matter of record. Following the statement of plaintiff or at the opening of defendant's case, at the election of counsel for the defendant, the defendant's counsel must make a statement of facts which defendant's counsel intends to establish, unless such statement is waived with permission of the Court. Such waiver or statement must be made as a matter of record.

(b) **Arguments.** Only one attorney will open and one attorney will close, except with the permission of the Court; provided that if the opening attorney does not intend to close, the opening attorney must so inform the Court so that the Court may appropriately apportion the arguments between counsel.

(c) **Examination of Witnesses.** Only one attorney for each party will examine or cross-examine a witness except with the permission of the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 40.1. Assignment of Cases.**

Civil and criminal cases will be assigned by the Clerk to the respective judges of the Court by lot. If it appears that a case has been improperly assigned for any reason, the Court may, in its discretion, reassign the case to another calendar area without prior notice.

Death penalty and pro se cases are assigned on a rotating basis founded upon workload and relative assignment of a companion case. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 41.1. Dismissal of Actions.**

Any civil case in which no action of record has been taken by the parties for a period of six (6) months will, after sufficient notice, be dismissed by the Court for lack of prosecution. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 47.1. Voir Dire of Jurors.**

(a) The jury box must be filled before examination on voir dire. The Court will examine the jurors as to their qualifications and, if permitted, will direct the order and manner of examination by counsel. Not less than seven (7) days before trial, attorneys may submit written requests for voir dire questions.

(b) The Court, after reviewing the complexity and possible length of the case, will determine the number of trial jurors necessary. This number of jurors, not less than six nor more than twelve, plus a number of jurors equal



to the total number of peremptory challenges which are allowed by law, must be called in the first instance. These jurors constitute the initial panel. As the initial panel is called, the Clerk must assign numbers to the jurors in the order in which they are called. If any juror in the initial panel is excused for cause, an additional juror must be immediately called to fill out the initial panel. A juror called to replace a juror excused must take the number of the juror who has been excused. When the initial panel is qualified, the parties must exercise their peremptory challenges secretly and alternately, with plaintiff exercising the first challenge. When peremptory challenges have all been exercised or waived, the Court must call the names of the selected jurors having the lowest assigned numbers. These jurors must constitute the trial jury. All jurors selected will deliberate on the verdict. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

### **Rule 51.1. Instructions to Jury.**

(a) **Submission of Proposed Jury Instructions.** In the case of a jury trial, written proposed jury instructions and any request for special interrogatories and special verdict forms must be prepared and filed by counsel at least fourteen (14) days prior to the date of trial, but the Court may, in its discretion, receive additional requests during the course of the trial.

Counsel must file proposed instructions and requests for special interrogatories and/or special verdict forms with the Clerk of Court. Each proposed instruction, request for special interrogatory, and/or special verdict must be numbered, must indicate the identity of the party presenting the same, and must contain citations of authority. Individual instructions must embrace one subject only, and the principle of law so embraced in any request for instruction must not be repeated on subsequent requests. The Court may require that proposed jury instructions, requests for special interrogatories, and/or special verdict forms also be submitted in electronic format for use by the Court.

(b) **Objections to Requested Instructions.** Requested instructions, together with any requests for special interrogatories and/or special verdicts, must be served upon the adverse party. The adverse party must, at least one (1) day prior to trial, specify objections to any of said instructions. Any objection must identify the instructions objected to by number, and specify distinctly the matter to which said adverse party objects. Objections must be accompanied by citations of authority in support thereof.

(c) **Objections to the Instructions Given by the Court.** The trial judge must fix the time, place, and procedure for making objections to the judge's charge to the jury. Objections must be made outside the presence of the jury and must be reported by the Court reporter in the transcript.

(d) **Instructions to the Jury.** The jury must be instructed by the Court, as provided in Federal Rule of Civil Procedure 51 either before or after arguments by counsel, or both, at the Court's election. The final jury instructions, as given by the Court, must be docketed and become a part of

the permanent case file. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## VII. JUDGMENT.

### **Rule 54.1. Taxation of Costs.**

(a) Within fourteen (14) days after entry of a judgment, under which costs may be claimed, the prevailing party must serve and file a cost bill in the form prescribed by the Court. Within fourteen (14) days after service by any party of its cost bill, any other party may serve and file specific objections to any items setting forth the grounds therefor. The cost bill must itemize the costs claimed and be supported by a certificate of counsel that the costs are correctly stated, were necessarily incurred, and are allowable by law. Not less than twenty-eight (28) days after receipt of a party's cost bill, and objections if any, the Clerk will tax costs and serve copies of the cost bill upon all parties of record. The cost bill should reflect the Clerk's action as to each item contained therein.

(b) Generally, the prevailing party is the one who successfully prosecutes the action or successfully defends against it, prevails on the merits of the main issue, and the one in whose favor the decision or verdict is rendered and judgment entered.

(c) Costs must be taxed in conformity with the provisions of 28 U.S.C. §§ 1920-1923 and such other provisions of law as may be applicable and such directives as the Court may from time to time issue. Taxable items include:

(1) **Clerk's Fees and Service Fees.** Clerk's fees (see 28 U.S.C. § 1920) and service fees are allowable by statute. Fees required to remove a case from the state court to federal court are allowed as follows: fees paid to clerk of state court; fees for service of process in state court; costs of documents attached as exhibits to documents necessarily filed in state court, and fees for witnesses attending depositions before removal.

(2) **Trial Transcripts.** The cost of the originals of a trial transcript, a daily transcript and a transcript of matters prior or subsequent to trial, furnished to the Court is taxable at the rate authorized by the Judicial Conference of the United States when either requested by the Court, or prepared pursuant to stipulation. Mere acceptance by the Court does not constitute a request. Copies of transcripts for counsel's own use are not taxable unless approved in advance by the Court.

(3) **Deposition Costs.** The prevailing party may recover the following costs relative to depositions used for any purpose in connection with the case: i) the cost of the original deposition plus one copy (where the prevailing party was the noticing party); ii) the cost of a copy of a deposition (where the prevailing party was not the noticing party); and iii) the cost of video-taped depositions. The prevailing party who noticed the deposition may also recover the reasonable expenses incurred for reporter fees, notary fees, and the reporter's/notary's travel and subsistence

expenses. In addition, witness fees, whether or not the witness was subpoenaed, are taxable at the same rate as for attendance at trial. The reasonable fee for a necessary interpreter to attend a deposition is also taxable on behalf of the prevailing party. Attorney's fees and expenses incurred in arranging for or taking a deposition are not taxable.

(4) **Witness Fees, Mileage and Subsistence.** The rate for witness fees, mileage and subsistence are fixed by statute (*see* 28 U.S.C. § 1821). Such fees are taxable even though the witness does not take the stand, provided the witness necessarily attends the Court. Such fees are taxable even though the witness attends voluntarily upon request and is not under subpoena. The mileage taxation is that which is traveled based on the most direct route. Mileage fees for travel outside the District must not exceed 100 miles each way without prior Court approval. Witness fees and subsistence are taxable only for the reasonable period during which the witness is within the District. No party will receive witness fees for testifying in his or her own behalf except where a party is subpoenaed to attend Court by the opposing party. Witness fees for officers of a corporation are taxable if the officers are not defendants and recovery is not sought against the officers individually. Fees for expert witnesses are not taxable in a greater amount than that statutorily allowable for ordinary witnesses. Allowance of fees for a witness on deposition must not depend on whether or not the deposition is admitted in evidence.

(5) **Copies of Papers and Exhibits.** The cost of an exhibit necessarily attached to a document (or made part of a deposition transcript) required to be filed and served is taxable. The cost of reproducing the required number of copies of the Clerk's record on appeal is allowable.

The cost of copies submitted in lieu of originals because of the convenience of offering counsel or his or her client are not taxable. The cost of reproducing copies of motions, pleadings, notices and other routine case papers is not taxable.

(6) **Maps, Charts, Models, Photographs, Summaries, Computations and Statistical Summaries.** The reasonable cost of maps, diagrams, visual aids and charts is taxable if they are admitted into evidence. The cost of photographs is taxable if admitted into evidence or attached to documents required to be filed and served on opposing counsel. Enlargements greater than 8" by 10" are not taxable except by order of the Court. The cost of models is not taxable except by order of the Court. The cost of compiling summaries, computations and statistical comparisons is not taxable.

(7) **Interpreter and Translator Fees.** The reasonable fee of a competent interpreter is taxable if the fee of the witness involved is taxable. The reasonable fee of a competent translator is taxable if the document translated is necessarily filed or admitted in evidence.

(8) **Other Items.** Other items may be taxed with prior Court approval.

(9) **Certificate of Counsel.** The certificate of counsel required by 28 U.S.C. § 1924 and the District of Idaho Local Civil and Criminal Rules of



Practice must be prima facie evidence of the facts recited therein. The burden is on the opposing party to establish that a claim is incorrectly stated, unnecessary or unreasonable.

(d) A review of the decision of the Clerk in the taxation of costs may be taken to the Court on a motion to retax by any party, pursuant to Federal Rule of Civil Procedure 54(d), upon written notice thereof, served and filed with the Clerk within seven (7) days after the costs have been taxed in the Clerk's office, but not afterwards. The motion to retax must particularly specify the ruling of the Clerk excepted to, and no others will be considered. The motion will be considered and determined upon the same papers and evidence used by the Clerk and upon such memorandum of points and authorities as the Court may require. A hearing may be scheduled at the discretion of the trial judge. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

#### **Rule 54.2. Award of Attorney Fees.**

(a) Claims for attorney fees will not be treated as routine items of costs. Attorney fees will only be allowed upon an order of a judge of the Court after such fact-finding process as the judge orders.

(b) Unless a statute or a court order provides otherwise, a party claiming the right to allowance of attorney fees may file and serve a motion for such allowance within fourteen (14) days after entry of judgment under which attorney fees may be claimed. The motion must state the amount claimed and cite the legal authority relied on. The motion must be accompanied by an affidavit of counsel setting forth the following: (1) date(s), (2) service(s) rendered, (3) hourly rate, (4) hours expended, (5) a statement of attorney fee contract with the client, and (6) information, where appropriate, as to other factors which might assist the Court in determining the dollar amount of fee to be allowed. Motions for attorney fees and cost bills must be filed as separate documents. Failure to comply with this requirement will result in delay in processing.

(c) Within twenty-one (21) days after receipt of a party's motion for allowance of attorney fees, any other party may serve and file a response brief objecting to the allowance of fees or any portion thereof. The responding party must set forth specific grounds of objection.

(d) Within fourteen (14) days after receipt of a response brief, the moving party may submit a reply brief. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011; amended effective January 1, 2012.)

#### **JUDICIAL DECISIONS**

##### **Time Limitations.**

Since final judgment in case was not entered until court denied defendant's motion

on December 14, 1994 for judgment as a matter of law and a new trial even though judgment on jury verdict was entered on



August 31, 1994, plaintiff's motion for attorney's fees filed on December 30, 1994 fell within the time limit set by this rule. *Peter-son v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997).

### **Rule 54.3. Jury Cost Assessment.**

When a civil action has been settled or otherwise disposed of in or out of Court, it is the duty of counsel to inform the Clerk by 3 p.m. of the business day immediately prior to trial. Costs may be assessed against counsel for failure to do so. In the event that failure to give notice hereunder results in the reporting of prospective jurors for service in the case, costs may include one day's fees for prospective jurors so reporting. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 58.1. Entry of Judgment.**

In every action or proceeding terminating in a judgment, there must be filed, separate from any findings of fact, conclusions of law, memorandum, opinion, or order, a judgment which must state in simple and direct terms the judgment of the Court, must be signed by the judge or the Clerk as allowed by Dist. Idaho Loc. Civ. R. 77.2 and must comply in other respects with Federal Rule of Civil Procedure 58. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 58.2. Satisfaction of Judgment.**

Whenever the amount directed to be paid by any judgment or order, together with interest (if interest accrues) and the Clerk's statutory charges, must be paid into Court by payment to the Clerk, the Clerk must enter satisfaction of said judgment or order. The Court must enter satisfaction of any judgment or order on behalf of the United States upon the filing of a written acknowledgment of satisfaction thereof by the United States Attorney, and in other cases, upon the filing of a written acknowledgment of satisfaction made by the judgment-creditor and the judgment-creditor's attorney, and by the legal representatives or assigns of the judgment-creditor with evidence of their authority, within two (2) years after the date of entry of the judgment or order, and thereafter upon written acknowledgment by the judgment-creditor or by the judgmentcreditor's legal representatives or assigns with evidence of their authority. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 62.2. Supersedeas Bonds.**

(a) **Approval, Filing, and Service.** If eligible under Dist. Idaho Loc. Civ. R. 67.1, the bond may be approved and filed by the Clerk. A copy of the bond plus notice of filing must be served on all affected parties promptly.

(b) **Objections.** The Court will determine objections to the form of the bond or sufficiency of the surety.

(c) **Execution.** Except where otherwise provided by Federal Rule Civil Procedure 62, or order of the Court, execution may issue after fourteen (14) days from the entry of a judgment unless a supersedeas bond has been approved by the judge or the Clerk. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

## **VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS.**

### **Rule 65.1.1. Security; Proceeding Against Sureties.**

(a) **The Judgment.** Every bond within the scope of these rules will contain the surety or sureties' consent that in case of the principal's or surety's default, upon notice of not less than fourteen (14) days, the Court may proceed summarily and render judgment against them and award execution.

(b) **Service.** Any indemnitee or party in interest who seeks the judgment provided by these rules will proceed by motion and, with respect to personal sureties and corporate sureties, will make the service provided by Federal Rule of Civil Procedure 5(b) or 31 U.S.C. § 9306, respectively. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 65.1.2. Bonds and Other Sureties.**

#### **(a) Bonds and Sureties.**

(1) **When Required.** A judge may, upon demand of any party, where authorized by law and for good cause shown, require any party to furnish security for costs which may be awarded against such party in an amount and on such items as are appropriate.

#### **(2) Qualifications of Surety.**

(A) Every bond must have as surety either: (i) a corporation authorized by the Secretary of the Treasury of the United States to act as surety on official bonds under 31 U.S.C. §§ 9301-9308; (ii) a corporation authorized to act as surety under the laws of the State of Idaho; (iii) two individual residents of the District, each of whom owns real or personal property within the District of sufficient equity value to justify twice the amount of the bond; or (iv) a cash deposit of the required amount made with the Clerk and filed with a bond signed by the principals.

(B) An individual who executes a bond as a surety pursuant to this subsection will attach an affidavit which gives the individual's full name, occupation, residence, and business addresses, and demonstrates ownership of real or personal property within this District. After excluding property exempt from execution and deducting liabilities (including those which have arisen by virtue of suretyship on other bonds or undertakings), the real or personal property must be valued at no less than twice the amount of the bond.

(3) **Court Officers As Sureties.** No clerk, marshal, or other employee of the Court nor any member of the bar representing a party in the particular action or proceeding, shall be accepted as surety on any bond or other undertaking in any action or proceeding in this Court. Cash deposits on bonds may be made by members of the bar on certification that the funds are the property of a specified person who has signed as surety on the bond. Upon exoneration of the bond, such monies must be returned to the owner and not to the attorney.

(4) **Examination of Sureties.** Any party may apply for an order requiring any opposing party to show cause why it should not be required to furnish further or different security or requiring personal sureties to justify their financial status in support of their bond.

(b) **Approval of Bonds by Attorneys and Clerk (or Judge).** All personal surety bonds must be presented to the judge for approval. When the party is represented by counsel, there must be appended thereto a certificate of the attorney for the party for whom the bond is being filed substantially in the following form:

This bond has been examined by counsel for (plaintiff/defendant) and is recommended for approval as provided in this rule.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

---

(attorney)

Such endorsement by the attorney will signify to the Court that said attorney has carefully examined the said financial information of the personal surety; that the attorney knows the contents thereof; that the attorney knows the purposes for which it is executed; that in the attorney's opinion the same is in due form; and that the attorney believes the affidavits of qualification to be true.

### **Rule 67.1. Deposits.**

(a) Whenever a party seeks an order for money to be deposited by the clerk in an interest-bearing account, the party must prepare a form of order in accord with the following.

(b) The following form of standard order must be used for the deposit of registry funds into interest-bearing accounts or the investment of such funds in an interest-bearing instrument:

IT IS ORDERED that the Clerk of Court invest the amount of \$\_\_\_\_\_ in the Court Registry Investment System ("CRIS"), which is administered by the Administrative Office of the United States Courts under 28 U.S.C § 2045, and said funds to remain invested pending further order of the Court.

IT IS FURTHER ORDERED that the Administrative Office of the Courts is authorized and directed by this Order to deduct the investment services fee for the management of investments in the CRIS and the registry fee for maintaining accounts deposited with the Court.



(Amended December 31, 2004, effective January 3, 2005; amended effective January 1, 2013.)

**Rule 67.2. Withdrawal of a Deposit Pursuant to Federal Rule of Civil Procedure 67.**

**Order of the Court.** Funds may only be withdrawn upon an order of this Court. Such order must specify the amounts to be paid and the names of any person or company to whom the funds are to be paid. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)

**Rule 72.1. Magistrate Judge Rules.**

**(a) Authority of United States Magistrate Judges.**

**(1) Authorized Magistrate Judge Duties.** All United States magistrate judges of this Court are authorized to perform the duties prescribed by 28 U.S.C. § 636(a), (b), (c), and (g).

**(2) Prisoner Cases Under 28 U.S.C. § 2254.** Upon referral by a district judge a magistrate judge may perform any or all of the duties imposed upon a district judge by the rules governing proceedings in the United States District Courts under § 2254 of Title 28, United States Code. In so doing, the magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceedings and must submit to a district judge a report containing proposed findings of fact and recommendations for disposition of the petition by the district judge except in cases where the death penalty has been imposed; in which case, the district judge will conduct any evidentiary hearing or other appropriate proceeding. Any order disposing of the petition may only be made by a district judge.

**(3) Prisoner Cases Under 42 U.S.C. § 1983.** Upon referral by a district judge a magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceedings and must submit to a district judge a report containing proposed findings of fact and recommendations for the disposition of petitions or complaints filed by prisoners challenging the conditions of their confinement.

**(4) Other Authorized Duties.** A magistrate judge is also authorized to:

(A) Conduct any pretrial matters, such as pretrial conferences, settlement conferences, omnibus hearings, and related proceedings in civil cases upon the referral of the district judge;

(B) Conduct voir dire and select petit juries in a civil case assigned to a district judge, with the consent of the parties; and

(C) Accept petit jury verdicts in civil and criminal cases at the request of a district judge.



**(b) Objections to Magistrate Judge's Orders, Reports, and Recommendations.**

(1) **Nondispositive Matter — 28 U.S.C. § 636(b)(1)(A).** Pursuant to Fed. R. Civ. P. 72(a), a party may serve and file any objections, not to exceed twenty (20) pages, to a magistrate judge's order within fourteen (14) days after being served with a copy of the order, unless the magistrate judge or district judge sets a different time period. A party may serve and file a response, not to exceed ten (10) pages, to another party's objections within ten (10) days after being served with a copy thereof. The district judge may also consider sua sponte any order by a magistrate judge found to be clearly erroneous or contrary to law.

(2) **Dispositive Matters — 28 U.S.C. § 636(b)(1)(B).** When a pretrial matter dispositive of a claim or defense of a party, a post-trial motion for attorney fees, or a prisoner petition is referred to a magistrate judge without consent of the parties pursuant to 28 U.S.C. § 636(b)(1)(B), the magistrate judge will conduct such proceedings as required. The magistrate judge will enter a report and recommendation for disposition of the matter, including proposed findings of fact when appropriate.

Pursuant to Fed. R. Civ. P. 72(a), a party objecting to the recommended disposition of the matter must serve and file specific, written objections, not to exceed twenty (20) pages, to the proposed findings and recommendations within fourteen (14) days after being served with a copy of the magistrate judge's report and recommendation, unless the magistrate or district judge sets a different time period. A party may serve and file a response, not to exceed ten pages, to another party's objections within fourteen (14) days after being served with a copy thereof. The district judge to whom the case is assigned will make a de novo determination of any portion of the magistrate judge's recommended disposition to which specific objection has been made. The district judge may also consider sua sponte any portion of the proposed disposition. The district judge may accept, reject, or modify the recommended disposition, receive further evidence, or recommit the matter to the magistrate judge with directions. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**JUDICIAL DECISIONS**

**Cited in:** Samuel v. Michaud, 129 F.3d 127  
(9th Cir. 1997).

**Rule 73.1. Assignment of Civil Cases to a Magistrate Judge Upon the Consent of the Parties.**

A civil case may be conditionally assigned to a magistrate judge or reassigned from a district judge to a magistrate judge under 28 U.S.C. § 636(c) for any and all proceedings in a jury or nonjury matter, including pretrial, trial, and post-trial motions, and ordering the entry of judgment.

Before a magistrate judge can exercise jurisdiction over a civil case, all parties must sign a written consent to proceed before the magistrate judge.

(a) **Notice.** The Clerk of Court must notify the parties in all civil cases that they may consent to have a magistrate judge conduct any or all proceedings in the case and order the entry of a final judgment. In all prisoner pro se cases and cases involving an in forma pauperis (IFP) application, Notice of Assignment to United States Magistrate Judge ("Notice of Assignment") with a consent to proceed form will be sent to the plaintiff by the Clerk of Court at the time the action is conditionally filed. If the case is not dismissed by the initial review order and reassignment was not requested by the plaintiff(s), the case will provisionally remain with the randomly assigned Magistrate Judge, and Notice of Assignment and consent to proceed form will be sent to counsel for the appearing defendant(s). In all other civil cases, the Notice of Assignment and consent to proceed form will be sent to counsel for plaintiff(s) by the Clerk of Court at the time an action is filed. Additional Notices of Assignment and consent to proceed form(s) will be sent to counsel for defendant(s) after an answer has been filed and, if necessary, may be included with pretrial notices and instructions.

(b) **Return of Consent Forms.** Any party deciding to proceed before a magistrate judge should sign the consent to proceed form and return it to the Clerk of Court by e-mailing the same in .pdf format to the following address: [consents@id.uscourts.gov](mailto:consents@id.uscourts.gov) (or by mail if the pro se litigant does not have electronic capabilities). The Clerk of Court will keep custody of all consent to proceed forms under seal until it is determined whether all parties have consented to proceed before a Magistrate Judge. If all parties to an action consent to proceed before a magistrate judge, the Clerk of Court will file and docket the consent to proceed forms and the case will continue before, or be reassigned to, a Magistrate Judge. Parties are free to withhold their consent without adverse substantive consequences, and the Clerk of Court will take reasonable steps to ensure the voluntariness and confidentiality of consents and requests for reassignment. (Amended December 31, 2004, effective January 3, 2005; amended January 12, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended December 30, 2010, effective January 1, 2011.)

## IX. DISTRICT COURTS AND CLERKS.

### Rule 77.1. Hours of the Court.

(a) **Location and Hours.** The office of the Clerk of Court is located at the Federal Building and United States Courthouse, 550 West Fort Street, Room 400, Boise, Idaho 83724. The regular hours are from 8 a.m. to 5 p.m. each day except Saturday, Sunday, and legal holidays or other days so ordered by the Court. Divisional offices are located at: 220 E. 5th Street, Room 304, Moscow, Idaho 83843; 801 E. Sherman St., Room 119, Pocatello, Idaho 83201; and 6450 N. Mineral Dr., Room 148, Coeur d'Alene, Idaho 83815.

(b) Filings may be made electronically before and after regular office hours or on Saturdays, Sundays, and legal holidays. An electronic document is considered timely filed if received by the Court before midnight, Mountain Time, on the date set as a deadline, unless the judge sets a specific time of day otherwise. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

#### **Rule 77.2. Sessions of the Court.**

(a) This Court will transact judicial business in Boise, Coeur d'Alene, Moscow, and Pocatello, Idaho, on all business days. The judges will preside over hearings and trials in these locations as the judicial workload may warrant.

(b) Any judge of this Court may, in the interest of justice or to further the efficient performance of the business of the Court, conduct proceedings at a special session at any time, anywhere in the District, on request of a party or otherwise. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

#### **Rule 77.3. United States Court Library.**

The Ninth Circuit law library is located on the sixth floor of the Federal Building and United States Courthouse in Boise, Idaho. The library is for the primary use of judges and personnel of the federal Court; however, attorneys admitted to practice in this Court may use the library when circumstances require.

In addition, with the permission of a judge, attorneys may use library materials that are not available at the Idaho Supreme Court law library. Requests for library access should be made in writing to the Chief United States Magistrate Judge for the District of Idaho.

The library is operated in accordance with such rules and regulations as the Court may from time to time adopt. The Public Access Policy for the library is available on the Court's website and may be viewed at the library. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

#### **Rule 77.4. Ex Parte Communication with Judges.**

Attorneys or parties to any action or proceeding should refrain from writing letters to the judge, or otherwise communicating with the judge, unless opposing counsel is present. All matters to be called to a judge's attention should be formally submitted as hereinafter provided. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

#### **Rule 79.1. Custody of Files and Exhibits.**

(a) After being admitted into evidence, exhibits of a documentary nature in any case pending or tried in this Court, shall be placed in the custody of



the Clerk unless otherwise ordered by the Court. All other exhibits, models and material offered or admitted in evidence shall be retained in the custody of the attorney or party producing the same at trial unless otherwise ordered by the Court.

(1) At the conclusion of the trial or hearing, every exhibit marked for identification or introduced in evidence, all depositions and transcripts, shall be returned to the party who produced them.

(2) On request, a party or their attorney who has custody of any exhibits, has the responsibility to produce any and all such exhibits to this Court or the Court of Appeals; and shall grant the reasonable request of any party to examine or reproduce such for use in the proceeding.

(b) All exhibits received in evidence in a criminal case that are in the nature of narcotic drugs, legal or counterfeit money, firearms or contraband of any kind, shall be retained by the United States Attorney or his or her designee pending disposition of the case and for any appeal period thereafter. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## **X. GENERAL PROVISIONS.**

### **Rule 81.1. Removal Actions — State Court Records.**

(a) This rule applies to civil actions removed to the United States District Court for the District of Idaho from the state courts and governs procedure after removal. The removing party must file:

(1) A copy of the entire state court record and the Register of Actions must be provided at the time of filing the notice of removal, and

(2) A Civil Cover Sheet with the Notice of Removal. Attorneys are required to complete a civil cover sheet when a notice of removal is filed in the District of Idaho. The form is available on the Court's website. This form is used by the Clerk of Court to identify the status of all parties and attorneys. See Dist. Idaho Loc. Civ. R. 7.1, Motion Practice and Dist. Idaho. Loc. Civ. R. 81.

(b) **Motions in Cases Removed from State Court.** The filing date of the notice of removal will be considered the filing date of all pending motions previously filed in the state court action, unless otherwise ordered by the Court. If a response and/or reply have also been filed in the state court action prior to the filing of the notice of removal, no further response or reply pleadings will be accepted. If a response to the motion has not been filed in the state court action, the response deadline will be twenty-one (21) days after service of the notice of removal. If a response to the motion was filed in the state court action but a reply to the response has not been filed in the state court action, the reply deadline will be fourteen (14) days after service of the notice of removal. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009.)



**Rule 83.1. Free Press — Fair Trial Provisions.**

(a) **Publicity.** Courthouse supporting personnel, including, among others, clerks and deputies, law clerks, messengers, and court reporters, must not disclose to any person information relating to any pending criminal or civil proceeding that is not part of the public records of the Court without specific authorization of the Court, nor can any such personnel discuss the merits or personalities involved in any such proceeding with any members of the public. Deputies and employees of the United States Marshal's Service coming into possession of confidential information obtained from the Court must not disclose such information unless necessary for official law enforcement purposes.

(b) **Confidentiality.** All courthouse support personnel are specifically prohibited from divulging information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

(c) **Conduct of Proceedings in a Widely Publicized or Sensational Case.**

(1) In a widely publicized or sensational case likely to receive massive publicity, the Court, on its own motion, or on motion of either party, may issue a special order governing such matters as extrajudicial statements by lawyers, parties, witnesses, jurors, and Court officials likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matter which the Court may deem appropriate for inclusion in such an order.

(2) Nothing in this rule or in any other criminal rule of this Court is intended to restrict the media's right to full pretrial coverage of news pursuant to the First Amendment to the United States Constitution.

(d) **Photographs, Broadcasts, Videotapes, and Tape Recordings Prohibited.**

(1) All forms, means, and manner of taking photographs, tape recordings, videotaping, broadcasting, or televising are prohibited in a United States courtroom or its environs during the course of, or in connection with, any judicial proceedings whether the Court is actually in session or not. This rule must not prohibit recordings by a court reporter or staff electronic recorder. No court reporter, staff electronic recorder, or any other person may use or permit to be used any part of any recording of a court proceeding on or in connection with any radio, videotape or television broadcast of any kind. The Court may permit photographs of exhibits or use of videotapes or tape recordings under the supervision of counsel.

(2) A judge may, however, permit (A) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record, and (B) the broadcasting, televising, recording, or photographing of investiture, ceremonial, naturalization proceedings, or for other purposes.

(e) **Wireless Portable Devices.** Because of the increased reliance on wireless devices, portable wireless communication devices such as cell phones, smart phones (including Androids, BlackBerrys and iPhones), PDA's and laptops (including iPads) such devices will be allowed in the courtroom so long as they do not either disrupt Court proceedings or pose a security threat. Cell phone calls cannot be either made from or answered in the courtroom. All such devices must be either turned off or set to the silent or vibrate mode. However, if a particular device is incompatible with existing technological architecture in a certain courtroom, (e.g. causes a microphone to buzz when an incoming call is received, despite being in the silent or vibrate mode), the owner will be asked to remove it from the courtroom or take some other action. Using any wireless device for surreptitious communication or unauthorized filming, photographing, recording or transmitting of either court proceedings, images of jurors, witnesses or undercover agents is strictly prohibited. The foregoing restrictions also apply to all jurors. Furthermore, jurors may not use cell phones during deliberations nor use wireless devices with internet access to research issues or access court files during the course of the trial.

(f) For purposes of this rule, *environs* means:

(1) In Boise, Idaho, the fifth and sixth floor of the Federal Building and United States Courthouse located at 550 West Fort Street, including the corridor area adjacent to the courtroom doors;

(2) In Moscow, Idaho, the third floor of the Federal Building and Courthouse located at 220 East Fifth Street;

(3) In Pocatello, Idaho, that portion of the second floor of the Federal Building and Courthouse at 804 East Sherman Street assigned for Court use, including the corridor area adjacent to the courtroom doors; and

(4) In Coeur d'Alene, Idaho, the second floor of the Federal Building and Courthouse located at 6450 N. Mineral Dr. assigned for court use, including the corridor adjacent to the courtroom doors. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended effective January 1, 2012.)

### **Rule 83.2. Courtroom and Courthouse Decorum.**

**Position of Counsel.** Counsel for the respective parties must be seated in accordance with instructions of the Court bailiff. In examining a witness or addressing the Court, counsel must remain at the counsel table or the lectern, if one is available, except when permission is granted by the Court to approach the bench, the Clerk's desk, or a witness. All papers and exhibits must be sent from counsel table to the Court, courtroom clerk, or witness by and through the bailiff unless permission is otherwise granted. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 83.3. Security in the Courthouse.**

The Court, or any judge, may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the Court and of all persons in attendance. To the extent deemed necessary, the Court or judge may coordinate any orders relating to the security of the Court and public with the U.S. Marshal's Service. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 83.4. Bar Admission.**

(a) **Admission to the Bar of this Court.** Admission to and continuing membership in the bar of this Court is limited to attorneys of good moral character who are active members in good standing of the Idaho State Bar. Each applicant for admission must present to the Clerk a written petition for admission stating the applicant's residence and office addresses and by what courts he or she has been admitted to practice and the respective dates of admission to those courts. Upon qualification, the applicant may be admitted upon written or oral motion as determined by the Court. Before any certificate of admission shall issue, the applicant must sign the prescribed oath.

(b) **Practice in this Court.** Except as herein otherwise provided, only members of the bar of this Court may practice in this Court. Only a member of the bar of this Court may appear for a party, sign stipulations, or receive payment or enter satisfactions of judgment, decree, or order.

(c) **Attorneys for the United States and Federal Defender Organizations.** An attorney for the United States or for a Federal Defender Organization, and who is a member in good standing of and eligible to practice before the bar of any United States Court or of the highest court of any state or of any territory or of any insular possession of the United States, and who is of good moral character, may practice in this Court in any matter in which the attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers or agencies or in which the attorney is part of a federal defender organization and is appointed by the Court to represent a criminal defendant. (Dist. Idaho Loc. Crim. R. 44.1). Attorneys so permitted to practice in this Court are subject to the jurisdiction of the Court with respect to their conduct to the same extent as members of the bar of this Court.

(d) **Appearance by Entities Other Than an Individual.** Whenever an entity other than an individual desires or is required to make an appearance in this Court, the appearance shall be made only by an attorney of the bar of this Court or an attorney permitted to practice under these rules.

(e) **Pro Hac Vice/Local Counsel.** An attorney not eligible for admission under Dist. Idaho Loc. Civ. R. 83.4(a) hereof, but who is a member in good standing of and eligible to practice before the bar of any United States Court or of the highest court of any state or of any territory or insular possession of the United States, who is of good moral character, and who has been



retained to appear in this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate in a particular case, and no certificate of admission must be issued by the Clerk.

The attorney requesting to appear pro hac vice must first (1) designate an active member of the bar of this Court as Local Counsel with the authority to act as attorney of record for all purposes, and with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, and (2) file with such designation the address, telephone number, and written consent of such designee. Designated local counsel shall be responsible both for filing the pro hac vice application through ECF and for payment of the prescribed fee. The pro hac vice application must be presented to the Clerk and must state under penalty of perjury (1) the attorney's residence and office addresses, (2) by what court(s) the attorney has been admitted to practice and the date(s) of admission, (3) that the attorney is in good standing and eligible to practice in said court(s), and (4) that the attorney is not currently suspended or disbarred in any other court(s). Upon the electronic filing of the pro hac vice application and payment of fees by designated local counsel, and granting of the application by the Court, out-of-state counsel shall immediately register for ECF.

Absent Court approval, an attorney who has been admitted pro hac vice for a particular case and received an ECF login and password, may not use these in a subsequent, unrelated case.

All pleadings filed with the Clerk of Court must contain the names and addresses and original signatures of the attorney appearing pro hac vice and associated local counsel.

The designated local counsel must personally appear with the attorney on all matters heard and tried before this Court unless such presence is excused by the Court.

**(f) Non-Appropriated Fund.**

(1) Attorneys admitted to the bar of this Court under the conditions prescribed in Dist. Idaho Loc. Civ. R. 83.4 must be required to pay to the Clerk of Court an admission fee in accordance with Appendix 1.

(2) Attorneys not admitted to the bar of this Court who, upon the filing of a verified petition for permission to practice in an individual case, are appearing under the conditions prescribed in Dist. Idaho Loc. Civ. R. 83.4(e), must be required to pay a fee in accordance with Appendix 1.

(3) Monies deposited into the Non-Appropriated Fund must be used for purposes which inure to the benefit of members of the bench and bar of this Court in the administration of justice.

(4) Attorneys for the United States, and Federal Public Defender, need not pay the admission fees specified above.

**(g) Legal Interns.** At the discretion of the presiding judge, a legal intern who possesses a limited license issued by the Idaho State Bar, may appear before the District Court in the presence of a supervising attorney, who shall be an attorney licensed to practice before this court.

**(h) Notice of Change of Status.** An attorney who is a member of the bar of this Court or who has been permitted to practice in this Court under Dist.



Idaho Loc. Civ. R. 83.4 hereof must promptly notify the Court of any change in his or her status in another jurisdiction which would make him or her ineligible for membership in the bar of this Court under Local Rule 83.4. In the event the attorney is no longer eligible to practice in another jurisdiction by reason of his or her suspension for nonpayment of fees or enrollment as an inactive member, he or she will forthwith be suspended from practice before this Court without any order of Court and until he or she becomes eligible to practice in such other jurisdiction. (Amended December 31, 2004, effective January 3, 2005; amended April 20, 2006, effective April 20, 2006, May 15, 2006; revised January 2, 2007, effective January 1, 2007; revised effective January 1, 2009; amended effective December 1, 2009; amended December 30, 2010, effective January 1, 2011.)

### **Rule 83.5. Attorney Discipline.**

(a) **Standard of Professional Conduct.** All members of the bar of the District Court and the Bankruptcy Court for the District of Idaho (hereafter the “Court”) and all attorneys permitted to practice in this Court must familiarize themselves with and comply with the Idaho Rules of Professional Conduct of the Idaho State Bar and decisions of any court interpreting such rules. These provisions are adopted as the standards of professional conduct for this Court but must not be interpreted to be exhaustive of the standards of professional conduct. No attorney permitted to practice before this court will engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein.

(b) **Discipline.**

(1) **General authority of the Court, and conduct subject to discipline.** This Court may impose discipline on any attorney practicing before this Court, whether or not a member of the bar of this Court, who engages in conduct violating the Idaho Rules of Professional Conduct, or who fails to comply with rules or orders of this Court. The discipline may consist of disbarment from practice before this Court, suspension, reprimand, or any other action that the Court deems appropriate and just. In the event any attorney engages in conduct which may warrant discipline or other sanctions, the Court may, in addition to initiating proceedings for contempt under Title 18, United States Code, and Federal Rule of Criminal Procedure 42, or imposing other appropriate sanctions pursuant to the Court’s inherent powers and/or the Federal Rules of Civil, Bankruptcy or Criminal Procedure, initiate a disciplinary process under section (b)(2) - (4) of this rule, and/or refer the matter under section (b)(8) of this rule.

(2) **Conviction of felony or serious crime.** Any attorney admitted to practice in this Court who is convicted of a felony or other “serious crime” as defined in Idaho Bar Commission Rule 501(s), in any court of the United States, of the District of Columbia, or of any state, territory, commonwealth, or possession of the United States, has the duty and

obligation to report such conviction to this Court within fourteen (14) days of its entry. Upon receiving notice of an attorney's conviction of a felony or other serious crime, whether received from the attorney, another court or its clerk, or otherwise, such attorney will be immediately suspended from practice before this Court, whether the conviction resulted from a plea of guilty or nolo contendere, or from a verdict after trial, or otherwise.

(a) **Pending Appeal.** The Court will issue an order to show cause at the time of suspension directing the suspended attorney to demonstrate within thirty (30) days from the date of such order why the attorney should be reinstated to practice before the Court during the pendency of any appeal.

(b) **Finality of conviction, and disbarment.** Upon the conviction becoming final and the Court being informed thereof, the Court will issue an order to show cause directing the suspended attorney to demonstrate within thirty (30) days from the date of such order why the suspension under section (b)(2) of this rule shall not be made permanent and why the Court should not enter an order of disbarment.

(3) **Reciprocal discipline (disbarment, suspension or other discipline by any other court).** Upon the receipt by this Court of a certified copy of a judgment or order showing that any attorney admitted to practice before this Court has been suspended, disbarred or otherwise disciplined by any other court of the United States or the District of Columbia, or of any state, territory, commonwealth or possession of the United States (hereafter the "supervising court"), or has resigned in lieu of discipline, this Court will review the judgment and order and determine whether similar discipline should be imposed by this Court.

(a) **Order imposing discipline and allowing response.** If the Court decides that similar discipline is warranted, an order of discipline and conjoined order to show cause will issue advising the disciplined attorney that (1) he or she is immediately subject to the same discipline as imposed by the supervising court and, if such discipline includes suspension or disbarment, may only be reinstated to practice before this Court as hereinafter provided, and (2) if the disciplined attorney contends that meritorious reasons exist why the disciplined attorney should not be subject to the same discipline by this Court as imposed by the supervising court, the disciplined attorney must file within thirty (30) days of this Court's order, a petition to set aside the discipline and/or be reinstated to practice in this Court. The petition must clearly demonstrate or this Court otherwise find: (i) the procedure in the supervising court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; (ii) there was such an absence of proof establishing misconduct that this Court would not accept as final the conclusions reached by the supervising court; (iii) the imposition of the disciplinary action stated in the order of the supervising court would otherwise result in a grave injustice; or (iv) the misconduct warrants discipline substantially different from that stated in the order of the supervising court.

(b) **Wind-up.** Unless otherwise ordered, the disciplined attorney will have fourteen (14) days after the date of the Order described in this section to wind-up and complete on behalf of any client, all matters pending on the date of the entry of such order.

(4) **Original (non-reciprocal) disciplinary proceedings.**

(a) **Initiation of proceedings.** Whenever a district, magistrate or bankruptcy judge of this district believes that conduct of an attorney may warrant disbarment, suspension, reprimand or other discipline by this Court, other than those matters addressed in sections (b)(1), (2) and (3) of this rule, such judge may issue a written report and recommendation for the initiation of disciplinary proceedings (the “recommendation”). The chief district judge, or another district judge if the chief district judge is the judge recommending such action (hereafter the “reviewing judge”), shall review the recommendation to determine if reasonable grounds exist for the initiation of disciplinary proceedings. If the reviewing judge determines that disciplinary proceedings should be initiated, the reviewing judge shall issue an order to show cause under this rule that identifies the basis for and nature of possible discipline.

(b) **Response.** An attorney against whom an order to show cause is issued under this section shall have thirty (30) days from the date of the order in which to file a response. The attorney may include in the response (i) a request to submit the matter on the recommendation, affidavits, briefs, and the record, or (ii) for a hearing, whether in-person, telephonic, or by video. The failure to include a request for a hearing will be deemed a waiver of any right to a hearing. The failure to file a timely response may result in the imposition of discipline by the Court without further notice.

(c) **Hearing on disciplinary charges.** If requested by the attorney, a hearing shall be conducted on the disciplinary charges. If a hearing is not requested, the matter shall be determined by the reviewing judge on the record submitted to him or her. At any hearing under this rule, the attorney may be represented by counsel who shall file a notice of appearance with the reviewing judge and with any attorney appointed by the Court to prosecute the matter under section (b)(4)(d) of this rule.

(d) **Appointment of counsel to prosecute charges.** In appropriate cases, the reviewing judge may appoint an attorney to prosecute charges of misconduct and shall provide notice of that appointment to the attorney and his counsel, if any. The Court may solicit recommendations from the Lawyer Representatives of the District of Idaho as to an appropriate appointment. Actual out-of-pocket costs incurred by the attorney prosecuting the charges will be reimbursed from the non-appropriated fund after review and approval by the Board of Judges.

(e) **Determination, and entry of order.** Upon the completion of hearing, if any, and its review of the record, the reviewing judge shall prepare a proposed determination which shall be served on the attorney, and his or her counsel if any. The attorney shall have ten (10) days



from the service of the proposed determination within which to file a reply. If the attorney files a reply, the proposed determination, reply and any record developed shall be presented to a randomly drawn three judge panel of the district, magistrate and bankruptcy judges of this Court, other than the initially complaining judge and the reviewing judge. In its discretion, the panel may call for further submissions or hearing. The final order in a disciplinary proceeding where such a reply has been filed by the attorney, shall be by the panel. In the absence of a reply, the proposed determination shall be entered as the final order.

(5) **Reinstatement.** To be readmitted, a suspended or disbarred attorney must file a petition for reinstatement with the clerk of this Court. The petition shall contain a concise statement of the circumstances of the disciplinary proceedings, the discipline imposed by the Court, and the grounds that justify reinstatement of the attorney. If this Court has imposed reciprocal discipline under section (b)(3) of this rule, and if the attorney has been readmitted by the supervising court or the discipline imposed by that supervising court has been modified or satisfied, the petition shall explain the situation with specificity, including description of any restrictions or conditions imposed on readmission by that supervising court. The petition shall be referred to the chief district judge, or another district judge at the chief district judge's discretion, who will file a proposed determination. The provisions of section (b)(4)(e) of this rule will govern determination and entry of decision on the petition for reinstatement.

(6) **Confidentiality.** All proceedings under this rule shall be public, except upon an order entered upon a showing of good cause that sealing all or part of the record is appropriate. The Court may make such determination and enter such an order *sua sponte*.

(7) **Non-limiting effect of rule.** Nothing in this rule shall limit the power of an individual judge to impose sanctions as authorized under applicable law including the Federal Rules of Civil, Bankruptcy or Criminal Procedure. Nothing in this rule is intended to limit the inherent authority of any judge of this court to suspend an attorney from practicing before that judge on a case by case basis, after appropriate notice and an opportunity to be heard.

(8) **Referral to other courts and entities.** This rule does not restrict the Court or any judge thereof from referring an attorney or a matter to any other court or to any bar association for investigation and/or disciplinary action. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 83.6. Appearance, Substitution, and Withdrawal of Attorneys.**

#### **(a) Appearances.**

(1) An attorney's signature to a pleading filed with the Court shall constitute an appearance by the attorney who signs it. Otherwise, an attorney who wishes to appear for a party or participate in any manner in



any action must file a notice of appearance, containing the information required for pleadings as set forth in Rule 5.2. Failure to file a separate notice of appearance may result in an attorney not receiving copies of orders issued by the Court.

(2) Whenever a party has appeared through an attorney, the party may not thereafter appear or act in his or her own behalf in the case or take any step therein unless an order of substitution must first have been made by the Court, after notice to the opposing party and his or her attorney; provided, that the Court may in its discretion hear a party in open court, notwithstanding the fact that the party has appeared or is represented by an attorney.

**(b) Substitutions.**

(1) When an attorney of record who is the sole representative for any person ceases to act for a party, such party must appear in person or appoint another attorney to appear on his behalf by filing a "Notice of Substitution of Attorney." Said notice of substitution must be signed by the party, the attorney ceasing to act, and the newly appointed attorney or by a written designation filed in the cause and served upon the attorney ceasing to act unless said attorney is deceased, in which event the designation of the new attorney must so state. Until such substitution is filed with the Court, the authority of the attorney of record must continue for all proper purposes. The original notice of substitution, containing all signatures, shall be maintained by the filing party pursuant to Dist. Idaho Loc. R. 5.1(e).

(2) When an attorney of record who is the sole representative ceases to act for a party because the attorney is no longer with the same law firm and another attorney from the same law firm is substituted, a "Notice of Substitution of Attorney Within the Firm" and proposed order must be filed with the Clerk of Court. The "Notice of Substitution of Attorney Within the Firm" must be signed by the attorney ceasing to act for the party and the newly appointed attorney from the same firm. Until such substitution is filed with the Court, the authority of the attorney of record will continue for all proper purposes.

**(c) Withdrawal.**

(1) No attorney of record who is the sole representative for a party may withdraw from representing that party without leave of the Court. Before an attorney is to be granted leave to withdraw, the attorney must present to the Court a proposed order permitting the attorney to withdraw and directing the client to appoint another attorney to appear, or to appear in person by filing a notice with the Court stating how the party will be represented. After the Court has entered such order, the withdrawing attorney must forthwith and with due diligence serve all other parties.

(2) The order shall provide that the withdrawing attorney must continue to represent the client until proof of service of the withdrawal order on the client has been filed with the Court. The client will be allowed twenty-one (21) days after the filing of proof of service by the attorney(s)

to advise the Court in writing in what manner the client will be represented.

If the said party fails to appear in the action, either in person or through a newly appointed attorney within such twenty-one (21)-day period, such failure will be sufficient grounds for the entry of a default against such party or dismissal of the action of such party with prejudice and without further notice, which shall be stated in the order of the Court.

(3) If the party represented by the withdrawing attorney is a corporation, the order must advise the entity that it cannot appear without being represented by an attorney in accordance with Dist. Idaho Loc. Civ. R. 83.4(d).

(4) Upon entry of the order and the filing of proof of service on the client, no further proceedings can be had in the action which will affect the right of the party represented by the withdrawing attorney for a period of twenty-one (21) days.

(d) **Notice of Change of Address.** Any attorney or pro se litigant who has been permitted to appear and participate in an action before this Court must advise the Court and other counsel of record, in writing, if that attorney or pro se litigant has a change in name, firm, firm name, office mailing address, or other mailing address by filing a document entitled "Notice of Change of Address" in each case in which he or she has made an appearance.

The Clerk's office will assume record keeping responsibility only for address changes made in accordance with this rule. (Amended December 31, 2004, effective January 3, 2005; technical amendments made March 31, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009; amended December 30, 2010, effective January 1, 2011.)

### **Rule 83.7. Persons Appearing Without an Attorney — Pro Se.**

**Persons Appearing Without an Attorney — In Propria Persona.** Any person who is representing himself or herself without an attorney must appear personally for such purpose and may not delegate that duty to any other person. While such person may seek outside assistance in preparing Court documents for filing, the person is expected to personally participate in all aspects of the litigation, including Court appearances. Persons appearing without attorneys are required to become familiar with and comply with all Local Rules of this District, as well as the Federal Rules of Civil and/or Criminal Procedure. In exceptional circumstances, the Court may modify these provisions to serve the ends of justice. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 83.8. Fairness and Civility.**

All pretrial and trial proceedings in the United States District and Bankruptcy Courts for the District of Idaho, must be free from prejudice and bias towards another on the basis of gender, race, ethnicity, disability, age or

sexual orientation. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another.

Civility is the responsibility of every lawyer, judge, and litigant in the federal system. While lawyers have an obligation to represent clients zealously, incivility to counsel, adverse parties, or other participants in the legal process undermines the administration of justice and diminishes respect for both the legal process and our system of justice.

The bar, litigants, and judiciary, in partnership with each other, have a responsibility to promote civility in the practice of law and the administration of justice. The fundamental principles of civility which will be followed in the United States District and Bankruptcy Courts for the District of Idaho, both in the written and spoken word, include the following:

(1) Treating each other in a civil, professional, respectful, and courteous manner at all times.

(2) Not engaging in offensive conduct directed towards others or the legal process.

(3) Not bringing the profession in to disrepute by making unfounded accusations of impropriety.

(4) Making good faith efforts to resolve by agreement any disputes.

(5) Complying with the discovery rules in a timely and courteous manner.

(6) Reporting acts of bias or incivility to the Clerk of Court. The Clerk of the Court will then determine the appropriate judicial officer with whom to discuss the matter. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

## PART 2. CRIMINAL RULES.

### Rule 1.1. Scope.

(a) **Title and Citation.** These rules shall be known as the Local Rules of Criminal Practice before the United States District Court for the District of Idaho. They may be cited as “Dist. Idaho Loc. Crim. R. \_\_\_\_\_.”

(b) **Effective Date.** These rules became effective on January 1, 2007. Any amendments to these rules become effective on the date approved by the Court.

(c) **Scope of Rules.** These rules shall apply to all criminal proceedings in the District of Idaho.

(d) **Relationship to Prior Rules; Actions Pending on Effective Date.** These rules supersede all previous local rules promulgated by this Court or any judge of this Court. They govern all applicable proceedings brought in this Court after they take effect. They also apply to all proceedings pending at the time they take effect, except to the extent that



their application is not feasible or will work an injustice, in which event the former rules shall govern.

(e) **Rule of Construction and Definitions.**

(1) Title 21, United States Code, Section 2071 shall, as far as applicable, govern the construction of these rules.

(2) The following definitions shall apply:

(A) **“Court.”** As used in these rules, the term “Court” refers to the United States District Court of the District of Idaho, the entire Board of Judges for the District of Idaho, or to a judge or magistrate judge of the Court before whom a proceeding is pending unless the rule expressly refers to a district judge only or to the full Court.

(B) **“Clerk.”** As used in these rules, the term “Clerk” refers to the Clerk of Court or any deputy clerk designated by the Clerk of Court to act in the capacity of the Clerk.

(f) **Applicability of Local Rules of Civil Practice.** All general provisions of the Local Rules of Civil Practice apply to criminal proceedings unless such provisions are in conflict with or are otherwise provided for by the Federal Rules of Criminal Procedure or the Local Rules of Criminal Practice. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 6.0. Sealed Documents and Public Access.**

The provisions of Dist. Idaho Loc. Civil R. 5.3 apply to criminal actions and proceedings unless otherwise ordered by the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**Rule 12.1. Procedural Orders and Motions.**

(a) **Procedural Orders.** At the arraignment, the magistrate judge or district judge shall set cutoff dates for the filing of requests for discovery, pretrial motions, and submission of jury instructions in accordance with the Criminal Procedural Order approved by the Court. These dates will be strictly adhered to unless an extension of time is granted by the Court upon good cause shown.

(b) **Pretrial Conference.** At the time of the arraignment, a date will be set for a pretrial conference. In addition to any other matters to be covered, i.e., evidentiary or trial procedures, the defendant should be prepared to advise the trial judge (1) if the case will continue to trial based on a not guilty plea, or (2) whether the case will be resolved on a plea of guilty. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 28.1. Interpreters.**

(a) **Courtroom Proceedings.** Only officially designated interpreters may interpret official courtroom proceedings. Regardless of the presence of a private interpreter, such official interpreter must interpret all proceedings in the courtroom.



(b) **Out-of-Court Proceedings.** Official interpreters shall also be available when needed to interpret at interviews between the attorney and his or her non-English-speaking client.

(c) **Compensation for Interpreters.** Attorneys appointed by the Court may claim up to the maximum allowed by the Criminal Justice Act in interpreter fees and be reimbursed, provided they attach all pertinent interpreter bills to said voucher.

Interpreters are compensated in accordance with the policies and the Fee Schedule established by the Judicial Conference of the United States. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 32.1. Disclosure of Investigative Reports by United States Probation Office.**

#### **(a) Presentence Report, Sentencing Recommendation and Confidentiality.**

(1) Presentence reports are not docketed in criminal cases and are not available for public inspection. They shall not be reproduced or copies distributed to other agencies or other individuals unless the Chief United States Probation Officer grants permission.

(2) In addition to the presentence report, the probation officer will submit a separate document entitled "Sentencing Recommendation" to the Court. The Sentencing Recommendation is for the benefit of the Court and will not be disclosed to the government, the defendant, or defendant's counsel or to any other person or party, unless authorized by the sentencing judge, as provided in subsection (3).

(3) The Sentencing Recommendation may be disclosed to the government and defense counsel if authorized by the sentencing judge. Such authorization shall be communicated to the Chief United States Probation Officer in writing or electronically and shall specify whether the authorization applies to all of the individual sentencing judge's cases or to selected cases only. The sentencing judge may revoke the authorization at any time by so notifying the Chief United States Probation Officer in writing or electronically.

(4) If a sentencing is scheduled before a visiting judge, the probation officer shall contact the staff of the visiting judge to determine whether the visiting judge would like the Sentencing Recommendation disclosed to the government and defense counsel.

(5) Probation reports, violation of supervised release reports, and sentencing recommendations prepared for these reports are governed by these same provisions.

#### **(b) Presentence Report.**

(1) Sentencing shall occur no less than seventy (70) days following the entry of a guilty plea or nolo contendere plea or verdict of guilty. At the time the Court sets the date of sentencing, the Court will advise counsel and the probation office of the dates the presentence report will be

disclosed to counsel, the date counsel is to submit any objections to the probation office, and the date on which the presentence report, and any amendments thereto, will be submitted to the Court and counsel. Should counsel or the probation office be unable to comply with the Court's specified dates, they shall notify the Court and request a continuance of the sentencing hearing.

(2) The probation officer shall timely notify counsel of the date and place of the initial and subsequent interviews for the presentence report. Counsel shall be provided a reasonable opportunity to attend any interview of the defendant during the course of the presentence investigation.

(3) Not less than thirty-five (35) days prior to the date of sentencing, the probation officer shall disclose the presentence investigation report to the defendant and to counsel for the defendant and the government. Within fourteen (14) days, counsel shall file with the Clerk of Court and submit a copy to the probation officer any objections they may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(4) After receiving counsel's objections, the probation officer shall conduct any further investigation and make any revisions to the presentence report that may be necessary. The probation officer may request counsel for both parties to meet with the probation officer to discuss unresolved factual and legal issues.

(5) Seven (7) days prior to the date of the sentencing hearing, the probation officer shall submit the presentence report to the sentencing judge. The report shall be accompanied by an addendum setting forth any objections counsel may have made that have not been resolved, together with the officer's comments thereon. If the sentencing judge has authorized its disclosure, the Sentencing Recommendation shall be disclosed to counsel for the defendant and the government together with the presentence report and addendum. Counsel shall not be permitted to discuss the Sentencing Recommendation with the probation officer.

(6) Except with regard to any objection made under subdivision (a) that has not been resolved, the presentence report may be accepted by the Court as accurate. The Court, however, for good cause shown, may allow a new objection to be raised at any time before the imposition of sentence. In resolving disputed issues of fact, the Court may consider any reliable information presented by the probation officer, the defendant, or the government.

(7) The times set forth in this rule may be modified by the Court for good cause shown, except that the thirty-five (35) day period set forth in subsection (b)(3) may only be shortened if the defendant expressly consents.

(8) Nothing in this rule requires the disclosure of any portions of the presentence report that are not disclosable under Federal Rule of Criminal Procedure 32.

(9) The presentence report shall be deemed to have been disclosed when a copy of the report is delivered by hand, fax, or e-mail, one (1) day

after the report's availability for inspection is orally communicated to the parties, or three (3) days after a copy of the report or notice of its availability is mailed.

**(c) Confidentiality of Probation Records.**

(1) Investigative reports and supervision records of this Court maintained by the probation office are confidential and not available for public inspection. However, the Chief Probation Officer may disclose these records to federal, state, or local Courts; correctional and law enforcement agencies, contacted treatment providers; or paroling authorities who have a legal, investigative, or custodial interest in that individual.

(2) Any party, other than those defined in subsection (c)(1), seeking access to the confidential records maintained by the probation office, must file a written request to the Chief Probation Officer that conforms to the requirements of *The Guide to Judiciary Policy, Volume 20, Chapter 8* (which is available at [www.idp.uscourts.gov/disclosure.html](http://www.idp.uscourts.gov/disclosure.html)).

**(d) Rule Not to Supersede or Void Provisions of Federal Rule of Criminal Procedure 32(c).** Nothing in this rule shall be construed to supersede or void the provisions of Fed. R. Crim. P. 32(c)(1). (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective January 1, 2013.)

**Rule 44.1. Right to and Appointment of Counsel.**

**(a) Right to and Appointment of Counsel.** Attorneys may be appointed for indigent parties in a criminal proceeding including pretrial diversion and parole revocation hearings. If a defendant, appearing without counsel in a criminal proceeding, desires to obtain his or her own counsel, a reasonable continuance for arraignment shall be granted for that purpose. If the defendant requests appointment of counsel by the Court or fails for an unreasonable time to appear with his or her own counsel, the assigned judge or magistrate judge shall, subject to the applicable financial eligibility requirements, appoint counsel unless the defendant advises the Court that he or she wishes to represent himself pro se. Any financial affidavit submitted with the application for appointment of counsel shall be sealed by the Clerk.

If a defendant desires to represent himself and proceed without counsel, he or she shall sign and file a written waiver of right to counsel. The district judge or magistrate judge may nevertheless designate counsel to advise and assist the defendant to the extent defendant might thereafter desire. Appointment of counsel shall be made in accordance with the plan of this Court adopted pursuant to the Criminal Justice Act of 1964 and on file with the Clerk.

**(b) Appearance and Withdrawal of Counsel.** An attorney who has appeared for a defendant may thereafter withdraw only upon notice to the defendant and all parties to the case and after order of the Court finding good cause exists and granting leave to withdraw. Failure of a defendant to pay agreed compensation shall not alone be deemed sufficient cause.



Unless such leave is granted, the attorney shall continue to represent the defendant until the case is dismissed or the defendant is acquitted. In the event the defendant is convicted, unless leave is granted, the attorney shall continue to represent the defendant until the time for making post-trial motions and for filing notice of appeal, as specified in Federal Rule of Appellate Procedure 4(b), has expired. If an appeal is taken, the attorney shall continue to serve until leave to withdraw is granted by any competent Court.

(c) **Pro Hac Vice/Local Counsel.** An attorney eligible for admission under Dist. Idaho Loc. Civ. R. 83.4(a), and who is a member in good standing and eligible to practice before the bar of any United States Court or of the highest court of any state or of any territory or insular possession of the United States, who is of good moral character and who has been retained to appear in this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate in a particular case, and no certificate of admission shall be issued by the Clerk of Court.

The pro hac vice application shall be presented to the Clerk of Court and shall state under penalty of perjury (1) the attorney's residence and office addresses, (2) by what court(s) the attorney has been admitted to practice and the date(s) of admission, (3) that the attorney is in good standing and eligible to practice in said court(s), and (4) that the attorney is not currently suspended or disbarred in any other court(s). The attorney shall also (1) designate an active member of the bar of this Court as Local Counsel with the authority to act as attorney of record for all purposes and with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, and (2) file with such designation the address, telephone number, and written consent of designated local counsel.

Attorneys not admitted to the bar of this Court who, upon the filing of a verified petition for permission to practice in an individual case, are admitted under the conditions prescribed in Dist. Idaho Loc. Civ. R. 83.4(e), and shall be required to pay the proscribed fee for each such pro hac vice application filed.

Attorneys not admitted to the bar of this Court who, upon the filing of a verified petition for permission to practice in an individual case, are admitted under the conditions prescribed in Dist. Idaho Loc. Civ. R. 83.4(e), and shall be required to pay a fee in accordance with the general orders of the court for each such pro hac vice application so filed.

The designated local counsel shall personally appear with the attorney on all matters heard and tried before this Court unless such presence is excused by the Court. Original proceedings may be filed by an attorney before admission pro hac vice, but the time for the responsive pleading shall not begin to run until the appearance of associated local counsel is filed with the Clerk of Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended December 30, 2010, effective January 1, 2011.)



**Rule 46.1. Release from Custody/Bail.**

(a) **Release from Custody.** Eligibility for release prior to and after trial shall be in accordance with 18 U.S.C. §§ 3142, 3143, and 3144.

(b) **Bail.** If the court sets as a condition of release a monetary bail under the Bail Reform Act, the bond or equivalent security shall comply with Dist. Idaho Loc. Civ. R. 65.1 unless the Court specifically orders otherwise.

(c) **Motion to Modify Release of Detention Orders.** Except as otherwise ordered by a judge of this Court, magistrate judges shall, subject to the provisions of 18 U.S.C. § 3141 et seq., hear and determine all motions to modify release or detention orders.

(d) **Appeal of Release or Detention Orders.** If a defendant is not moving to modify a previous order entered by a magistrate judge, but desires to appeal the decision made by the magistrate judge, the pleading should be clearly entitled “Notice of Appeal.” (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

**Rule 46.2. Pretrial Services.**

Pursuant to the Pretrial Services Act of 1982 (18 U.S.C. §§ 3152-3155), the Court authorizes the United States Probation Office for the District of Idaho to establish a Pretrial Services Division as provided for by the Act.

At the discretion of the Chief U.S. Probation Officer, personnel within the probation office shall be designated to perform pretrial services pursuant to the Act.

Upon notification that a defendant has been charged with an offense, either felony or misdemeanor, pretrial service officers will conduct a pre-release investigation as soon as practicable. The judicial officer setting bail or reviewing a bail determination shall receive and consider all reports submitted by pretrial service officers.

Pretrial service reports shall be made available to the attorneys for the accused and the attorneys for the government and shall be used only for the purpose of fixing conditions of release, including bail determinations. Otherwise, the reports shall remain confidential, as provided in 18 U.S.C. § 3153, subject to the exceptions provided therein. In the event a pretrial service report is received in evidence at a hearing on terms and conditions of release, it shall be sealed by the Court and not made a matter of public record.

Pretrial service officers shall supervise persons released on bail at the discretion of the judicial officer granting the release or conditions of the release. Supervision will be conducted in accordance with 18 U.S.C. § 3154, *The Guide to Judiciary Policy*, Volume 8, and District of Idaho operations policy.

The Chief U.S. Probation Officer of the District is authorized to approve interdistrict travel for persons under the supervision of the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective January 1, 2013.)

**Rule 57.1. Release of Information by Attorneys in Criminal Cases.**

(a) **General.** It is the duty of the lawyer for the United States and the lawyer for the defendant not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he or she is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by any means of public communication related to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime) or the character or reputation of the accused, except that, the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any danger he or she may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense; or

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(b) **Pretrial Matters.** During the course of any pretrial proceedings, including investigations by the grand jury, the attorney for the United States shall be guided by the provisions of Fed. R. Crim. Pro. 6(e) and 28 C.F.R. § 50.2(b), Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings. Attorneys for the defendant shall comply with Rule 3.6, Idaho Rules of Professional Conduct.

(c) **Release of Information During Trial.** During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or the defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial for dissemination by any means of public communication.

(d) **Release of Information After Trial.** After the completion of a trial or disposition without trial of any criminal matter and prior to the

imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

(e) **Exclusions.** Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(f) **Sanctions.** Violation of this rule may result in sanctions being imposed consistent with the powers of the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 57.2. Violation Notices, Forfeiture of Collateral in Lieu of Appearance.**

For certain scheduled offenses committed within the territorial and subject matter jurisdiction of a United States magistrate judge within the District of Idaho, collateral may be posted in the scheduled amount, in lieu of an accused's appearance before the magistrate judge.

If the accused fails to appear before the magistrate judge after posting collateral in the scheduled amount, the collateral shall be forfeited to the United States and such forfeiture shall be accepted in lieu of appearance and as authorizing the termination of the proceedings.

No forfeiture of collateral will be permitted for certain listed offenses described in the general order adopting the Uniform Collateral Forfeiture Schedule for this Court.

Copies of current schedules of offenses for which collateral may be posted in lieu of appearance, and of the amounts of required collateral shall be available for public inspection at the offices of the Clerk of Court in Boise, Pocatello, Moscow, and Coeur d'Alene. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 57.3. Custody of Files and Exhibits.**

The provisions of Dist. Idaho Loc. Civ. R. 79.1 apply to criminal actions and proceedings, unless otherwise ordered by the Court. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 58.1. Assignment of Criminal Matters to Magistrate Judges.**

(a) **Misdemeanor Cases.** All misdemeanor cases shall be assigned, upon the filing of an information or the return of an indictment, to one of the district judges and then delivered to a magistrate judge to conduct the arraignment. All magistrate judges are specifically designated to exercise misdemeanor jurisdiction. If the defendant consents to a trial of the case by



a magistrate judge, the magistrate judge shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and Fed. R. Crim. Pro. 58.

(b) **Felony Cases.** Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the Clerk of Court to one of the district judges and then delivered to a magistrate judge to conduct an arraignment, to appoint counsel when appropriate, and other preliminary matters pursuant to the Federal Rules of Criminal Procedure, including entry of the procedural order. Upon receipt of a not guilty plea, the magistrate judge shall set the matter for trial before the assigned district judge. If the defendant advises the magistrate judge that he or she wishes to enter a plea of guilty or nolo contendere, the magistrate judge shall inform the district judge so the matter can be placed on the district judge's calendar. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007.)

### **Rule 58.2. Appeal From Conviction By a Magistrate Judge.**

(a) **Notice of Appeal.** A defendant who has been convicted by a magistrate judge may appeal to a district judge by filing a timely notice of appeal within fourteen (14) days after entry of judgment with the Clerk of Court and by serving a copy on the United States Attorney pursuant to Fed. R. Crim. Pro. 58(c)(4).

(b) **Record.** A transcript, if desired, shall be ordered as prescribed by Fed. R. App. Pro. 10(b), except that, in the absence of a reporter, the transcript shall be ordered as directed by the magistrate judge. Applications for orders pertaining thereto shall be made to the magistrate judge. Within thirty (30) days after a transcript has been ordered, the transcript shall be filed with the Clerk.

If no transcript is ordered within fourteen (14) days after the notice of appeal is filed, the record on appeal shall be deemed complete.

(c) **Assignment to a District Judge.** The Clerk of Court shall assign the appeal to a District judge in the same manner as any indictment or felony information.

(d) **Notice of Hearing.** After assignment, the Clerk shall promptly notify the parties of the time set for oral argument. Argument shall be scheduled not less than sixty (60) days, nor more than ninety (90) days, after the date of the notice. However, an earlier date may be set upon application to the judge to whom the appeal has been assigned.

(e) **Time for Serving and Filing Briefs.** The appellant shall serve and file his or her brief within twenty-one (21) days after the notice of hearing. The appellee shall serve and file his or her brief within twenty-one (21) days after service of the brief of the appellant. The appellant may serve and file a reply brief within seven (7) days after service of the brief of the appellee. These periods may be altered by order of the assigned judge upon application of a party for good cause shown.

(f) **Scope of Appeal.** The scope of the appeal shall be the same as on an



appeal from a judgment of the District Court to the Court of Appeals. (Amended December 31, 2004, effective January 3, 2005; revised January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

**Rule 59.1. Magistrate Judge Rules.**

**(a) Authority of United States Magistrate Judges in Felony Matters.**

(1) Upon referral by a district judge, a magistrate judge shall impanel the grand jury.

(2) A magistrate judge may accept waivers of indictment pursuant to Federal Rule of Criminal Procedure 7(b).

(3) A magistrate judge shall preside over all arraignments, establish deadlines within which parties shall file and respond to pretrial motions, and fix trial dates.

(4) A magistrate judge may conduct plea inquiry hearings pursuant to Fed. R. Crim. P. 11 if a district judge has referred the matter to the magistrate judge, and the defendant, in writing, has waived his or her right to have a district judge take the plea. If, during the hearing, the requirements of Fed. R. Crim. P. 11 are met, the magistrate judge shall:

(a) Order the probation officer to conduct a presentence investigation and prepare a presentence report pursuant to Fed. R. Crim. P. 32;

(b) Set deadlines in accordance with Fed. R. Crim. P. 32 for disclosure of the presentence report;

(c) Set the date for objections and responses to objections;

(d) Calendar the case for sentencing before the district judge; and

(e) File a report certifying that the requirements of Fed. R. Crim. P. 11 have been met and recommending that the district court accept the defendant's plea.

(5) A magistrate judge may conduct voir dire and select petit juries if the district court has referred the matter to the magistrate judge for that purpose and the parties have consented in writing.

(6) A magistrate judge may at the request of a district judge, and with the consent of the parties, accept petit jury verdicts, fix dates for imposition of sentence, determine if release pending appeal is appropriate, and set the terms and conditions of that release.

(7) Perform any additional duties not inconsistent with the Constitution and laws of the United States.

**(b) Orders and Reports and Recommendations.** Objections to an order on a non-dispositive matter or to a report and recommendation on a dispositive matter filed by a magistrate judge shall be filed pursuant to Fed. R. Crim. P. 59 and shall not exceed twenty (20) pages. A party may respond to another party's objections within fourteen (14) days of being served with a copy of the objections, or at some other time set by the magistrate judge. Any response shall not exceed ten (10) pages. (Adopted January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

## **PART 3. LOCAL PATENT RULES.**

### **1. SCOPE OF RULES.**

#### **Rule 1.1. Title.**

These are the Local Patent Rules for Cases before the United States District Court for the District of Idaho. They may be cited as “Dist. Idaho Loc. Patent R. \_\_.” (Adopted effective December 1, 2009.)

#### **Rule 1.2. Scope and Construction.**

These rules apply to all civil actions filed in or transferred to this Court which allege infringement of a utility patent in a complaint, counterclaim, cross-claim or third party claim, or which seek a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable. The District of Idaho’s Local Civil Rules shall also apply to such actions, except to the extent that they are inconsistent with these Local Patent Rules. If the filings or actions in a case have not triggered the application of these Local Patent Rules under the terms set forth herein, the parties shall meet and confer as soon as any triggering circumstances become known for the purpose of agreeing on the application of these Local Patent Rules to the case and promptly report the results of the meet and confer to the Court. (Adopted effective December 1, 2009.)

#### **Rule 1.3. Modification of these Rules.**

The Court may modify the obligations or deadlines set forth in these Patent Local Rules based on the circumstances of any particular case, including, without limitation, the simplicity or complexity of the case as shown by the patents, claims, products, facts, or parties involved. Such modifications shall, in most cases, be made at the initial scheduling conference, but may be made at other times upon a showing of good cause. In advance of submission of any request for a modification, the parties shall meet and confer for purposes of reaching an agreement, if possible, upon any modification. (Adopted effective December 1, 2009.)

#### **Rule 1.4. Effective Date.**

These Local Patent Rules take effect on December 1, 2009. They govern patent cases filed on or after that date. For actions pending prior to December 1, 2009, the Court will confer with the parties and apply the Local Patent Rules as the Court deems appropriate. (Adopted effective December 1, 2009.)

### **2. GENERAL PROVISIONS.**

#### **Rule 2.1. Governing Procedure.**

(a) **Initial Scheduling Conference.** When the parties confer pursuant to Fed. R. Civ. P. 26(f), in addition to the matters covered by Fed. R. Civ. P.

26, the parties shall discuss and address in the scheduling/litigation plan filed pursuant to Fed. R. Civ. P. 26(f) and Dist. Idaho Loc. Civ. R. 16.1, the following topics:

(1) Proposed modification of the obligations or deadlines set forth in these Local Patent Rules to ensure that they are suitable for the circumstances of the particular case (see Dist. Idaho Loc. Patent R. 1.3);

(2) The scope and timing of any claim construction discovery including disclosure of and discovery from any expert witness permitted by the Court;

(3) The format of the Claim Construction Hearing, including whether the Court will hear live testimony, the order of presentation, and the estimated length of the hearing;

(4) The scope and timing of any discovery after the claim construction ruling including the disclosure of and discovery from expert witnesses (see Dist. Idaho Loc. Patent R. 5);

(5) How the parties intend to educate the Court on the technology at issue;

(6) The need for any discovery confidentiality order; and

(7) Whether the management of the case would benefit from a voluntary case management conference with a Magistrate Judge pursuant to Dist. Idaho Loc. Civ. R. 16.1. (Adopted effective December 1, 2009.)

### **Rule 2.2. Confidentiality.**

Discovery cannot be withheld on the basis of confidentiality absent Court order. Pending entry of a confidentiality order, discovery and disclosures deemed confidential by a party shall be produced to the adverse party for outside counsel's Attorney's Eyes Only, solely for the purposes of the pending case and shall not be disclosed to the client or any other person. (Adopted effective December 1, 2009.)

### **Rule 2.3. Certification of Disclosures.**

All documents including statements, disclosures, or charts filed or served in accordance with these Local Patent Rules shall be dated and signed by counsel of record. Counsel's signature shall constitute a certification that to the best of his or her knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the information contained in the statement, disclosure, or chart is complete and correct at the time it is made. (Adopted effective December 1, 2009.)

### **Rule 2.4. Admissibility of Disclosures.**

Statements, disclosures, or charts governed by these Local Patent Rules are admissible to the extent permitted by the Federal Rules of Evidence or Procedure. However, the statements and disclosures provided for in Dist. Idaho Loc. Patent R. 4.1, 4.2 and 4.3 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Patent

Rules shall be taken. (Adopted effective December 1, 2009.)

**Rule 2.5. Relationship to Federal Rules of Civil Procedure.**

Except as provided in this paragraph or as otherwise ordered, it shall not be a ground for objecting to an opposing party's discovery request (e.g., interrogatory, document request, request for admission, deposition question) or declining to provide information otherwise required to be disclosed pursuant to Fed. R. Civ. P. 26(a)(1) that the discovery request or disclosure requirement is premature in light of, or otherwise conflicts with, these Local Patent Rules, absent other legitimate objection. A party may object, however, to responding to the following categories of discovery requests (or decline to provide information in its initial disclosures under Fed. R. Civ. P. 26(a)(1)) on the ground that they are premature in light of the timetable provided in the Local Patent Rules:

- (a) Requests seeking to elicit a party's claim construction position;
- (b) Requests seeking to elicit from the patent claimant a comparison of the asserted claims and the accused apparatus, product, device, process, method, act, or other instrumentality;
- (c) Requests seeking to elicit from an accused infringer a comparison of the asserted claims and the prior art; and
- (d) Requests seeking to elicit from an accused infringer the identification of any advice of counsel, and related documents.

Where a party properly objects to a discovery request (or declines to provide information in its initial disclosures under Fed. R. Civ. P. 26(a)(1)) as set forth above, that party shall provide the requested information on the date on which it is required to be provided to an opposing party under these Local Patent Rules or as set by the Court, unless there exists another legitimate ground for objection. (Adopted effective December 1, 2009.)

**Rule 2.6. Limitations on Discovery.**

Based on the circumstances of a particular case, the Court may modify the scope of discovery to be permitted prior to any Claim Construction Hearing. Such limitations shall, in most cases, be made at the initial scheduling conference, but may be made at other times upon a showing of good cause. In advance of submission of any request for a modification, pursuant to Dist. Idaho Loc. Patent R. 1.3, the parties shall meet and confer for purposes of reaching an agreement, if possible, upon any modification. (Adopted effective December 1, 2009.)

**3. PATENT DISCLOSURES.**

**Rule 3.1. Disclosure of Asserted Claims and Infringement Contentions.**

Not later than 14 days after the initial scheduling conference, a party claiming patent infringement shall serve on all parties a "Disclosure of Asserted Claims and Infringement Contentions." Separately for each oppos-



ing party, the “Disclosure of Asserted Claims and Infringement Contentions” shall contain the following information:

(a) Each claim of each patent in suit that is allegedly infringed by such opposing party, including for each claim the applicable statutory subsections of 35 U.S.C. § 271 asserted;

(b) Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality”) of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus shall be identified by name or model number, if known. Each method or process shall be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;

(c) A chart identifying specifically where each limitation of each asserted claim is found within each Accused Instrumentality, including for each limitation that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;

(d) For each claim which is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. Insofar as alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described;

(e) Whether each limitation of each asserted claim is alleged to be literally present or present under the doctrine of equivalents in the Accused Instrumentality;

(f) For any claim in a patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled;

(g) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party shall identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim; and

(h) If a party claiming patent infringement alleges willful infringement, the basis for such allegation. (Adopted effective December 1, 2009.)

### **Rule 3.2. Document Production Accompanying Disclosure.**

With the “Disclosure of Asserted Claims and Infringement Contentions,” the party claiming patent infringement shall produce to each opposing party or make available for inspection and copying and identify by production number which documents correspond to each category:

(a) Documents (e.g., contracts, purchase orders, invoices, advertisements, marketing materials, offer letters, beta site testing agreements, and third party or joint development agreements) sufficient to evidence

each discussion with, disclosure to, or other manner of providing to a third party, or sale of or offer to sell, or any public use of, the claimed invention prior to the date of application for the patent in suit. A party's production of a document as required herein shall not constitute an admission that such document evidences or is prior art under 35 U.S.C. § 102;

(b) All documents evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the patent in suit or the priority date identified pursuant to Dist. Idaho Loc. Patent R. 3.1(f), whichever is earlier;

(c) A copy of the file history for each patent in suit;

(d) Documents sufficient to establish ownership of the patent rights by the party asserting patent infringement; and

(e) If a party identifies instrumentalities pursuant to Dist. Idaho Loc. Patent R. 3.1(g), documents sufficient to show the operation of any aspects or elements of such instrumentalities the patent claimant relies upon as embodying any asserted claims. (Adopted effective December 1, 2009.)

### **Rule 3.3. Invalidity Contentions.**

Not later than 42 days after service upon it of the "Disclosure of Asserted Claims and Infringement Contentions," each party opposing a claim of patent infringement, shall serve on all parties its "Invalidity Contentions" which shall contain the following information:

(a) The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by its number, country of origin, and date of issue. Each prior art publication shall be identified by its title, date of publication, and where feasible, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

(b) Whether each item of prior art anticipates each asserted claim or renders it obvious. If obviousness is alleged, an explanation of why the prior art renders the asserted claim obvious, including an identification of any combinations of prior art showing obviousness;

(c) A chart identifying where specifically in each alleged item of prior art each limitation of each asserted claim is found, including for each limitation that such party contends is governed by 35 U.S.C. § 112(6), the

identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and,

(d) Any grounds of invalidity based on 35 U.S.C. § 101, indefiniteness under 35 U.S.C. § 112(2) or lack of enablement or insufficiency of written description under 35 U.S.C. § 112(1) of any for the asserted claims. (Adopted effective December 1, 2009.)

#### **Rule 3.4. Document Production Accompanying Invalidity Contentions.**

With the “Invalidity Contentions,” the party opposing a claim of patent infringement shall produce or make available for inspection and copying:

(a) Source code, specifications, schematics, flow charts, artwork, formulas, or other documentation sufficient to show the operation of any aspects or elements of an Accused Instrumentality identified by the patent claimant in its Dist. Idaho Loc. Patent R. 3.1(c) chart; and

(b) A copy or sample of the prior art identified pursuant to Dist. Idaho Loc. Patent R. 3.3(a) which does not appear in the file history of the patent(s) at issue. To the extent any such item is not in English, an English translation of the portion(s) relied upon shall be produced.

The producing party shall separately identify by production number which documents correspond to each category. (Adopted effective December 1, 2009.)

#### **Rule 3.5. Disclosure Requirement in Patent Cases for Declaratory Judgment of Invalidity.**

(a) **Invalidity Contentions If No Claim of Infringement.** In all cases in which a party files a complaint or other pleading seeking a declaratory judgment that a patent is invalid Dist. Idaho Loc. Patent R. 3.1 and 3.2 shall not apply unless and until a claim for patent infringement is made by a party. If the Defendant does not assert a claim for patent infringement in its answer to the complaint, no later than 14 days after the Defendant serves its answer, or 14 days after the initial scheduling conference, whichever is later, the party seeking a declaratory judgment of invalidity shall serve upon each opposing party its Invalidity Contentions that conform to Dist. Idaho Loc. Patent R. 3.3 and produce or make available for inspection and copying the documents described in Dist. Idaho Loc. Patent R. 3.4.

(b) **Inapplicability of Rule.** This Dist. Idaho Loc. Patent R. 3.5 shall not apply to cases in which a request for a declaratory judgment that a patent is invalid is filed in response to a complaint for infringement of the same patent. (Adopted effective December 1, 2009.)

#### **Rule 3.6. Disclosure Requirements for Patent Cases Arising Under 21 U.S.C. § 355 (commonly referred to as “the Hatch-Waxman Act”).**

The requirements of this Dist. Idaho Loc. Patent R. 3.6 apply to all patents subject to a Paragraph IV certification in cases arising under 21



U.S.C. § 355 (commonly referred to as “the Hatch-Waxman Act”). This provision takes precedence over any conflicting provisions in Dist. Idaho Loc. Patent R. 3.1 to 3.5 for all cases arising under 21 U.S.C. § 355.

(a) At or before the initial scheduling conference, the Defendant(s) shall produce to Plaintiff(s) the entire Abbreviated New Drug Application or New Drug Application that is the basis of the case in question.

(b) Not more than 14 days after the initial scheduling conference, the Defendant(s) shall provide to Plaintiff(s) the written basis for their “Invalidity Contentions,” for any patents referred to in Defendant(s) Paragraph IV Certification which shall contain all disclosures required by Dist. Idaho Loc. Patent R. 3.3.

(c) Any “Invalidity Contentions” disclosed under Dist. Idaho Loc. Patent R. 3-6(b), shall be accompanied by the production of documents required under Dist. Idaho Loc. Patent R. 3.4.

(d) Not more than 14 days after the initial scheduling conference, the Defendant(s) shall provide to Plaintiff(s) the written basis for their “Non-Infringement Contentions,” for any patents referred to in Defendant(s) Paragraph IV Certification which shall include a claim chart identifying each claim at issue in the case and each limitation of each claim at issue. The claim chart shall specifically identify for each claim which claim limitation(s) are literally absent from the Defendant(s) allegedly infringing Abbreviated New Drug Application or New Drug Application.

(e) Any “Non-Infringement Contentions” disclosed under Dist. Idaho Loc. Patent R. 3.6(d), shall be accompanied by the production of any document or thing that the Defendant(s) intend to rely on in defense against any infringement contentions by Plaintiff(s).

(f) Not more than 42 days after the disclosure of the “Non-Infringement Contentions” as required by Dist. Idaho Loc. Patent R. 3.6(d), Plaintiff(s) shall provide Defendant(s) with a “Disclosure of Asserted Claims and Infringement Contentions,” for all patents referred to in Defendant(s) Paragraph IV Certification, which shall contain all disclosures required by Dist. Idaho Loc. Patent R. 3.1.

(g) Any “Disclosure of Asserted Claims and Infringement Contentions” disclosed under Dist. Idaho Loc. Patent R. 3.6(f), shall be accompanied by the production of documents required under Dist. Idaho Loc. Patent R. 3.2. (Adopted effective December 1, 2009.)

### **Rule 3.7. Amendment to Contentions.**

Amendments to the Infringement Contentions or the Invalidity Contentions may be made only by order of the Court upon a timely application and showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to the nonmoving party, support a finding of good cause include: (a) a claim construction by the Court different from that proposed by the party seeking amendment; (b) recent discovery of material, prior art despite earlier diligent search; (c) recent discovery of nonpublic



information about the Accused Instrumentality which was not discovered, despite diligent efforts, before the service of the Infringement Contentions; and (d) disclosure of an asserted claim and infringement contention by a Hatch-Waxman Act plaintiff under Dist. Idaho Loc. Patent R. 3.6(f) that requires response by defendant because it was not previously presented or reasonably anticipated. The duty to supplement discovery responses does not excuse the need to obtain leave of court to amend contentions. (Adopted effective December 1, 2009.)

### **Rule 3.8. Advice of Counsel.**

Not later than 28 days after service by the Court of its Claim Construction Ruling, each party relying upon advice of counsel as part of a patent-related claim or defense for any reason shall:

(a) Produce or make available for inspection and copying any written advice and documents related thereto for which the attorney-client and work product protection have been waived;

(b) Provide a written summary of any oral advice and produce or make available for inspection and copying that summary and documents related thereto for which the attorney-client and work product protection have been waived; and

(c) Serve a privilege log identifying any other documents, except those authored by counsel acting solely as trial counsel, relating to the subject matter of the advice which the party is withholding on the grounds of attorney-client privilege or work product protection.

A party who does not comply with the requirements of this Dist. Idaho Loc. Patent R. 3.8 shall not be permitted to rely on advice of counsel for any purpose absent a stipulation of all parties or by order of the Court. (Adopted effective December 1, 2009.)

## **4. CLAIM CONSTRUCTION PROCEEDINGS.**

### **Rule 4.1. Exchange of Proposed Terms for Construction.**

(a) Not later than 14 days after service of the “Invalidity Contentions” pursuant to Dist. Idaho Loc. Patent R. 3.3, not later than 42 days after service upon it of the “Disclosure of Asserted Claims and Infringement Contentions” in those actions where validity is not at issue (and Dist. Idaho Loc. Patent R. 3.3 does not apply), or, in all cases in which a party files a complaint or other pleading seeking a declaratory judgment not based on validity, not later than 14 days after the Defendant serves an answer that does not assert a claim for patent infringement (and Dist. Idaho Loc. Patent R. 3.1 does not apply), each party shall serve on each other party a list of claim terms which that party contends should be construed by the Court, and identify any claim term which that party contends should be governed by 35 U.S.C. § 112(6).

(b) The parties shall thereafter meet and confer for the purposes of limiting the terms in dispute by narrowing or resolving differences and

facilitating the ultimate preparation of a Joint Claim Construction and Prehearing Statement. The parties shall also jointly identify the 10 terms per unrelated patent likely to be most significant to resolving the parties' dispute, including those terms for which construction may be case or claim dispositive. (Adopted effective December 1, 2009.)

**Rule 4.2. Exchange of Preliminary Claim Constructions and Extrinsic Evidence.**

(a) Not later than 21 days after the exchange of the lists pursuant to Dist. Idaho Loc. Patent R. 4.1, the parties shall simultaneously exchange proposed constructions of each term identified by either party for claim construction. Each such "Preliminary Claim Construction" shall also, for each term which any party contends is governed by 35 U.S.C. § 112(6), identify the structure(s), act(s), or material(s) corresponding to that term's function.

(b) At the same time the parties exchange their respective "Preliminary Claim Constructions," each party shall also identify all references from the specification or prosecution history that support its proposed construction and designate any supporting extrinsic evidence including, without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses. Extrinsic evidence shall be identified by production number or by producing a copy if not previously produced. With respect to any supporting witness, percipient or expert, the identifying party shall also provide a description of the substance of that witness' proposed testimony that includes a listing of any opinions to be rendered in connection with claim construction.

(c) The parties shall thereafter meet and confer for the purposes of narrowing the issues, jointly identifying up to a maximum of 10 terms per unrelated patent likely to be most significant in resolving the parties' dispute, including those terms for which construction may be case or claim dispositive, and finalizing preparation of a Joint Claim Construction and Prehearing Statement. For purposes of Dist. Idaho Loc. Patent R. 4.2, 4.3 and 4.5, a patent and any continuation, divisional, reexamined or reissued patent that claims priority to the same patent application are considered "related."

(d) The number of terms per unrelated patent that are identified under Dist. Idaho Loc. Patent R. 4.2(c) and 4.3(c) and addressed by the parties' claim construction briefs under Dist. Idaho Loc. Patent R. 4.5 may be modified by the Court at the initial scheduling conference pursuant to Dist. Idaho Loc. Patent R. 2.1(a)(1) or by stipulation of all parties. If all parties stipulate to a different limitation, the parties' stipulation shall be reflected in the Joint Claim Construction and Prehearing Statement. (Adopted effective December 1, 2009.)

**Rule 4.3. Joint Claim Construction and Prehearing Statement.**

Not later than 28 days after the Exchange of Preliminary Claim Construction and Extrinsic Evidence the parties shall complete and file a

Joint Claim Construction and Prehearing Statement, which shall contain the following information:

- (a) The construction of those terms on which the parties agree;
- (b) Each party's proposed construction of each disputed term, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction or to oppose any other party's proposed construction, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses;
- (c) An identification of the terms whose construction will be most significant to the resolution of the case up to a maximum of 10 per unrelated patent. The parties shall also identify any term among the 10 whose construction will be case or claim dispositive. If the parties cannot agree on the 10 most significant terms, the parties shall identify the ones which they do agree are most significant and then they may evenly divide the remainder with each party identifying what it believes are the remaining most significant terms. However, the total terms identified by all parties as most significant cannot exceed 10. For example, in a case involving two parties, if the parties agree upon the identification of five terms as most significant, each may only identify two additional terms as most significant; if the parties agree upon eight such terms, each party may only identify only one additional term as most significant.
- (d) The anticipated length of time necessary for the Claim Construction Hearing; and
- (e) Whether any party proposes to call one or more witnesses at the Claim Construction Hearing, the identity of each such witness, and for each witness, a summary of his or her testimony including, for any expert, each opinion to be offered related to claim construction. (Adopted effective December 1, 2009.)

#### **Rule 4.4. Completion of Claim Construction Discovery.**

Not later than 28 days after service and filing of the Joint Claim Construction and Prehearing Statement, the parties shall complete all discovery relating to claim construction, including any depositions with respect to claim construction of any witnesses, including experts, identified in the Preliminary Claim Construction statement (Dist. Idaho Loc. Patent R. 4.2) or Joint Claim Construction and Prehearing Statement (Dist. Idaho Loc. Patent R. 4.3). (Adopted effective December 1, 2009.)

#### **Rule 4.5. Claim Construction Briefs.**

(a) Not later than 42 days after serving and filing the Joint Claim Construction and Prehearing Statement, the party claiming patent infringement, or the party asserting invalidity if there is no infringement issue present in the case, shall serve and file an opening brief and any



evidence supporting its claim construction. The opening brief may not exceed thirty (30) pages absent prior leave of Court.

(b) Not later than 14 days after service upon it of an opening brief, each opposing party shall serve and file its responsive brief and supporting evidence. Each responsive brief may not exceed thirty (30) pages absent prior leave of Court.

(c) Not later than 7 days after service upon it of a responsive brief, the party claiming patent infringement, or the party asserting invalidity if there is no infringement issue present in the case, shall serve and file any reply brief and any evidence directly rebutting the supporting evidence contained in an opposing party's response. Any reply brief may not exceed fifteen (15) pages absent prior leave of Court. (Adopted effective December 1, 2009.)

#### **Rule 4.6. Claim Construction Hearing.**

Subject to the convenience of the Court's calendar, two weeks following submission of the reply brief specified in Dist. Idaho Loc. Patent R. 4.5(c), the Court shall conduct a Claim Construction Hearing, to the extent the parties or the Court believe a hearing is necessary for construction of the claims at issue. (Adopted effective December 1, 2009.)

#### **Rule 4.7. Good Faith Participation.**

A failure to make a good faith effort to narrow the instances of disputed terms or otherwise participate in the meet and confer process of any of the provisions of section 4 may expose counsel to sanctions, including under 28 U.S.C. § 1927. (Adopted effective December 1, 2009.)

### **5. DISCOVERY AFTER CLAIM CONSTRUCTION.**

#### **Rule 5.1. Discovery Other Than For Expert Witnesses.**

The parties shall have 42 days after the Court enters its claim construction ruling to take discovery, unless the case Scheduling Order provides for a longer time. (Adopted effective December 1, 2009.)

#### **Rule 5.2. Disclosure of Experts and Expert Reports.**

In the event there will be expert testimony in addition to what was presented during proceedings on claim construction, the following shall apply:

(a) Not later than 28 days after the close of discovery provided for in Dist. Idaho Loc. Patent R. 5.1, each party shall make its initial expert disclosures required by Fed. R. Civ. P. 26 on the issues for which each bears the burden of proof.

(b) Not later than 28 days after the first round of disclosures, each party shall make its initial expert witness disclosures required by Fed. R. Civ. P. 26 on the issues for which the opposing party bears the burden of proof.

(c) Not later than 14 days after the second round of disclosures, each party shall make any rebuttal expert witness disclosures permitted by



Fed. R. Civ. P. 26. (Adopted effective December 1, 2009.)

**Rule 5.3. Depositions of Experts.**

Depositions of expert witnesses disclosed under Dist. Idaho Loc. Patent R. 5.2 shall be completed within 28 days after the deadline for disclosing rebuttal expert witnesses. (Adopted effective December 1, 2009.)

## APPENDICES

### Appendix 1.

#### General District Court Fee Schedule and Miscellaneous Fee Schedule.

##### CASE FILING FEES

Civil Filing Fee	\$350.00
Appeal Filing Fee	\$455.00
Writ of Habeas Corpus	\$5.00
Document Filing/Registration of a Foreign Judgment	\$46.00
Appeal to a District Judge (from a judgment of conviction by a magistrate judge in a misdemeanor case)	\$37.00
Cuban Liberation Civil Filing Fee	\$6,355.00

##### MISCELLANEOUS FEES

Pro Hac Vice Fee	\$225.00
Attorney Admission Fee	\$200.00
Copies (per page)/\$.10 @ Public Terminal in Courthouse	\$0.50
Certification	\$11.00
Certificate of Good Standing	\$18.00
Duplicate Certificate of Admission	\$15.00
Exemplification	\$18.00
Check Returned for Lack of Funds	\$53.00
Retrieval of Records from Archives	\$53.00
Audio Recordings	\$30.00
Search of Records	\$30.00
Sale of Monthly Listings of Court Orders and Opinions	\$22.00
Orders and Opinions	
Microfiche (per sheet)	\$6.00

### Appendix 2.

#### Rates of Compensation of Appointed Counsel.

##### Hourly Rates

\$110 per hour for any time - effective March 11, 2009.

\$100 per hour for any time - effective January 1, 2008.

\$ 94 per hour for in-court or out-of-court for time effective May 20, 2007



Certified and Professionally Qualified Interpreters:

Full Day:	\$388
Half Day:	\$210
Overtime:	\$ 55 per hour or part thereof
Language Skilled (Non-Certified) Interpreters:	
Full Day:	\$187
Half Day:	\$103
Overtime:	\$ 32 per hour or part thereof

The half-day rate is paid for services up to and including four hours in one day; the full-day (daily) rate is paid for services in excess of four hours up to and including eight hours in one day; the overtime/hourly rates apply if the workday exceeds eight hours, not including meal periods. This adjustment to the maximum rates does not automatically increase any exceptions to the rates previously approved.

Courts may amend current contracts to incorporate these new maximum rates by preparing an SF-30, Amendment of Solicitation/Modification of Contract. If, following negotiations, an interpreter will not accept the established rates, the court should request authorization to exceed these rates from the District Court Administration Division prior to the scheduled use of the interpreter by submitting a “Request for Authorization to Exceed Fee Schedule” which can be found on the J-Net at [http://jnet.ao.dcn/District/Court\\_Interpreting/Exceed\\_Fee.html](http://jnet.ao.dcn/District/Court_Interpreting/Exceed_Fee.html).

If you have any questions on the payment of court interpreters or other aspects of the court interpreting program, please contact Javier A. Soler, District Court Administration Division, at (202) 502-3261 or via e-mail at Javier Soler/DCA/AO/USCOURTS. If you have any questions concerning the SF 30 or the contracting process for court interpreters, please contact Don Parkins, Procurement Management Division, at (202) 502-1391 or via e-mail at Don Parkins/DCA/AO/USCOURTS.

Appendix 4.

Transcript Fees — All Parties per Page (effective April 14, 2011)				
Delivery Option	Delivery Definitions	Original	First Copy to Each Party	Each Additional Copy to Same Party
Ordinary Rate	Transcript to be delivered within 30 calendar days after receipt of order.	\$ 3.65	\$ .90	\$ .60
14-Day Rate	Transcript to be delivered within 14 calendar days after receipt of order.	\$4.25	\$ .90	\$ .60



Expedited Rate	Transcript to be delivered within 7 calendar days after receipt of order.	\$ 4.85	\$ .90	\$ .60
Daily Rate	Transcript to be delivered following adjournment and prior to normal opening hour of court on following morning whether or not it actually is a court day.	\$ 6.05	\$ 1.20	\$ .90
Hourly Rate	Transcript (ordered under unusual circumstances) to be delivered within 2 hours.	\$ 7.25	\$ 1.20	\$ .90
* Realtime Unedited (including diskette)	A draft unedited transcript produced by a certified realtime reporter as a by-product of realtime to be delivered electronically during proceedings or immediately following adjournment. This transcript has not been checked, proofread or corrected. It is a draft transcript, not a certified transcript. As such, it may contain computer-generated mistranslations of stenotype code or electronic transmission errors, resulting in inaccurate or nonsensical word combinations, or untranslated stenotype symbols which cannot be deciphered by non-stenotypists.	\$3.05 (one feed)	\$2.10 (two-to-four feeds)	\$1.50 (five or more feeds)

\* A litigant who orders realtime services will be required to purchase an original certified transcript of the same pages of realtime unedited transcript at the regular rates (ordinary,

A realtime “feed” is the electronic data flow from the court reporter to the computer of each person or party ordering and receiving the realtime transcription in the courtroom.

These rates are applicable to each page of the transcript, excluding the certification page which must be included at the end of each transcript volume.

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14-day, expedited, daily or hourly). A realtime unedited transcript will not be sold to anyone who is not a party to the case without prior approval of the presiding judge.

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# LOCAL BANKRUPTCY RULES OF PROCEDURE FOR THE UNITED STATES BANKRUPTCY COURT IN THE DISTRICT OF IDAHO

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## Appendix III. Interim Bankruptcy Rules

**Rule 1001.1. Scope, Applicability and Promulgation of Local Rules.**

(a) **Scope.** These local bankruptcy rules govern practice and procedure in the United States Bankruptcy Court for the District of Idaho. These rules shall be cited as “LBR \_\_\_\_\_.” The term “judge,” as used in these rules, includes a U.S. Bankruptcy Judge, a U.S. District Judge, or any other judicial officer to which a bankruptcy case or proceeding has been referred.

(b) **Applicability.** Unless otherwise indicated, each of these local rules applies to cases commenced under chapters 7, 9, 11, 12, and 13 of the Bankruptcy Code and in all adversary proceedings. In the event of an appeal to the district court, or a withdrawal of reference under 28 U.S.C. § 157, the District Court may in its discretion direct that the District of Idaho Local Civil Rules (D.Id.L.Civ.R.) shall replace or supplement the provisions of the local bankruptcy rules in such matters.

(c) **Promulgation.** Promulgation of local rules shall be made by the U.S. District Court in accord with Fed. R. Bankr. P. 9029, and shall be made with the advice of the U.S. Bankruptcy Court Advisory Committee on local rules unless the U.S. District Court determines cause exists for emergency promulgation. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

**STATUTORY NOTES**

**Advisory Committee Notes:** These local rules are subject to clarification and interpretation by the courts of this district.

These local rules were promulgated to address certain areas where the Bankruptcy Code and Federal Rules of Bankruptcy Procedure are vague or incomplete, or where experience dictated a need for further clarification or modification of practice in this district. The Local Bankruptcy Rules are based upon prior local rules, the local rules of other districts, and the efforts of the court and practitioners to improve the quality and efficiency of bankruptcy practice.

The “Advisory Committee Notes” following the rules designated to provide explanation regarding the need for, as well as guidance regarding the anticipated operation of, the local rules. Constructions of the rules as contained in such Advisory Committee Notes, however, are not controlling, and in some instances may not reflect unanimity of belief by the members of the Advisory Committee.

Local rules, forms, guidelines, fees, and other information can be viewed at: [www.id.uscourts.gov](http://www.id.uscourts.gov)

**Rule 1001.2. Establishment of Business Hours.**

The standard business hours of the office of the clerk of court will be from 8:00 a.m. to 5:00 p.m. local time, all days except Saturday, Sunday, and legal holidays. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011.)

**Rule 1002.1. Petitions.**

(a) **Petitions.** All petitions shall be submitted in Electronic Case Filing, (hereinafter “ECF”) unless otherwise ordered by the court or exempted by ECF Procedures.



(b) **Captions of Petitions and Identity of Debtors.** In regard to all cases filed under 11 U.S.C. §§ 301 and 302 of the Code, the caption of such cases shall be in the following style:

(1) If the debtor is an individual, not filing a joint petition with his/her spouse: “John A. Doe” or “Doe, John A.”

(2) If the debtor is an individual filing a joint petition with his/her spouse: “John A. Doe and Mary A. Doe” or “Doe, John A. and Doe, Mary A.”

(3) If the debtor is a general [or limited] partnership: “Name of entity, a general [limited] partnership.”

(4) If the debtor is a corporation: “Name of entity, a corporation” (unless the word “Inc.,” “Incorporated” or “Corporation” is a part of the name).

(5) If the debtor is a limited liability company or similar entity: “Name of entity, a Limited Liability Company,” or “L.L.C.” or similar designations.

(c) **Petition Filed by a Corporation, Partnership, or Other Entity.** Although a corporation, a general partnership, limited partnership, limited liability company or other entity may file a voluntary petition, it must be executed by an authorized corporate officer, general partner, or designated manager and must include a resolution or other evidence of entity authorization for the petition. Further, an attorney shall represent these entities, and such attorney shall also sign the petition. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended effective January 1, 2012.)

#### STATUTORY NOTES

**Advisory Committee Notes:** ECF is defined in this Rule and that abbreviation is used throughout the balance of the Rules.

This rule attempts to address the problems caused by petitions either improperly or confusingly captioned, as well as those caused by petitions improperly purporting to be “joint”

petitions outside the limited authority of § 302 of the Code — *i.e.*, an individual and a corporation.

The rule in (c) addresses the problem of so-called “*pro se*” corporate or partnership cases. Also see LBR 9010.1(e)(3) regarding appearances for such entities.

#### **Rule 1006.1. Filing Fees.**

(a) For pleadings and documents filed in ECF which require a filing fee, the filing party must use a credit card and submit payment in accord with ECF Procedures.

(b) For pleadings and documents submitted other than through ECF, payment shall be made in the form of cash, cashier’s check, money order, or an attorney’s check. Two party checks or personal checks of the debtor(s) will not be accepted.

(c) An application requesting waiver of the filing fee, or an application for permission to pay filing fees in installments, shall be submitted on the Official Form prescribed for that purpose. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

## STATUTORY NOTES

**Advisory Committee Notes:** This rule addresses an obvious problem encountered by the clerk when debtors present petitions for filing. A fee schedule may be obtained at the court's website [www.id.uscourts.gov](http://www.id.uscourts.gov) or from

the clerk's office. Official Forms (Form 3A for installments, and Form 3B for *in forma pauperis* or IFP applications) can be obtained at the court's website or can be obtained from the clerk's office.

**Rule 1007.1. Master Mailing List (MML).**

(a) **Filing of Master Mailing List. (MML).** At the time of filing a petition initiating a proceeding under the Bankruptcy Code, a Master Mailing List (MML) shall accompany the petition, which list shall include the name, address, and zip code of every scheduled creditor and other parties in interest. The MML shall not include the names or addresses of the debtor, joint debtor, or counsel for the debtor(s). Also, the MML shall not include the account numbers between the creditor(s) and debtor(s).

(b) **Form of Master Mailing List.** The MML shall be prepared in the form as required by the clerk of the court.

(c) **Accuracy of Master Mailing List.** The clerk and/or the Bankruptcy Noticing Center (BNC) need not check to ensure that the MML accurately reflects the names and addresses of creditors, equity security holders, and/or parties in interest listed on the debtor's schedules. For purposes of notice by the clerk; the BNC or by any party in interest, an error or omission on the MML shall be deemed an error or omission on the debtor's schedules, unless such creditor or party in interest should have been added as a result of a filed proof of claim or a written request to the court. The clerk's office or the Bankruptcy Noticing Center will forward returned mail to the debtor's attorney (or the debtor if pro se). It will be the responsibility of the attorney (or debtor if pro se) to provide the court with a current address of those creditors whose mail was undeliverable. It will also be the responsibility of the debtor's attorney (or debtor if pro se), to send a § 341(a) notice to those creditors whose mail was not delivered and to provide proof to the court that notice was sent.

(d) **Amendments to Master Mailing List.** Any additions to the MML subsequent to its initial filing shall include only those names added in the MML format required by the clerk and shall be accompanied by the amendment fee. Any deletions from the MML are to be done through an appropriate ECF event, or if by a pro se debtor, they must be set forth in a letter to the clerk of court. A party may not delete names from the MML by submitting a new MML with the names deleted.

(e) **Creditor's Case Specific Preferred Address Per § 342(e).** A creditor who wishes a specific address to be used solely in a particular case under § 342(e) must either electronically file notice of such request using the appropriate event, or clearly mark on a paper document that it is a "Notice for Use of Specified Address in this Case Only". The filed notice must contain the debtor's name; case number; the party's name and address on file with the court; and the party's complete new service address for that particular case. A failure to use the proper electronic filing event,

specifically note on a paper document the information required above, or provide all the other information required above will not result in the override of any nationally preferred address submitted pursuant to § 342(f) and pursuant to the other subsections of this particular LBR.

(f) **Preferred Address Per § 342(f).** Notice of a preferred address pursuant to § 342(f) must be filed directly with the National Creditor Registration Service (NCRS) established by the court's notice provider and the Administrative Office of the U.S. Courts for this purpose. Such filing will constitute the filing of that notice with the Court. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** This rule has been modified consistent with internal changes in the clerk's office. The clerk has detailed information on how to prepare an MML so that the MML can be read by the court's equipment. This information will be provided by the clerk upon request, or can be viewed at [www.id.uscourts.gov](http://www.id.uscourts.gov). See LBR

1009.1 and Miscellaneous Fee Schedule regarding assessment of an amendment fee when creditors are added to schedules or lists.

The NCRS website for registration of preferred address under § 342(f) and the filing of notices is [www.ncrsuscourts.com](http://www.ncrsuscourts.com), and its toll-free support line number is 877-837-3424.

#### Rule 1007.2. Extension of Time.

Except as provided in 11 U.S.C. § 1116(3), an extension of time under Fed. R. Bankr. P. 1007(c) for filing schedules, statement of affairs, or other required documents will not be granted beyond the date set for the meeting of creditors under § 341(a) unless a judge orders otherwise for cause shown. Any motion for extension of time filed under this rule shall (a) state the date of extension requested and (b) identify the date currently set for the § 341(a) meeting or, alternatively, affirmatively allege that no such date has yet been set. An extension beyond the date set for the § 341(a) meeting will not be granted unless the debtor has also been granted a continuance of the § 341(a) meeting, pursuant to LBR 2003.1, and the confirmation hearing if applicable, pursuant to LBR 2003.1 and provided appropriate notice thereof. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011.)

#### STATUTORY NOTES

**Advisory Committee Notes:** It is the responsibility of the U.S. Trustee to make a request for dismissal when the filing require-

ments are not met. See § 707(a)(3), § 1112(e), § 1208 and § 1307(c)(9) and (10).

#### Rule 1007.3. Tax Returns.

(a) **Restrictions Regarding Debtor's Tax Information.** Tax information filed with the court and that which is provided to creditors and trustees is subject to the Administrative Office's guidance regarding tax information



as from time to time promulgated. Any person receiving copies of the debtor's tax information shall treat the information as confidential and shall not disseminate it except as appropriate under the circumstances of the case.

(b) **Filing Tax Returns.** Except where the court orders otherwise for good cause shown, a debtor, must file all required tax returns with the proper taxing authority; and provide the trustee a copy of any tax return for the tax years subject to the *Income Tax Turnover Order*, in accordance with 11 U.S.C. § 521, § 1116, § 1308, and § 1325. Failure to do so may be grounds for dismissal. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes: Current Tax Returns Submitted by Debtor:** Pursuant to the time periods and terms of Interim Fed. R. Bankr. P. 4002(b)(3), (b)(4), and (b)(5); 11 U.S.C. § 521(e); and § 1116(1)(A), as applicable, the debtor shall provide to the trustee, and upon request, to a creditor, a copy of the federal income tax return for the most recent tax year ending immediately before the commencement of the case.

While the Bankruptcy Code addresses federal returns, it is also important to provide

the state tax returns to the trustee prior to the Creditors meeting. Failure to do so may be grounds for dismissal.

As the Administrative Office's Guidance may change, please refer to the court's website at [www.id.uscourts.gov](http://www.id.uscourts.gov) for the most recent version. (Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521)

#### Rule 1007.4. Payment Advices.

(a) **Filing of Payment Advices.** Except where the court orders otherwise for good cause shown, debtors shall file payment advices as required by § 521(a)(1)(B)(iv) with the court, and shall simultaneously serve a complete and unredacted copy thereof on the trustee appointed in that debtor's case. The payment advices filed with the court shall be maintained as sealed documents absent order of the court to the contrary for cause shown.

(b) **Statement that No Payment Advices Available.** Where debtors did not receive payment advices within the time period set forth in § 521(a)(1)(B)(iv), they shall file a statement to that effect. The statement shall also provide the reason why no payment advices were received. Debtors shall simultaneously serve a complete and unredacted copy of that statement on the trustee appointed in that debtor's case. (Adopted January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Payment advices are filed with the court pursuant to the Code but maintained as sealed documents, limiting parties' access to this infor-

mation. It is critical that the case trustees promptly receive this information from debtors in order to perform their jobs.



**Rule 1007.5 Statement of Domestic Support Obligations.**

In Chapter 7, 11, 12 and 13 cases and within the time provided by Fed. R. Bankr. P. 1007(c), the individual debtor and any joint debtor shall file with the court a separate “Statement of Domestic Support Obligation”. All current and past due Domestic Support Obligations as defined by 11 U.S.C. § 101(14A) shall be reported on said statement. If a domestic support obligation is owed, the statement shall include: (1) the name, address and phone number, of the employer of the debtor and joint debtor; (2) the name, address and phone number of the holder of such claim of support; (3) the amount of the support obligation; (4) the term of the support obligation; (5) the amount that the debtor is in arrears as of the filing of the bankruptcy petition, if any; (6) the identity of the court action where an order, judgment or decree establishing said Domestic Support Obligation was entered; and (7) the name, address and phone number of any State child support enforcement agency involved with such claim. (Adopted January 1, 2008, effective January 1, 2008; adopted January 1, 2009, effective January 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** The Advisory Committee has promulgated a standard form statement for the debtor and a separate

form for the joint debtor that can be found on the court website at: [www.id.uscourts.gov](http://www.id.uscourts.gov).

**Rule 1009.1. Amendments of Petitions, Lists, Schedules and Statement of Financial Affairs.**

(a) Any amendment of the petition, list, schedule or statement of financial affairs shall bear, on its face, the debtor’s name and case number, and the notation “amendment”. The amendment shall identify the schedule or document being amended and include an explanation of the change(s) or addition(s) in the amendment and shall be limited to the changed or additional information being offered and shall not include unaffected portions of the schedule or document being amended.

(b) Where the amendment adds additional creditors, the debtor shall:

(1) Send to the creditor(s) so added a copy of the filed “Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines” and a copy of any “Notice of Need to File Proof of Claim due to Recovery of Assets” and plan if applicable;

(2) File a certificate of service with the clerk;

(3) Complete the appropriate ECF event, or if a pro se debtor, submit a written request the clerk to add the creditor(s) to the Master Mailing List, and

(4) Submit the applicable filing fee.

The clerk need not verify or confirm that the additional creditor(s) receive notice. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011; amended effective January 1, 2012.)

## STATUTORY NOTES

**Advisory Committee Notes:** This rule continues current practice in those situations where the debtor or debtor's counsel causes notice of the amendment to be served.

Note that Fed. R. Bankr. P. 1008 requires all amendments to petitions, schedules and statements to be verified or contain an un-

sworn declaration of the debtor(s). In addition, this Court's ECF Procedures require a scanned pdf version of the original signature pages of such amendments to be electronically submitted to the Clerk at the time of filing.

**Rule 1017.1. Conversion or Dismissal of Case.****(a) Conversion of chapter 7 to chapter 13.**

(1) Motion. A motion under 11 U.S.C. § 706(a) to convert from chapter 7 to chapter 13 shall comply with this rule.

(2) Service. A debtor shall serve the motion to convert on the Chapter 7 Trustee, the United States Trustee and any creditor who has appeared in the case.

(3) Objection. An objection to the motion to convert must be filed within seven (7) days of service of the motion.

(A) Hearing. If an objection is filed, the debtor must schedule a hearing on the motion to convert and the objection, giving a minimum of seven (7) and a maximum of fourteen (14) days notice to the objecting party, the Chapter 7 Trustee and the United States Trustee.

(4) No Objection. If no objection to debtor's motion is filed within seven (7) days, the Court will enter a notice of conversion.

**(b) Dismissal of chapter 13.**

(1) Motion. A motion under 11 U.S.C. § 1307(b) to dismiss a chapter 13 case which has not been converted to chapter 13 pursuant to 11 U.S.C. §§ 706, 1112, or 1208 shall state whether there are any pending motions to convert or dismiss with prejudice the chapter 13 case.

(2) Service. A debtor shall serve the motion to dismiss on the Chapter 13 Trustee, the United States Trustee and any creditor who has appeared in the case.

(3) Objection. An objection to the motion to dismiss must be filed within seven (7) days of service of the motion.

(A) Hearing. If an objection is filed, the debtor must schedule a hearing on the motion to dismiss and the objection, giving a minimum of seven (7) and a maximum of fourteen (14) days notice to the objecting party, the Chapter 13 Trustee and the United States Trustee.

(4) No Objection. If no objection to debtor's motion is filed within seven (7) days, the Court will enter an order dismissing the case. (Adopted December 1, 2009.)

## STATUTORY NOTES

**Advisory Committee Notes:** *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007) and *Rosson v. Fitzgerald (In re Ros-*

*son)*, 545 F.3d 764 (9th Cir. 2008), necessitated a rule to establish procedures on motions to convert a chapter 7 case to chapter 13

and to dismiss a chapter 13 case that, prior to such precedent, were “automatically” granted.

### **Rule 1019.1. Conversions.**

(a) **Schedules of unpaid debts.** Within fourteen (14) days following the entry of the order of conversion, a schedule of unpaid debts incurred after commencement of the superseded chapter 11, 12 or 13 case shall be filed. A Master Mailing List setting forth the name and address of each such creditor shall be filed with the court by the following parties, and served on the U.S. Trustee and successor trustee, if applicable.

(1) The debtor in possession, or trustee if one served, in a chapter 11 case;

(2) A chapter 13 debtor, or

(3) A chapter 12 debtor in possession or the chapter 12 trustee if the debtor is not in possession.

(b) **List of 20 largest unsecured creditors.** If converting to a chapter 11 proceeding, a separate list of the 20 largest unsecured creditors shall be filed with the court and served on the U.S. Trustee.

(c) **Filing of Plan.** If converting to a chapter 13, a plan is to be filed with the notice or motion to convert or within fourteen (14) days thereafter.

(d) **Final Report and Account.** Upon conversion, the final report and account required to be filed by the debtor or trustee shall include the following:

(1) A schedule of property acquired by the debtor after the commencement of the chapter 11 case.

(2) A balance sheet as of the date of conversion and a profit and loss statement for the period of the pendency of a case under chapter 11, unless such balance sheet and profit and loss statements for the period of the pendency of a case under chapter 11 have been previously filed in accordance with court order.

(3) A statement of the money or property paid or transferred, directly or indirectly, during the pendency of a chapter 11 case, to the debtor, if the debtor is an individual; or to each partner, if the debtor is a partnership; or to each officer, stockholder, and director, if the debtor is a corporation.

(4) A listing of all matters pending in the case and any adversary proceedings or other litigation pending in which the debtor, debtor-in-possession or trustee is a party.

(5) Except to the extent otherwise clearly disclosed by the foregoing, amended schedules reflecting the status of assets and liabilities as of the date of conversion.

(e) **Bank Account.** The debtor, or trustee if one served in the original chapter 11 case, shall furnish to the successor trustee originals or photocopies of all canceled checks and bank statements pertaining to the bank account(s) maintained in the chapter 11 case.

(f) **Requests for Allowance of Administrative Expenses.** All applications for allowance of administrative expenses in the original chapter 11

case, other than those of a governmental unit, shall be filed within ninety (90) days of entry of the order of conversion, or at another time may be established by order. (Adopted January 5, 2006, effective January 1, 2006; amended January 2, 2007, effective January 1, 2007; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Fed. R. Bankr. P. 1019 provides for the filing of lists, inventories, schedules, statements, and other reports upon conversion of any chapter 11, 12 or 13 case to a chapter 7 and establishes numerous requirements in addition to those under this rule. Additionally, if the schedule

of unpaid debt is not filed within the required fourteen (14) days, the clerk will assess an amendment fee.

A suggested form of final report and account in converted chapter 11 cases is available at the clerk's office. The form can also be viewed at [www.id.uscourts.gov](http://www.id.uscourts.gov).

#### **Rule 2002.1. Sale of Property of the Estate.**

(a) **Contested Matter.** A sale pursuant to § 363(b), including a sale free and clear of any interest of an entity other than the estate, is initiated by notice and is subject to LBR 2002.2.

(b) **Notice of Sale.**

(1) The notice of sale shall include, without limitation, the following information:

- (A) A description of the property to be sold;
- (B) The time and place of sale;
- (C) The terms of sale;
- (D) Whether the property is to be sold free and clear of liens;
- (E) The estimated fair market value of the property and a brief statement of the basis for the estimate;
- (F) If known, the amounts of each lien or encumbrance claimed against the property and the identity of each lienholder;
- (G) The proposed disposition of the proceeds of sale shall include any proposed compensation to brokers, auctioneers, or other professionals to be paid from the proceeds of sale;
- (H) The subdivision of § 363(f) which authorizes the sale, and
- (I) The date by which objections to the sale must be filed, pursuant to Fed. R. Bankr. P. 6004(b), and the name and address of any entity to be served with the objection.

(2) All interests in the property sold free and clear shall attach to the proceeds of the sale, except as otherwise provided in the notice.

(c) **Order.** A party moving for an order approving or confirming an unopposed sale shall support the motion with an affidavit showing the necessity for the order. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Certain controls on the sale of property of the estate, including a requirement of specificity in the notice, were deemed advisable by the commit-



tee especially in regard to sales free and clear of claims, liens and interests.

The notice, under subdivision (b)(1)(G), should note that any such compensation is subject to review of the court.

An action to determine the validity, priority, or extent of any interest of an entity other than the bankruptcy estate in property must be brought separately as an adversary proceeding. *See* Fed. R. Bankr. P. 7001(2).

### **Rule 2002.2. Notice and Hearing.**

(a) **Applicability.** All contested matters under Fed. R. Bankr. P. 9014, all motions under Fed. R. Bankr. P. 9013, and all other matters requiring or with provision for a hearing under the Bankruptcy Code or Federal Rules of Bankruptcy Procedure, shall be subject to the following requirements and conditions, in addition to other and further requirements as may be imposed by rule or applicable law.

(b) **Notice.**

(1) By whom given. Except for notices specified in Fed. R. Bankr. P. 2002(a)(1), (a)(7), (b)(2) chapter 13 only, (e) and (f), all notices shall be given by the party requesting an order or other relief.

(2) To whom given.

(A) “Notice,” as used in this rule shall mean notice by mail or electronic means to all creditors, equity security holders, trustees and indenture trustees, the debtor, the chairman of any committee appointed in the case, U.S. Trustee and any other parties in interest. A different method or less inclusive notice may be given only if allowed by the Bankruptcy Code or Federal Rules of Bankruptcy Procedure, or if authorized by a judge.

(B) The addresses of notices shall be in accordance with Fed. R. Bankr. P. 2002(g) and 11 U.S.C. § 342.

(i) A Master Mailing List of names and addresses, as filed with the court, and updated in accordance with Rule 2002(g) and 11 U.S.C. § 342, may be downloaded from PACER which can be accessed from the court’s website at [www.id.uscourts.gov](http://www.id.uscourts.gov).

(ii) Required notice to all creditors is presumed to be appropriate if sent to all entries on the Master Mailing List, which has been provided by the clerk.

(iii) Notices sent by the clerk, BNC, or some other person or entity as the court may direct, pursuant to 11 U.S.C. §§ 341(a), 342(a) and (b), and Fed. R. Bankr. P. 2002, that are determined undeliverable will be forwarded to the debtor’s attorney (or debtor if *pro se*). Any notice, other than a § 341(a) meeting of creditors, or a copy of the final order of discharge, which is returned to the court, shall be destroyed after processing.

(3) Proof of Service. After giving notice, the moving party shall file within five (5) days of the notice, a certificate of mailing with a list of the persons and their addresses to whom the notice was sent. If notice to all creditors is required, the certificate of service must certify mailing (or other services) on all parties included on the Master Mailing List described in subdivision (b)(2)(B) of this rule.

(c) **Objection.** If the notice provides for the filing of an objection, a party objecting to an act or the entry of an order shall file with the clerk and serve on the moving party, a written objection within the time set forth in the notice. The objection shall state, with specificity, the grounds therefor.

(d) **When hearing is not required.** A request for an order under Fed. R. Bankr. P. 9013, where only notice and an opportunity for a hearing are required, may proceed with the service of a motion/application complying with this Local Bankruptcy Rule.

(1) **Form of Disclosure.** The following language must be placed immediately below the caption of the motion/application:

**Notice of Motion for [name of motion or application] and  
Opportunity to Object and for a Hearing**

**No Objection.** The Court may consider this request for an order without further notice or hearing unless a party in interest files an objection within [ ] days of the date of service of this notice.

If an objection is not filed within the time permitted, the Court may consider that there is no opposition to the granting of the requested relief and may grant the relief without further notice or hearing.

**Objection.** Any objection shall set out the legal and/or factual basis for the objection. A copy of the objection shall be served on the movant.

**Hearing on Objection.** The objecting party shall also contact the court's calendar clerk to schedule a hearing on the objection and file a separate notice of hearing.

(2) **Time of Negative Noticing.** The minimum number of days under this Local Rule will be 14 days unless another notice period is applicable under the Federal Rules of Bankruptcy Procedure or the Local Bankruptcy Rules.

(3) **Statement of No Objection.** To obtain the requested order if no objection is filed within the applicable notice period, the movant shall file a *Statement of No Objection* and a proposed Order. The statement shall contain the Bankruptcy Court docket number for the initial motion/application sent under subsection (d) of this Rule, any related certificate of service, and a certification that no objection has been received to the requested relief.

(4) **Hearing on Objection.** If the objecting party does not schedule a hearing as provided in the notice, the moving party may set the matter for a hearing.

(e) **Hearing.**

(1) **By moving party.** Counsel for the party who desires or is required to set a matter for hearing shall be responsible for contacting the calendar

clerk and obtaining a date for such hearing. Unless the moving party obtains a hearing date and properly files and serves the notice, the matter will not be heard. Counsel obtaining a hearing date shall be responsible for providing notice to all parties as provided by this rule.

(2) **By objecting party.** If a party objects to an act or the entry of an order and the matter is not previously set for hearing, counsel for the objecting party shall be responsible for contacting the calendar clerk and obtaining a hearing date, as provided in subdivision (e)(1) of this rule and notifying the moving party and all other parties as required by this rule.

(3) Any party requesting a hearing date from the calendar clerk (or in open court) shall file the notice of hearing and related pleadings at least seven (7) days prior to the scheduled hearing date. Failure to do so may result in the hearing being removed from the calendar.

(f) **Vacation or continuance of hearing.** A hearing may be vacated or continued for good cause by approval of the court:

(1) On a judge's own motion;

(2) Upon submission, prior to hearing, of an agreed order resolving the matter endorsed by the parties or their counsel of record;

(3) Upon agreement of the parties, set forth in writing and filed no later than the day before the scheduled hearing, and for good cause shown, or, if settled later than the day before the hearing, upon an agreement read into the record at the time of the hearing by counsel for one of the parties; or

(4) On the request of a party after notice to all opposing parties filed and served at least three (3) days prior to the scheduled hearing, accompanied by an affidavit stating the grounds for such request, unless a judge for cause shown waives the requirements of this rule. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009; amended December 27, 2010, effective January 1, 2011; amended effective January 1, 2013.)

### STATUTORY NOTES

**Advisory Committee Notes:** Note that subdivision (b)(1) requires a party to serve notice in certain circumstances where previously the clerk provided notice.

Subdivision (e) reflects current practice and emphasizes the necessity of setting matters through the calendar clerk. Subdivision (e)(3) requires the filing of supporting pleadings. Upon request of a party, a hearing may be heard by video conference. Parties must request and obtain approval for a video conference hearing by calling the calendaring department at (208) 334-9343.

Subdivision (f) is designed to cure problems presently encountered by the court where counsel vacates a hearing without advising the court and/or opposing counsel.

2008 Advisory Committee Notes: It is the intent of the Committee that the text box containing the required notice under 2002.2(d)(1) be placed in the motion/application immediately below the caption and immediately before the substantive allegations of that motion/application.

The time permitted for filing an objection under the negative notice procedure is the time period required for notice by the applicable rules or local rules relating to the motion or application. If no specific time is otherwise provided in the rules or local rules, a minimum of 14 days notice must be given.

The procedures for the following motions/applications are specifically governed by other local rules and 2002.2(d) does not apply:



- Relief from the Automatic Stay. [LBR 4001.2]
- Confirmation of Chapter 13 Plans. [LBR 2002.3]
- Objection to Claims. [LBR 3007.1]

The following matters are addressed by other local rules as to substantive requirements, who is to receive service, and/or the time in which to respond or object. However, if the movant/applicant wants an order without

a hearing, these motions/applications are also subject to LBR 2002.2(d)'s requirement of notice and statement of no objection.

- Examinations. [LBR 2004.1]
- Employment of Professionals. [LBR 2014.1]
- Objections to Exemptions. [LBR 4003.1]
- Motions to Avoid Liens. [LBR 4003.2]
- Sale of Property of the Estate. [LBR 2002.1]

### **Rule 2002.3. Filing and Service of Plans.**

#### **(a) Chapter 13 Cases.**

(1) The BNC, or some other person or entity as the court may direct, will send plans filed with the petition in chapter 13 cases with the § 341(a) notice to creditors. In such cases, and provided all other schedules and statements are also filed with the petition, the accelerated confirmation process of LBR 2002.5 shall apply and the notice of the § 341(a) meeting of creditors issued by the BNC shall advise creditors of the confirmation hearing date.

(2) In all cases where the plan is not filed with the petition, the debtor shall be responsible for sending copies of the chapter 13 plan and notice of hearing on confirmation to all creditors and parties in interest. Such notice must comply with Fed. R. Bankr. P. 2002 and 3015, and must be served at least 28 days prior to the initial confirmation hearing. In such cases, the notice of the § 341(a) meeting issued by the BNC shall advise creditors of the confirmation hearing date. Such cases will not be subject to the accelerated confirmation procedures of LBR 2002.5. The debtor shall immediately after serving the creditors with the plan, file proof of service with the clerk of the court.

(b) **Other Cases.** In all chapter 11 and 12 cases, the debtor or plan proponent shall give notice of the hearing on confirmation of the plan. The debtor or plan proponent shall send copies of the plan, with such notice, to all creditors and parties in interest prior to the hearing date set for confirmation of the plan. In chapter 11 cases, except if governed by 11 U.S.C. § 1125(f) and Fed. R. Bankr. P. 3017.1, the debtor or plan proponent shall also send copies of the order approving disclosure statement and notice of the confirmation hearing, together with a copy of the disclosure statement, plan, ballot, and any amendments or addenda to the original plan or disclosure statement. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended effective January 1, 2013.)

### **STATUTORY NOTES**

**Advisory Committee Notes:** Unless the court provides otherwise, to comply with § 1324(b) (providing, in part, chapter 13 con-

firmation hearings may not be held sooner than 20 days and no later than 45 days from the § 341(a) meeting) and with Fed. R.



Bankr. P. 2002(b) (requiring 28 days notice of confirmation hearing), a debtor scheduling a confirmation hearing date under subdivision (a)(2) must ensure that an appropriate date is obtained and notice of hearing is issued.

In addition to the requirements of this rule, plan proponents in chapter 11 cases are required by LBR 3018.1 to file ballots and a written summary of the ballots and by LBR 3020.1 to file a preconfirmation report.

#### **Rule 2002.4. Filing and Confirmation of Chapter 12 Plan.**

(a) **Objections.** Objections to confirmation of a chapter 12 plan shall be in writing and filed with the clerk and served on the debtor, the trustee, and on any other party in interest, not less than seven (7) days prior to any scheduled confirmation hearing. An objection to confirmation must set forth with specificity the grounds for objection and is governed by Fed. R. Bankr. P. 9014.

(b) **Notice.** The debtor or plan proponent shall provide notice according to LBR 2002.3(b). Unless a judge fixes a shorter period, notice of such hearing shall be given not less than twenty-eight (28) days before the hearing. A copy of the plan shall accompany the notice.

(c) **Retained Power.** Notwithstanding the entry of the order of confirmation, a judge may enter all orders necessary to administer the estate. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

#### **STATUTORY NOTES**

**Advisory Committee Notes:** Section 1221 and Fed. R. Bankr. P. 3015(a) provide that a chapter 12 debtor may file a plan with the petition. If a plan is not filed with the petition, it must be filed within ninety (90) days thereafter unless the court extends the time for filing the plan. After notice, as provided in this rule, a judge shall conduct and

conclude a hearing within the time prescribed by § 1224 and rule on confirmation of the plan. If no objection is timely filed, Fed. R. Bankr. P. 3015(f) allows the judge to determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on those issues.

#### **Rule 2002.5. Filing and Confirmation of Chapter 13 Plan.**

##### **(a) Chapter 13 Plan and Schedules Filed with Petitions.**

(1) **Applicability.** When the chapter 13 plan and all other schedules and statements are filed with the bankruptcy petition, as identified in LBR 2002.3, an accelerated confirmation process is available provided the requirements set forth herein in subpart (a) are satisfied.

(2) **Notice to Creditors.** The BNC shall send to the debtor, debtor's attorney, the trustee, and all creditors and parties in interest, a notice that advises them of the provisions of this rule. This notice shall be sent at the same time as, and may be incorporated within, the notice of the § 341(a) meeting of creditors. The clerk shall schedule a confirmation hearing date, in the event an actual hearing is required under this rule, and provide notice of the date on the notice of the § 341(a) meeting of creditors.

(3) **Objections to Confirmation of the Plan.** Any objection to the confirmation of the plan must be in writing and filed with the clerk, the trustee, debtor, and debtor's attorney prior to or on the date of the

scheduled § 341(a) meeting of creditors, or within seven (7) days thereafter. An objection to confirmation must set forth with specificity the grounds for objection and is governed by Fed. R. Bankr. P. 9014.

(4) **Confirmation of Plan Without Objection.** Where no objection to confirmation of a chapter 13 plan is filed within the time limits established by this rule, then a judge, without hearing, may enter an order confirming the plan.

(b) **Chapter 13 Plan and Schedules Not Filed With Petition.**

(1) **Objections to Confirmation of the Plan.** When the chapter 13 plan and all other schedules and statements are not filed with the petition, as identified in LBR 2002.3, any objections to confirmation of the plan must be in writing and filed with the clerk, the trustee, debtor and debtor's attorney no later than seven (7) days prior to the time set for the confirmation hearing. An objection to confirmation must set forth with specificity the grounds for objection and is governed by Fed. R. Bankr. P. 9014.

(2) **Notice of Hearing.** When the chapter 13 plan and all statements are not filed with the petition, as identified in LBR 2002.3, the notice of hearing of confirmation required by LBR 2002.3(a) shall state that any objection to the confirmation of the plan must be in writing and filed with the clerk, the trustee, debtor and debtor's attorney no later than seven (7) days prior to the time set for the confirmation hearing. If the hearing is set by the debtor with a plan filed and noticed after the petition is filed, the date of the confirmation hearing must be in compliance with 11 U.S.C. § 1324(b).

(3) **Confirmation of Plan Without Objection.** Where no objection to confirmation of plan is filed within the time limits established by this rule, then a judge, without hearing, may enter an order confirming the plan.

(c) **Amendment of Plans.** The proposed plan may be amended anytime prior to confirmation to resolve an objection. Such amendment must be included in an amended plan or in the order for confirmation. Where a timely objection has been made, the plan will not be confirmed until the objecting party has withdrawn such objection, or a hearing is held addressing the objection, or the parties reach an agreement as stipulated to in the order of confirmation. Where the amendment does not affect any other party in interest, a judge may confirm the plan as amended without notice or a hearing. Where the amendment would affect another party in interest, the plan as amended must be mailed to each affected party with a notice providing twenty-one (21) days to object to the amendment. If no objection is made within the time allowed, a judge may confirm the plan as amended without a hearing.

(d) **Unresolved Objections to Confirmation.** Where an objection to a proposed chapter 13 plan cannot be resolved by an amendment to the proposed plan or an endorsed confirmation order, or where the trustee does not recommend confirmation, the court shall hold a confirmation hearing to resolve the objection.

(e) **Standard Chapter 13 Plan and Order.** The debtor shall use the standard approved chapter 13 plan and order for this district with such alterations as may be appropriate in a particular case. If the debtor provides additions, deletions, or other modifications, the debtor shall provide at the beginning of the plan a notice that the chapter 13 plan contains deviations, and the deviations shall be clearly identified. If the debtor is represented by an attorney, the plan or any amended plan shall be signed by the attorney at the time it is filed and shall be signed by the debtor prior to the confirmation hearing. If the debtor is not represented by an attorney, the plan shall be signed by the debtor at the time it is filed. If either the plan or any amended plan is further amended and the amendments are contained in the order confirming the plan, the proposed order confirming the plan shall be signed by the debtor, the debtor's attorney, the trustee, and any other party in interest affected by the amendments. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008; amended effective December 1, 2009; amended effective January 1, 2013.)

#### STATUTORY NOTES

**Advisory Committee Notes:** The process of confirmation as structured under this rule is designed to protect interests of objecting creditors, while allowing accelerated confirmation of plans and payment to creditors in the large majority of chapter 13 cases where there are no objections or where objections can be readily resolved. The notice and timing requirements under the Federal Rules of Bankruptcy Procedure make the accelerated

confirmation process appropriate only in those cases where the plan is filed with the petition, and the clerk is able to issue notice. In all other cases, the debtor must file the plan within fourteen (14) days of the petition. *See* Fed. R. Bankr. P. 3015(b), and provide copies of the plan and notice of confirmation hearing to all creditors and parties in interest, in compliance with Fed. R. Bankr. P. 2002 and 3015, and these local rules.

#### **Rule 2003.1. Section 341(a) Meeting of Creditors.**

##### **(a) Debtor's Request to Continue the 11 U.S.C. § 341(a) Meeting.**

(1) A request to continue a § 341(a) meeting shall be submitted in writing to the corresponding Chapter 7, 12, or 13 trustee or, in Chapter 11 cases, to the U.S. Trustee, as soon as possible and, absent unforeseeable circumstances, not later than 14 days before the scheduled meeting. A written request to continue a § 341(a) meeting shall identify the circumstances rendering the debtor or the debtor's counsel unable to appear. The request is not filed with the Court.

(2) When a written request could not have been made before the § 341(a) meeting, the debtor or debtor's counsel may request, at the time of the § 341(a) meeting, that the presiding officer grant a continuance.

(3) In the event a debtor fails to appear at the § 341(a) meeting and a request for a continuance could not have been made at or before the meeting, the debtor or debtor's attorney may submit to the U.S. Trustee a written request that the debtor be permitted to appear at a continued § 341(a) meeting. The request must demonstrate that unavoidable cir-



cumstances caused the failure to appear. The request must be submitted to the U.S. Trustee not later than 7 days after the scheduled meeting.

(b) **Notice and Service.** If a debtor's request to continue the § 341(a) meeting is granted, the debtor or debtor's attorney must serve notice of the continuance on all creditors as soon as possible and not later than 7 days before the originally scheduled § 341(a) meeting or, if the continuance was granted at, or after the § 341(a) meeting, as soon as possible and not later than 7 days before the date of the continued § 341(a) meeting. The notice must include the date, time, and location of the continued § 341(a) meeting, and, if the case is a chapter 13, the notice must also include the date, time and location of the confirmation hearing. Proof of service of the notice of continuance must be filed with the clerk and must list each party served and their mailing address.

(c) **Waiver of Meeting.** A request pursuant to § 341(e) that the § 341(a) meeting of creditors and/or equity security holders not be convened, shall be made to the court at the time of filing the petition for relief. If not timely filed, the right to seek such relief shall be deemed waived.

(d) **Dismissal.** If the debtor fails to appear at the § 341(a) meeting, the U.S. Trustee or other party in interest may move for an order of dismissal. The motion may be filed pursuant to the negative notice procedures provided in these Local Bankruptcy Rules.

(e) **Notice to Other Courts.** The debtor's attorney (or the debtor if *pro se*) shall provide a notice of the commencement of the bankruptcy case to all courts in which the debtor is known to be a party. Such notice shall reasonably identify to such court(s) the case or action affected by the debtor's bankruptcy. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008; amended effective December 1, 2009; amended December 27, 2010, effective January 1, 2011.)

#### STATUTORY NOTES

**Advisory Committee Notes:** This reflects the responsibilities of the U.S. Trustee in conducting § 341(a) meetings. The U.S. Trustee's policies regarding § 341(a) meetings, such as continuing meetings or arranging meetings for active duty military service members, can be found at <http://www.justice.gov/ust/r18/boise/>. These policies apply to cases under Chapters 7, 11, 12 and 13.

Under subdivision (d) of the rule, the U.S. Trustee may request that the case be dismissed. However, the U.S. Trustee or case trustee may elect to have the case remain

open, for example, to administer assets or oppose entry of the debtor's discharge based on the failure to appear. *See* 11 U.S.C. §§ 704, 727. Note also that dismissal on this ground may fall within the scope of the prohibition of § 109(g)(1) on filing of a subsequent petition for relief.

For purposes of planning and avoiding potential conflicts, note that the court's calendar for § 341(a) meeting dates is set one year in advance. Copies of this calendar are available, without charge, from the office of U.S. Trustee or at [www.id.uscourts.gov](http://www.id.uscourts.gov).



**Rule 2004.1. Examinations.**

(a) **Motions.** A motion by a party in interest under Fed. R. Bankr. P. 2004(a) for an order requiring the examination of an entity is subject to LBR 2002.2(d).

(1) Document production. If the party seeking an order for examination seeks also to require the production of documents at such examination under Fed. R. Bankr. P. 2004(c), the proposed production shall be specified in the motion.

(2) Time and place of examination. The motion shall specify the date, time and place of the proposed examination, unless the party seeking the order expressly indicates in the motion that the same will be established after consultation and in coordination with the entity to be examined.

(b) **Orders.**

(1) Upon expiration of time for objection. In the absence of response or objection within fourteen (14) days, an order may be submitted for entry.

(2) Upon shortened time. For specific cause shown in the motion or in a supporting affidavit, a party in interest may seek entry of an order setting an examination prior to the expiration of fourteen (14) days.

(3) Upon agreement. An order for an examination of an entity under Fed. R. Bankr. P. 2004 may be entered immediately and without compliance with the requirements of LBR 2002.2(d) if such order is endorsed by the entity to be examined or by the attorney for such entity.

(c) **Disputes.** Disputes or disagreements over compliance with the order for examination, the production of documents at the examination, or the conduct of the examination, are subject to LBR 7037.1. (Adopted January 1, 2009, effective January 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** This rule requires notice to an entity (including a debtor, *see* Fed. R. Bankr. P. 2004(d)), of the details of a proposed examination, and allows an opportunity for objection before an order is entered by the court. Provision is made for requests on shortened notice basis, for cause shown. If parties discuss and consult in ad-

vance, and submit an agreed and endorsed order, the court may enter the order immediately. Additionally, once an order is entered, disputes over the compliance with that order or the conduct of the examination are subject to the conference and certification requirements of LBR 7037.1.

**Rule 2014.1. Approval of Employment of Professional Persons.**

(a) **Applications for Approval of Employment of Professional Persons.** In addition to including the information required by Fed. R. Bankr. P. 2014(a), an application for approval of employment of a professional person shall be signed by the trustee, debtor-in-possession or committee, and shall state the following information:

(1) The proposed arrangement for compensation. If there is a retainer, the application shall disclose all pre-petition fees and expenses drawn down against the retainer, and any written retainer agreement shall be attached to the application; and

(2) To the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the U.S. Trustee, or any person employed in the office of the U.S. Trustee.

**(b) Service and Proof of Service.**

(1) Copies of the application for approval of employment, the verified statement, any accompanying documents, and the proposed order approving employment shall be transmitted to the office of the U.S. Trustee in Boise.

(2) In a non-chapter 11 case, service shall also be made upon the debtor(s), debtor(s)' counsel, the trustee, and trustee's counsel.

(3) In a chapter 11 case, service shall also be made upon members of any creditors' committee and any attorneys appointed to represent the committee. In the event no committee has been appointed, service shall also be made on the 20 largest unsecured creditors. In a chapter 11 case, service shall also be made on the debtor and the attorney for the debtor if the application is made upon behalf of a party other than the debtor.

(4) Proof of such service shall be filed with the application.

**(c) Entry of an Order of Approval of Employment.** If neither the U.S. Trustee nor any other party in interest objects to the application for approval of employment of the professional within twenty-one (21) days of the date of service of the application, the court may enter the order approving the employment of the professional without a hearing. If an objection to the application is timely filed, then the applicant shall schedule a hearing on the application and serve notice of the hearing on the U.S. Trustee and all other parties in interest. Proof of such service shall be filed with the notice of hearing. Any order of approval of appointment entered by the court will relate back to the date of service of the application, which date shall be set forth in the order. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Fed. R. Bankr. P. 2014 governs applications for employment of professional persons. This rule sets forth a minimum standard of notice. In

many cases, a party may wish to set an actual hearing and/or provide notice to all parties in interest. The rule is not designed to prohibit such an approach.

**Rule 2016.1. Chapter 13 Representation and Compensation.**

**(a) Applicability.** Attorneys representing debtors in cases under chapter 13 of the Bankruptcy Code may elect to establish terms of compensation for their services under the requirements and conditions of this rule. If they elect not to do so, the terms and conditions of employment shall be as established by appropriate written agreement, and compensation shall be subject to the requirements of the Bankruptcy Code and the Federal Rules

of Bankruptcy Procedure, including but not limited to 11 U.S.C. § 330(a)(4)(B).

(b) **Presumptive fee.** If an attorney elects to establish compensation for representation of debtors in chapter 13 cases under this rule, and upon compliance with the terms and conditions of this rule, the attorney shall be allowed a fixed fee not to exceed the amount provided in a General Order of this court for all services rendered or to be rendered throughout the duration of the chapter 13 case, and inclusive of all costs and expenses with the exception of filing fees. This fixed fee shall be presumptively reasonable and allowable under 11 U.S.C. § 330(a)(4)(B) without itemization of time or other submission. The chapter 13 plan may make provision for the payment of any portion of such fee not paid by the debtor(s) prior to the filing of the petition.

(1) Inasmuch as such fee's reasonableness is presumptive only, the court may, in its discretion or upon request of the debtor, the chapter 13 trustee, the U.S. Trustee, a creditor or party in interest, conduct a hearing to consider the reasonableness of such fee under all the facts and circumstances of the case. The court may, as a result of such hearing, reduce or modify such fee.

(c) **Required use of Model Retention Agreement.** An attorney seeking to establish presumptive compensation under this rule shall execute and be bound by the Model Retention Agreement in the form required by the Court. Such attorney shall also obtain the signatures of the debtor(s) to the Model Retention Agreement. A copy of the fully executed Model Retention Agreement shall be attached to the statement filed by the attorney under Fed. R. Bankr. P. 2016(b).

(d) **Applications for fees in addition to presumptive amount.** In extraordinary circumstances, an attorney receiving presumptive compensation under this rule may seek additional fees through an application for allowance of additional compensation and, if necessary, a motion to modify a confirmed plan. Such an application shall be set for a hearing upon notice to the debtor(s), the chapter 13 trustee, the U.S. Trustee, and all creditors and parties in interest. Such an application shall be accompanied by an affidavit justifying the request and including an itemization of all services rendered by the attorney, from the initiation of representation of the debtor(s) through the date of application, supporting the total amount of compensation sought. This affidavit shall be filed with the court and served on the debtor(s), the chapter 13 trustee, and the U.S. Trustee. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** This rule provides an alternative fee approach to counsel representing chapter 13 debtors. Ordinarily, counsel representing debtors in chapter 13

cases would be required to support fees paid pre-petition through a confirmed plan by providing itemization on a time and hour basis. This court has previously as a matter of



practice waived, in most cases, the requirement of itemization of services for counsel charging a fee for services in the case not exceeding \$2,500.00. *See generally In re Gebert*, 99.4 I.B.C.R. 137, 138 (Bankr. D. Idaho 1999).

The court wishes to ensure reasonable and adequate compensation is paid chapter 13 debtors' counsel; to encourage full performance of duties by such counsel throughout the duration of the case as debtors' needs and changed circumstances require; and to eliminate the expense of serial requests for incremental fees through modified plans. It has elected to do so through a significantly higher presumptively reasonable fee, but conditions its availability to those cases where debtors and their counsel agree to a standard form of retention agreement outlining the mutual duties and responsibilities of attorney and client.

Under this rule, counsel may charge and receive a fixed fee not to exceed the amount provided in a General Order of this court for all services rendered or to be rendered in the chapter 13 case. Use of this alternative requires that the attorney and the client execute the Model Retention Agreement, which may be found in Appendix II of the Local Bankruptcy Rules. A copy of the executed Model Retention Agreement must be attached to counsel's Rule 2016(b) statement.

The contemplation is that this compensation is a fixed fee for all services in the case, and not a base fee that in ordinary cases would be subject to post-confirmation requests for additional fees. However, in extraordinary circumstances, an attorney could seek relief from the fixed fee, and additional compensation, though only upon an application with supporting affidavits, notice, and actual hearing.

### **Rule 3003.1. Filing of Proofs of Claim in Chapter 11 Cases.**

(a) **Time to File.** Pursuant to Fed. R. Bankr. P. 3003(c)(3) and except as provided in subdivision (b) of this rule, the last day to file proofs of claim in a chapter 11 case shall be ninety (90) days from the first date set for a § 341(a) meeting of creditors. A claim of a governmental unit shall be filed before one hundred eighty (180) days after the date of the order for relief, except as otherwise provided in the Federal Rules of Bankruptcy Procedure. The clerk shall notify all creditors and parties in interest of such bar date.

(b) **Extension.** The court may, for cause shown, extend the deadline upon appropriate motion, notice, and hearing. If the § 341(a) meeting notice to creditors has already been sent by the clerk's office, the notification to creditors of an extension of deadline to file claims will be the responsibility of the debtor in possession and its counsel. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

### **STATUTORY NOTES**

**Advisory Committee Notes:** The rule does not change the operation of § 1111(a) or Fed. R. Bankr. P. 3003(b)(1) or (c)(2) as to

claims scheduled by the debtor as undisputed, non-contingent, and liquidated.

### **Rule 3007.1. Procedures and Hearings for Objections to Claims.**

(a) **Objections to proof of claims.** The party objecting to a proof of claim (objecting party) may set the matter for hearing at the time the objection to the claim is filed or may wait to set the hearing to first determine if a hearing is necessary after receiving the claimant's response.

(b) **Responses to objections to proof of claims.** A response to an objection to a claim must be filed and served not later than thirty (30) days



after service of the objection. If a response is not timely filed, the court may sustain the objection without a hearing.

(c) **Time for setting hearing or withdrawing objection.** Within twenty-one (21) days after being served with the claimant's response, the objecting party shall either: (1) withdraw its objection to the claim, or (2) file and serve a notice of hearing for the objection which provides the proper notice as required by Fed. R. Bankr. P. 3007. If the objecting party has not withdrawn the objection or set a hearing pursuant to the terms set forth herein, the claimant may set a hearing date.

(d) **Witness and exhibit lists.** If the parties intend to offer evidence, the parties, not later than seven (7) days prior to any scheduled hearing, shall:

- (1) File a list of witnesses;
- (2) File a list of exhibits; and
- (3) Exchange copies of any exhibits.

(e) **Order on claim objection.** If there is no timely response to the objection to the claim, or there has been a response but it has been resolved, the moving party shall submit an order to the court consistent with their objection, or any agreement, which sets forth how the claim shall be treated. (Adopted January 1, 2009, effective January 1, 2009; Amended effective December 1, 2009; amended effective January 1, 2012.)

### **Rule 3011.1. Unclaimed Funds.**

(a) **Filing of Application.** If a party seeks disbursement of unclaimed funds from a case, an application for withdrawal of funds must be executed and filed with the clerk. The clerk shall serve a copy of the application on the U.S. Attorney.

(b) **Proof of Entitlement.**

(1) If the application is filed by a funds locator or other party, on behalf of a creditor in whose name the claim is filed, a signed limited or general power of attorney from the creditor must accompany the application (together with such other documentation required of the creditor under subdivisions (2) and (3) below).

(2) If the application is filed by a creditor, that is a corporation, partnership, or limited liability company, the application must be executed by an authorized officer, a general partner, or the limited liability company manager and accompanied by sufficient verification of capacity, such as articles of incorporation, board meeting minutes, partnership agreement, articles of organization, operating agreement, or other appropriate documentation.

(3) In all cases, sufficient proof of legal capacity and entitlement shall be filed with the application.

(c) **Objections.** The U.S. Attorney may object by filing a written objection within twenty-eight (28) days of service of the application. An order approving the disbursement will be entered if no timely objection is filed. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended, effective December 1, 2009.)

## STATUTORY NOTES

**Advisory Committee Notes:** The clerk will provide guidelines upon request. The guidelines and form of application can be

viewed at [www.id.uscourts.gov](http://www.id.uscourts.gov). The ability to search the unclaimed funds database is also available at the court's website.

**Rule 3017.1. Small Business Chapter 11 Reorganization Cases.  
[Deleted.]**

## STATUTORY NOTES

**Compiler's Notes.** This rule, which had been adopted January 5, 2006, effective Janu-

ary 1, 2006, was deleted in the revision of January 2, 2007, effective January 1, 2007.

**Rule 3018.1. Chapter 11 Ballots — Voting on Plans.**

Not less than 5 days prior to the confirmation hearing, the plan proponent shall file the ballots and a written summary of the ballots cast, and shall serve a copy of the summary on the debtor, the United States Trustee, any committee appointed pursuant to the Bankruptcy Code or their authorized agents, and any party that has filed an objection to confirmation or has requested notice. The summary shall contain a separate listing of acceptances and rejections and shall include the following information by class:

- (a) the name of each creditor filing an acceptance or rejection, the dollar amount of each claim, and whether the debtor has objected to the claim;
- (b) the total dollar amount and number of all allowed claims voted;
- (c) the percentage dollar amount of acceptances; and
- (d) the percentage number of acceptances. (Adopted January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011.)

## STATUTORY NOTES

**Advisory Committee Notes:** Official Form 14 provides the ballot for accepting or rejecting a chapter 11 plan of reorganization. Official Form 13 provides the order for approving disclosure statement and fixing time for filing acceptances or rejections of the plan.

**2010 Notes:** In order to improve practice under this Rule, a form of Ballot Summary

has been developed by the Committee. In addition to providing the information called for in this form, note that the Rule also requires the filing of a separate list of all accepting and rejecting ballots. The Ballot Summary form can be located at [www.id.uscourts.gov](http://www.id.uscourts.gov).

**Rule 3020.1. Preconfirmation Reports.**

In a chapter 11 case, the plan proponent shall, not less than 5 days prior to the confirmation hearing, file a memorandum containing the proponent's response to any objections, and a statement as to how each requirement of 11 U.S.C. § 1129 is satisfied. The memorandum shall be served on the debtor, the United States Trustee, any committee appointed pursuant to the Bankruptcy Code or their authorized agents, and any party that has filed an objection to confirmation or has requested notice. If the confirmation hearing is continued, a revised preconfirmation report shall likewise be filed

and served not less than 5 days prior to the continued hearing. (Adopted January 2, 2007, effective January 1, 2007.)

**Rule 3022.1. Final Decree in Chapter 11 Reorganization Case.**

(a) The debtor shall provide certain statistical information to the clerk, including:

- (1) Percent of dividend to be paid;
- (2) Amounts paid or to be paid for:
  - Trustee compensation
  - Attorney for trustee
  - Attorney for debtor
  - Other professionals (e.g. accountant, bookkeeper, auctioneer, etc)
  - All expenses, including trustee's;
- (3) Total amounts for claims allowed (listed separately):
  - Secured
  - Priority
  - Unsecured
  - Equity security holders

(b) A final decree closing the case after the estate is fully administered does not affect the right of the court to enforce or interpret its own orders.

(c) The clerk may close an open chapter 11 case subsequent to entry of an order confirming a plan of reorganization upon provision of not less than thirty (30) days written notice to the debtor(s), to counsel for debtor(s), and to the U.S. Trustee. (Adopted December 27, 2010, effective January 1, 2011.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Fed. R. Bankr. P. 3022.

Upon request, the clerk will furnish a chapter 11 form for the required closing statistical information. The form can be viewed at [www.id.uscourts.gov](http://www.id.uscourts.gov).

**Rule 4001.1. Use of Cash Collateral and Obtaining Post Petition Credit.**

(a) **Motions to Use Cash Collateral.** Motions for use of cash collateral shall set forth the information required by Fed. R. Bankr. P. 4001 and shall contain, at a minimum, the following information:

- (1) Identity of the creditor(s) whose cash collateral is to be utilized and the relationship, if any of the creditor(s) to the debtor;
- (2) If interim use is requested, the amount of cash collateral to be used until the time of the final hearing on the motion to use cash collateral and the amount of cash collateral to be used thereafter;
- (3) A line-item budget listing projected income and expenses for one year. If interim use is requested, the budget must also include projected income and expenses until the time of the final hearing on the motion;

(4) The estimated balance owed to the creditor(s) identified in paragraph (a)(2), as of the date the petition was filed, including any accrued, unpaid interest, cost or fees as provided in the agreement;

(5) If the cash collateral is rent, the amount of the gross and net rent realized each month, a description of the property from which the rent is generated, and an estimate of its fair market value;

(6) If the cash collateral is receivables, a description and itemization of such receivables and, if any accounts receivable aging statement exists, the same must be provided to the affected creditor(s) and any party requesting such statement;

(7) The estimated fair market value, and the basis of the estimate, of the collateral which allegedly secures the creditor's claims;

(8) The estimated value, and the basis of the estimate, of any property offered as adequate protection; and

(9) A statement of whether or not the debtor proposes any provision contained in the Guidelines Regarding Motions to Use Cash Collateral or to Obtain Credit, or Stipulations Regarding the Same which is other than a provision normally approved by the court (under subsection (a) of the Guidelines) and, if so, the provision shall be clearly identified.

(b) **Motions to Obtain Credit.** Motions by the debtor in possession or trustee for authorization to obtain postpetition credit or for approval of a postpetition financing agreement shall contain the information required by Fed. R. Bankr. P. 4001 and also shall contain, at a minimum, the following information:

(1) Identity of the lender, vendor or other creditor (hereafter "creditor") and relationship, if any, of the creditor to the debtor.

(2) If funding is to be incremental, timing of funding or method by which funding is to be determined.

(3) A line-item budget listing projected income and expenses for an appropriate period given the request made. If interim financing is requested, the budget shall also include projected income and expenses until the time of the final hearing on the motion.

(4) If the creditor is a pre-petition creditor, the following information:

(A) The balance owed to the creditor, as of the date the petition was filed, including any accrued, unpaid interest, cost or fees provided in the agreement;

(B) If the lender is secured by receivables, an accounts receivable aging statement;

(C) A description of the collateral which allegedly secures the creditor's claims, an estimate of its fair market value, and the basis of the estimate.

(5) A description of the collateral, if any, to secure the postpetition financing, and the current fair market value of that collateral.

(6) If any other entity has, or claims, an interest in the collateral proposed to secure the post-petition credit or financing.

(A) The balance owed that entity;



(B) Whether the interest of that entity is to be subordinated to the postpetition financing; and if so:

(i) Whether the subordinated entity has consented; or

(ii) In the absence of consent, how the interest of that entity is to be adequately protected; and

(7) A statement of whether or not the debtor proposes any provision contained in the Guidelines Regarding Motions to Use Cash Collateral or to Obtain Credit, or Stipulations Regarding the Same which is other than a provision normally approved by the court (under subsection (a) of the Guidelines) and, if so, the provision shall be clearly identified.

(c) **Cash Collateral and Credit Agreements.** Motions for the approval of an agreement for use of cash collateral and/or for postpetition credit or financing shall set forth in the body of the motion whether or not the agreement includes any provision contained in the Guidelines Regarding Motions to Use Cash Collateral or to Obtain Credit, or Stipulations Regarding the Same which is other than a provision normally approved by the court, (under subsection (a) of the Guidelines) and, if so, the provision shall be clearly identified.

(d) **Motions Heard on Shortened Time.**

(1) If emergency motions for interim relief made under subsections (a), (b), or (c) of this rule are requested to be heard on shortened time, such request shall be served by facsimile or personal delivery to the entities identified in the applicable provision of Fed. R. Bankr. P. 4001, the United States Trustee, the trustee, if any, and any creditor or party whose rights or interests may be directly affected if the requested relief is granted.

(2) All requests for hearings on shortened time shall set forth with specificity:

(A) The immediate and irreparable harm the estate will suffer if relief is not immediately granted;

(B) The extent of the relief required to prevent such immediate and irreparable harm to the estate; and

(C) As much of the information required by subsection (a), (b), or (c) of this rule, as applicable, as may be necessary to establish the necessity of relief to avoid immediate and irreparable harm to the estate pending a final hearing.

(e) **Notice of final hearing.** Notice of the final hearing on a motion for the use of cash collateral under subsection (a), to obtain credit under subsection (b), or for approval of an agreement under subsection (c) shall be given, together with a copy of the motion or agreement if not previously served, to the persons specified in paragraph (d)(1) and such other persons as the court may direct. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008.)

## STATUTORY NOTES

**Advisory Committee Notes:** The Guidelines Regarding Motions to Use Cash Collateral or to Obtain Credit, or Stipulations Regarding the Same are found in Appendix I of the Local Bankruptcy Rules.

**Rule 4001.2. Motions Requesting Relief From the Automatic Stay.**

(a) **Motions.** A request by a party in interest for relief from the automatic stay pursuant to §§ 362(d), 1201(c), or 1301(c) shall be made by filing a motion with the court, and paying the applicable fee. There is no fee for a motion for co-debtor relief under §§ 1201 or 1301.

(b) **Requisite Information in Motions.**

The motion shall:

- (1) Identify the nature of the stay relief sought;
- (2) Provide the details of the underlying obligation or liability upon which the motion is based;
- (3) Contain an itemization of amounts claimed to be due upon the obligation;
- (4) When appropriate, state the estimated value of any collateral for the obligation and the method used to obtain the valuation;
- (5) Attach accurate and legible copies of all documents evidencing the obligation and the basis of perfection of any lien or security interest;
- (6) Attach copies of recorded documents if any documents are recorded with the secretary of state, county recorder, or other lawfully designated recording agency; and
- (7) Include the notice required by subsection (g) and the proof of service required by subsection (h).

(c) **Objections.** Any party in interest opposing the motion must file and serve an objection thereto not later than seventeen (17) days after the date of service of the motion. The objection shall specifically identify those matters contained in the motion that are at issue and any other basis for opposition to the motion. The objection shall also contain the notice of hearing required by subsection (e)(1) and the proof of service required by subsection (h). Absent the filing of a timely objection, movant may submit a proposed order, and the court may grant the relief sought without a hearing.

(d) **Service.**

(1) **Motions.** If relief is sought under § 362(d), the motion shall be served upon the debtor, debtor's attorney, the trustee if one has been appointed, upon any committee or other creditors as required in Fed. R. Bankr. P. 4001(a)(1), and on any other party known to movant claiming an interest in any property subject of the motion.

(2) **Motions for Co-debtor Stay Relief.** If relief is sought under §§ 1201(c) or 1301(c), the motion shall be served upon the debtor, debtor's attorney, the trustee, any co-debtor affected thereby, and on any other party known to the movant claiming an interest in any property subject of the motion.

(3) **Objections.** If an objection is filed to a motion for stay relief, the objection shall be served upon the movant and upon all parties receiving service of the motion.

(e) **Hearings.**

(1) **Scheduling.** A party opposing a motion shall contact the court's calendar clerk to schedule a preliminary hearing. The objection to a motion shall include the notice of such hearing.

(A) Upon court approval, the movant may schedule a hearing for cause shown in the motion or other submissions.

(2) **Preliminary Hearing Procedure.** At the preliminary hearing, the parties shall be prepared to make specific representations to the court as to the proof and evidence to be submitted at any final hearing. In particular, the parties shall advise the court with specificity as to the issues to be presented at a final hearing, the identity of any witnesses expected to testify, and a summary of the expected testimony.

(3) **Final Hearing.** Unless otherwise ordered by the court, the parties, not later than seven (7) days prior to any scheduled final hearing, shall:

(A) File a list of witnesses;

(B) File a list of exhibits; and

(C) Exchange copies of any exhibits.

(4) **Vacation of Hearings.** Once scheduled, a preliminary hearing or final hearing may be vacated or continued only upon compliance with LBR 2002.2(f).

(f) **Emergency Relief Motions.** This rule does not affect a motion for relief brought under § 362(f) and Fed. R. Bank. P. 4001(a)(2).

(g) **Required Notice.** In any motion filed under this rule, the movant shall serve with the motion a notice of the requirements of subdivision (c), (d)(3), and (e)(1), of this rule. In addition, if relief is sought from the automatic stay against acts against property of the estate under § 362(d) and (e), the notice shall also advise the party against whom relief is sought of the requirements of § 362(e).

(h) **Proof of Service.** Any motion filed under this rule shall be accompanied by an appropriate written proof of service.

(i) **Sanctions.** The court may impose appropriate sanctions against any party and/or counsel who fails to prosecute or defend the motion in good faith, contrary to the representations made in its pleadings or preliminary hearing, or violates the requirements of this rule.

(j) **Standard Form Order.** If no objection is filed within the subdivision (c) objection period, the movant shall submit the standard approved order for this district with such alterations as may be appropriate in a particular case. If the moving party provides additions, deletions, or other modifications, the moving party shall clearly identify the deviation. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009; revised effective December 1, 2009; amended December 27, 2010, effective January 1, 2011.)



## STATUTORY NOTES

**Advisory Committee Notes:** This rule specifically requires certain information to be included in a motion for relief from stay. A response must fairly meet the grounds of the motion. Both of these requirements are enhanced by the requirement of specificity in representation at the preliminary hearing. The Advisory Committee considered and rejected requiring affidavits in regard to factual issues presented. (*See, e.g.*, Fed. R. Bankr. P. 7056). However, even though the current practice of allowing representation of counsel is continued, in order to achieve the goal of productive preliminary hearings, factual detail in such representation is mandated. Failure of counsel to adhere to this standard may lead to sanction under the rule. *See* Fed. R. Bankr. P. 9011 (Fed. R. Civ. P. 11).

Notes to 2004 revisions. Under the revised rule, unless cause is shown and prior court

permission is obtained, the moving party may not schedule a stay relief motion for hearing at the time of filing such a motion. Instead, a party opposing a motion must file a detailed objection, obtain a hearing date from the calendar clerk, and provide notice of both objection and hearing at the time of filing the objection. An objection without a properly noticed and timely conducted hearing will be ineffective to prevent automatic relief under § 362(e).

Notes to 2008 revisions. The Standard Form Order can be located at [www.id.uscourts.gov](http://www.id.uscourts.gov).

Notes to 2010 revisions. Proposed Orders required by subdivision (j) must be submitted in accordance with the court's ECF Procedures. *See generally* LBR 5003.1.

**Rule 4002.1. Property in Need of Attention or Protection.**

(a) **Inventory or Equipment.** When a stock of goods or business equipment is scheduled, the debtor shall, immediately after the general description thereof, list a present inventory, append a brief explanation of its exact location, the name and address of the custodian thereof, the protection being given such property, and the amount of fire and theft insurance, if any, and state whether prompt additional attention or protection is necessary.

(b) **Need for Immediate Action.** If a stock of goods includes perishables, or if property or the business premises otherwise requires immediate attention or protection, the debtor or the debtor's attorney, when relief is ordered under chapter 7 or 13, or a trustee is appointed under chapter 11, shall notify the trustee of the need for immediate action. Notification shall be by personal communication, telephone, or by facsimile. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

## STATUTORY NOTES

**Advisory Committee Notes:** While this rule reflects current practice in many cases that fall within its scope, it is anticipated that

the rule will provide the trustee with additional necessary information in a timely manner in other cases.

**Rule 4003.1. Exemptions.**

(a) **Claim of Exemptions.** The Idaho Code section under which any exemption is claimed, and each item of property claimed as exempt, shall be described with specificity, without reference to other schedules.

(b) **Claim of Exemption by Joint Debtors.** If joint debtors claim separate exemptions under § 522(m), each debtor must make and file a



separate itemization in the manner prescribed by subdivision (a) of this rule.

(c) **Objections to Exemptions.** An objection to a claimed exemption shall state the specific exemption objected to and state the grounds upon which the objection is based. The objection may be sustained and the exemption disallowed without a hearing, unless a hearing is requested and set by the debtor(s), the trustee, or a party in interest. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** This rule addresses the common problem of failure of the debtors to provide sufficient information regarding the exemptions claimed. It also reflects, in subdivision (c), the fact that hearings in many cases are not needed or demanded by debtors after review of the objection. Under Fed. R. Bankr. P. 4003(b), copies of an objection to a claim of exemption must

be delivered or mailed to the trustee, the person claiming the exemption, and the attorney for such person. The debtor's right to a hearing is preserved, however. The trustee may also request and set a hearing. This may be necessary, for example, in cases where the debtor amends the claim of exemption but such amendment is itself objectionable or does not fully resolve the original objection.

#### **Rule 4003.2. Avoidance of Liens on Exempt Property.**

(a) **Specificity.** All § 522(f) lien avoidance motions shall contain a specific description of the lienholder's interest to be avoided including, where applicable, the instrument number and the recording governmental unit. The motion shall also specify the statutory exemption that is impaired and the creditor's name.

Further, all attendant orders shall specifically describe the avoided lienholder's interest, the extent that the lien is avoided, and the statutory basis for the impairment. If the avoided interest is represented by a recorded document, the order shall further provide the type of recorded instrument avoided, its date of recording, the recording governmental unit, and recording instrument number.

(b) **Nature of Relief.** The language contained in such motions to avoid lien and attendant orders should be substantially identical to the language of § 522(f).

(c) **Notice.** Notice of such a motion to avoid a lien pursuant to § 522(f) need be given only to the trustee and to the creditor claiming the lien. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Many § 522(f) lien avoidance motions and orders are factually incomplete, vague, or ambiguous. Additionally, the court has found that many of the proposed orders granting relief improperly recite that the lien is absolutely "void," rather than avoided "to the extent that

such lien impairs an exemption to which the debtor would have been entitled."

Debtor's counsel may want to consider:

(i) attaching accurate and legible copies of all documents evidencing the lienholder's interest to be avoided, and the basis of perfection of any lien or security interest;

(ii) attaching copies of recorded documents, if any documents are recorded with the county recorder, secretary of state, or other lawfully designated recording agency; and (iii) describing specifically the property upon which the lien is claimed and to be avoided.

### **Rule 4008.1. Reaffirmations. [Deleted.]**

#### **STATUTORY NOTES**

**Compiler's Notes.** This rule, which had been adopted January 5, 2006, effective January 1, 2006, was deleted in the revision of January 2, 2007, effective January 1, 2007.

### **Rule 5003.1. Electronic Case Filing.**

(a) **Official Records of the Court.** The docketing and case management system for the Bankruptcy Court for the District of Idaho shall be the Case Management and Electronic Case Filing Program (CM/ECF). The official record of the court shall be all documents filed electronically, all documents converted to an electronically filed format, and all documents filed and not capable of conversion to electronic format or otherwise ordered by the Court to be maintained.

(b) **Establishment of Electronic Case Filing Procedures.** The clerk of the court is authorized to establish and promulgate Electronic Case Filing Procedures ("ECF Procedures"), including the procedure for registration of attorneys and other authorized users, and for issuance and control of passwords to permit electronic filing and notice of pleadings and other papers. The clerk may modify the ECF Procedures from time to time, after conferring with the Chief Judge. The ECF Procedures shall be made available to the public on the Court's website ([www.id.uscourts.gov](http://www.id.uscourts.gov)) and copies shall be available at all divisional court offices.

(c) **Scope of electronic filing.** Unless expressly prohibited, the filing of all documents required or permitted to be filed with the court in connection with a bankruptcy case or adversary proceeding shall be accomplished electronically. Any and all references to "filing" or "service" in these Local Bankruptcy Rules shall be interpreted to include filing or service by electronic means consistent with the ECF Procedures and any applicable General Order. Local Bankruptcy Rule provisions which are or may be in conflict with ECF Procedures shall be superceded by such Procedures and/or applicable General Order until such time as appropriate rule amendments are promulgated.

(1) Documents filed conventionally with the court will be converted into an electronic format by the court and in such cases, such documents will be treated for all purposes as if they had been electronically filed, except that conversion of a conventionally filed document to electronic format by the court will not affect the original filing date and time of that document.

(2) On a case by case basis, the presiding judge may direct that paper copies of any documents filed electronically be sent directly to the judge's chambers.

(d) **Court Retention of Records — Copies.** Where a document filed conventionally is converted to an electronic format by the court, the

document originally filed shall be maintained as a copy only. Such copies of documents will be retained by the court only so long as required to ensure that the information has been transferred to the court's data base, for other court purposes or as required by other applicable laws or rules. It shall be the responsibility of any party who has filed a document conventionally who desires to have the document returned by the clerk, to specifically request and arrange for its return. Absent such a request, the clerk is authorized to dispose of the document after electronic conversion.

(e) **Retention of Conventionally Signed Documents.** The original of all conventionally signed documents that are electronically filed shall be retained by the filing party for a period of not less than the maximum allowed time to complete any appellate process, or the time the case of which the document is a part, is closed, whichever is later. The document shall be produced upon an order of the court.

(f) **Eligibility.** Only a Registered Participant or an authorized employee of the Registered Participant may file documents electronically. To become a Registered Participant, or to act as an authorized employee of the Registered Participant, a person must satisfy the registration requirements established by the court and participate in training as required by the court unless the clerk is satisfied that training is not necessary.

(g) **Consequences of Electronic Filings.** The electronic transmission of a document to the court constitutes filing of the document for all purposes. Such transmission shall be consistent with ECF Procedures. The filing date and time of a document filed electronically shall be the date and time the document is electronically received by the court, which for the purposes of this Rule shall be Mountain Time.

(h) **Entry of Court Issued Documents.** The court shall enter all orders, decrees, judgments and proceedings of the court in accordance with the ECF Procedures, which shall constitute entry of the order, decree, judgment, or proceeding on the docket kept by the clerk of court.

(i) **Large Documents, Exhibits and Attachments.** The parties are directed to refer to the ECF Procedures, which may be amended from time to time.

(j) **Signatures.** The electronic filing of any document by a Registered Participant shall constitute the signature of that person for all purposes provided in the Federal Rules of Bankruptcy Procedure. For instructions regarding electronic signatures, refer to the ECF Procedures.

(k) **Notice and Service of Documents.** Participation by a Registered Participant in the Court's ECF system by registration and receipt of a login and password from the clerk of court shall constitute consent by that Registered Participant to the electronic service of pleadings and other papers under applicable Federal Rules of Bankruptcy Procedure.

(l) **Technical Failures.** Any Registered Participant or other person whose filing is made untimely or who is otherwise prejudiced as a result of a technical failure at or by the Court, may seek appropriate relief from the court. The court shall determine whether a technical failure has occurred or



whether relief should be afforded on a case by case basis. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

### STATUTORY NOTES

**Advisory Committee Notes:** Effective January 1, 2006, members of the bar and other Registered Participants are required to file all documents in the District and Bankruptcy Court through ECF unless otherwise ordered by the Court. Detailed procedures are found in the clerk's ECF Procedures and in the Court's General Order(s), which are avail-

able on the Court's website or at any clerk's office. All references in the Local Bankruptcy Rules to "filing" or "service" (except service or process) are deemed to include electronic filing and/or service, even though more detailed amendments of the Local Bankruptcy Rules may later be made.

### Rule 5003.2. Sealed Documents and Public Access.

This Rule applies to documents filed electronically or those filed in paper format.

#### (a) General Provisions

(1) **Motion to File Under Seal.** Parties seeking to file a document under seal shall file a motion to seal, along with supporting memorandum and a proposed order, and file the document with the clerk of court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading.

(2) **Motion to Seal Existing Documents.** Parties seeking to place a pending case or previously filed document under seal shall file a "MOTION TO SEAL", along with supporting memorandum and proposed order. Portions of a document cannot be placed under seal. Instead, the entire document must be placed under seal in order to protect confidential information.

(3) **Public Information.** Unless otherwise ordered, the motion to seal will be noted in the public record of the court. The filing party or the clerk of court shall be responsible for restricting public access to the sealed documents, as ordered by the court.

#### (b) Procedure for the Electronic Filing of Sealed Documents.

(1) Sealed documents and sealed cases will be filed in electronic format, with access restricted to the Court and authorized staff, unless otherwise ordered by the court.

(2) A motion to seal a document or case shall be submitted electronically in CM/ECF. If a party wishes to file a document under seal in CM/ECF, they shall first contact the clerks office for instructions regarding how to file the document and how to maintain the confidentiality of the information. The document submitted under seal shall be filed separately from the motion to seal.

(3) Documents submitted to the Court for *in camera* review shall be submitted in the same fashion as sealed documents.

(4) The presiding judge may request paper copies of documents for in camera inspection.



(5) Additional instructions for the electronic submission of sealed and in camera documents are contained in the ECF Procedures.

**(c) Documents Submitted in Paper Format.**

(1) If the material to be sealed is presented in paper, counsel shall submit the material in an UNSEALED 8½ x 11 inch manilla envelope. The envelope shall contain the title of the court, the case caption, and case number.

(2) Absent any other court order, sealed documents submitted in paper format will be returned to the submitting party after the case is closed and the appeal time has expired, or if appealed, after the conclusion of all appeals. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011.)

**Rule 5005.1. Venue.**

(a) **Hearings and Meetings.** Bankruptcy Court hearings and § 341(a) meetings are regularly scheduled in Boise, Coeur d'Alene, Moscow, Pocatello, Twin Falls, and Jerome.

(b) **Filing of Pleadings and Papers.** All pleadings, motions, and other pertinent papers may be filed with the office of the clerk of court in Boise, Pocatello, Moscow, and Coeur d'Alene. When a judge is sitting elsewhere in the district, such papers may be filed with the deputy clerk at such place. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Hearings and § 341(a) meetings are held in various sites depending upon the county of the debtor's residence or principal place of business. Certain hearings may be heard by video conference — see Advisory Committee Notes of LBR 2002.2. The court's and U.S. Trustee's designation of counties within each area is as follows:

**Eastern Calendar** (Pocatello):

Matters before the court and § 341(a) meeting of creditors: Federal Building & U.S. Courthouse, 801 E. Sherman, Pocatello, Idaho

Bannock, Bear Lake, Bingham, Bonneville, Butte, Caribou, Clark, Custer, Franklin, Fremont, Jefferson, Lemhi, Madison, Oneida, Power, Teton.

**South Central Calendar** (Twin Falls or Jerome, as set forth in the Rules):

Matters before the Court: Snake River Adjudication District Court, 253 3<sup>rd</sup> Ave N, Twin Falls, Idaho

Section 341(a) meetings of creditors (except chapter 13): Jerome County Courthouse, 300 N Lincoln, 2nd Floor, Jermonie, Idaho.

Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka, Twin Falls.

**Southern Calendar** (Boise):

Matters before the court: Federal Building & U.S. Courthouse, 550 W. Fort St, 5<sup>th</sup> Floor, Boise, Idaho

Section 341(a) meeting of creditors: Office of U.S. Trustee, Washington Group Central Plaza, 720 Park Blvd., Suite 210, Boise ID

Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley, Washington (and referred Malheur County, Oregon cases).

**Central Calendar** (Moscow):

Matters before the court and § 341(a) meeting of creditors: Federal Building & U.S. Courthouse, 220 E 5th St, Moscow, Idaho

Clearwater, Idaho, Latah, Lewis, Nez Perce.

**Northern Calendar** (Coeur d'Alene):

Matters before the court and § 341(a) meeting of creditors: Federal Building & U.S. Courthouse, 6450 N. Mineral Dr., Coeur d'Alene, Idaho (Rev. 12/1/09)

Benewah, Bonner, Boundary, Kootenai, Shoshone.

**Rule 5005.2. Documents for Filing or Administering.**

(a) **Petitions.** At the time of filing, documents may be reviewed for format and legibility; correct size of paper (8 ½ x 11) for scanning purposes; and signatures. If filed in paper by pro se litigants, documents must be affixed by a fastener (i.e., paper clip,) and NOT staples.

(b) **No Filing Fee or an Inappropriate Amount Submitted; and Facsimile Pleadings.** The clerk has been given authority by General Order to refuse to accept or file:

(1) Any facsimile pleadings mailed or faxed to the clerk which do not comply with General Order 201, or

(2) Any petition or pleading not accompanied by the required filing fee under 28 U.S.C. § 1930.

(c) **General Format of Papers Presented for Filing.**

(1) Except for proposed orders submitted to the court, starting 1 inch from the top of the first page, the following information must appear in the upper left-hand corner of the first page of each paper presented for filing, except that in multiparty actions or proceedings, reference may be made to the signature page for the complete list of parties represented:

- (a) Name of the Attorney (or if in propria persona, of the party);
- (b) E-mail address;
- (c) Idaho State Bar Number (if applicable);
- (d) Office mailing address;
- (e) Telephone number;
- (f) Facsimile number;
- (g) Specific identification of the party represented by name and interest in the litigation (i.e., debtor, creditor, plaintiff, defendant, etc.).

(2) Any pleading, motion or other paper presented for filing must be submitted in 12 to 14 font, with the exception of forms, exhibits, attachments or other documents which cannot be converted to this font.

(3)(a) Following the counsel identification, a caption in the following form should appear:

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF IDAHO

In Re

[Debtor Name]

Debtor

)

)

)

)

)

)

)

)

)

)

Case No. \_\_\_\_\_

Chapter No. \_\_\_\_\_

[Designation of Character of Paper]

(b) In completing the form of caption, insert in place of bracketed material the debtor(s) name and designation of character of paper. When

completing the case number, include three letter suffix indicating the assigned judge (i.e., 07-00001-TLM or 07-00001-JDP)

(Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008.)

### STATUTORY NOTES

**Advisory Committee Notes:** The procedures on facsimile filing are governed by District of Idaho General Order 201, that is available on the court's website or you may call the local clerk's office.

With respect to the format for advisory captions, refer to LBR 7003.1.

### **Rule 5007.1. Files, Records and Exhibits.**

(a) **Custody and Withdrawal.** All files and records of the court, except those sealed by order of the court, shall remain in the custody of the clerk, subject to examination by the public without charge. No record, paper, or article belonging to the files of the court shall be taken from the custody of the clerk without a special order of the court and a receipt given by the party obtaining it, describing the item and date of receipt, except as otherwise provided in this rule. Withdrawal orders will be made only in exceptional circumstances.

(b) **Exhibits Part of Files.** Every exhibit offered in evidence, whether admitted or not, becomes a part of the files.

(c) **Substitution of Copies.** Unless there be some special reason why original exhibits or depositions should be retained, the bankruptcy court may, on stipulation or application, order them returned to the party to whom they belong upon filing of a copy, either certified by the clerk or approved by counsel, for all parties concerned.

(d) **Disposition of Exhibits.**

(1) **Delivery to Person Entitled.** In all proceedings in which final judgment has been entered, and the time for filing a motion for new trial or rehearing and for appeal has passed, or in which a final order on appeal has been entered, any party or person may withdraw any exhibit or deposition originally produced by such party without court order, upon fourteen (14) days written notice to all parties, unless within that time another party or person files notice of claim thereto with the clerk. In the event of competing claims, the court shall determine the person entitled and order delivery accordingly. For good cause shown, the court may allow withdrawal or determine competing claims in advance of the time above specified.

(2) **Unclaimed Exhibits.** If exhibits or depositions are not withdrawn within thirty (30) days of the time when notice may be given under subdivision (1) of this subdivision (d), the clerk may destroy them or make other disposition as appears proper.

(e) **Retention of Electronic Recordings.**

(1) **Section 341(a) Meetings.** Retention and preservation of electronic sound recordings of the § 341(a) meeting of creditors is the responsibility of the U.S. Trustee. Copies of the recordings may be obtained from the U.S. Trustee.

(2) **Court Hearings and Proceedings.** Electronic sound recording and/or court reporter's stenographic records of any bankruptcy court proceeding shall be retained and preserved by the clerk. Copies of the recordings may be obtained from the clerk upon payment of the duplication fee. Transcripts may be obtained upon written request. Requests for duplication or transcripts shall identify the name, address, and phone number of the requesting attorney, the case name and case number, and the date of the subject hearing or proceeding. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Subdivision (e) reflects the current administrative requirements that control the clerks and U.S. Trustee's retention of electronic recordings of meetings and proceedings. Transcription from the duplicate tape of the § 341(a) meeting of

creditors is the responsibility of counsel, while the clerk will obtain the transcript of court hearings and charge counsel therefore. The Advisory Committee determined not to address issues of "certification" or the evidentiary use of such transcriptions.

**Rule 5009.1. Closing of Cases.**

The clerk may close any open case which is otherwise eligible for closing despite a motion pending therein if a hearing date on such motion has not been obtained from the clerk within twenty-one (21) days of the filing of the motion, or where an order has not been submitted by the moving party within twenty-one (21) days of the date when such an order could properly be executed. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009; amended December 27, 2010, effective January 1, 2011.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Many cases otherwise eligible to be closed have pending motions never brought on for hearing and/or stipulations upon which orders have never

been presented. This rule is designed to encourage the prompt noticing of matters and submission of orders. *See* LBR 5010.1.

**Rule 5010.1. Reopening Fees and Procedures.**

Any party wishing to file a pleading or other document in a closed case must submit a motion and order reopening the case and pay the attendant fee unless otherwise ordered by the court. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)



## STATUTORY NOTES

**Advisory Committee Notes:** There are only limited circumstances where the court may act without reopening a case. See Fed. R. Bankr. P. 9024. The “attendant fee” is the same as the filing fee for a case under such chapter in effect as of the time of the motion to reopen. See 28 U.S.C. § 1930(b). The Miscel-

laneous Fee Schedule can be found at [www.id.courts.gov](http://www.id.courts.gov).

As provided in the described schedule, the court may waive the filing fee in appropriate circumstances, or in the event of an administrative or clerical error.

### **Rule 6006.1. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease.**

(a) **Motions.** A motion to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, shall be served and heard in compliance with the provisions of Fed. R. Bankr. P. 9014, 6006 and this rule, unless otherwise ordered by the court.

(b) **Notice.**

(1) Motion to reject. A motion to reject an executory contract or unexpired lease shall be served on the parties to the contract or lease and, except in a chapter 9 municipality case, the U.S. Trustee. In a chapter 11 case, the motion shall also be served on the members of any creditors’ committee or, if no creditors’ committee has been appointed, on the twenty (20) largest unsecured creditors.

(2) Motion to assume or assign. A motion to assume or assign an executory contract or unexpired lease shall be served on all creditors and interested parties and, except in a chapter 9 municipality case, on the U.S. Trustee. (Adopted January 1, 2009, effective January 1, 2009.)

### **Rule 6007.1. Motions for Abandonment.**

A motion by a party in interest under 11 U.S.C. § 554(b) for an order requiring a trustee to abandon property of the estate shall be noticed to creditors and parties in interest in accord with the requirements of Fed. R. Bankr. P. 6007(a). (Adopted January 1, 2009, effective January 1, 2009.)

## STATUTORY NOTES

**Advisory Committee Notes:** This rule makes Fed. R. Bankr. P. 6007(a) applicable to

motions brought under 11 U.S.C. § 554(b) and Fed. R. Bankr. P. 6007(b).

### **Rule 7001.1. Amended and Renumbered as Rule 7041.2.**

### **Rule 7003.1. Commencement of Adversary Proceedings.**

(a) **Cover Sheet.** A completed “Adversary Proceeding Cover Sheet” and attendant fee shall accompany every complaint commencing an adversary proceeding under Fed. R. Bankr. P. 7003, together with a summons prepared in compliance with the Federal Rules of Civil Procedure.

(b) **Form.** All pleadings in an adversary proceeding shall meet the requirements of Fed. R. Bankr. P. 7010 and the Official Forms, including identification of the debtor and the debtor’s bankruptcy case number.

(1) The bankruptcy case number shall include the three letter suffix indicating the assigned judge (*i.e.*, 05-00001-TLM or 05-00001-JDP).

(c) **Adversary Number and Summons.** Upon the filing of a complaint under Fed. R. Bankr. P. 7003, the clerk will assign the proceeding an adversary number, which number must thereafter appear on all pleadings and issue the summons which will then be returned to the plaintiff who will be responsible for service according to Fed. R. Bankr. P. 7004.

(1) The adversary proceeding number shall include the three letter suffix indicating the assigned judge (*i.e.*, 05-6001-TLM or 05-6001-JDP). (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008.)

#### STATUTORY NOTES

**Advisory Committee Notes:** A corporate ownership statement pursuant to Fed R. Bankr. P. 7007.1 must be filed concurrently with the complaint or responsive pleading, as applicable.

#### **Rule 7005.1. Non-filing of Discovery and Limitations on Discovery.**

(a) **Adversary Proceedings.** All discovery, including depositions upon oral examination or written questions, interrogatories, requests for production of documents, requests for admissions, and answers and responses thereto, shall be served but shall not be filed except upon order of a judge following a motion by a party in interest.

(b) **Contested Matters.** All discovery made in a contested matter pursuant to Fed. R. Bankr. P. 9014, including depositions upon oral examination or written questions, interrogatories, requests for production of documents, requests for admissions, and answers and responses thereto, shall be served but shall not be filed with the court except upon order of a judge following a motion by a party in interest.

(c) **Limitations on Discovery.** All discovery made in a contested matter pursuant to Fed. R. Bankr. P. 9014 is subject to the following limitations absent stipulation of the opposing party or order of a judge upon a showing of good cause waiving or modifying such limitations:

(1) **Interrogatories:** No party shall serve upon any other party more than twenty-five (25) interrogatories, in which sub parts of interrogatories shall count as separate interrogatories.

(2) **Requests for Admission:** No party shall serve upon any other party more than twenty-five (25) requests for admissions. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Subdivisions (a) and (b) are designed to eliminate the filing burden upon the court in the majority of cases where discovery is never utilized prior to or at trial or prior to disposition of the case, as well as eliminate any potential problems

caused by the nature or admissibility of the material included in the discovery requests or responses.

The provision of the rule set forth in subdivision (c) is meant to control abuses of discovery processes in regard to motion practice

under the provisions of Fed. R. Bankr. P. 9014 regarding “contested matters” while still preserving availability and usefulness of discovery in proper circumstances. Under extraordinary circumstances, the court may modify the limitations.

### **Rule 7026.1. Discovery Rules Not Applicable in Adversary Proceedings.**

Except as otherwise ordered by the court, provisions of Fed. R. Civ. P. 26(a)(1)-(4) concerning requirements for disclosure of information, the first sentence of Rule 26(d) and Fed. R. Civ. P. 26(f) (and those provisions of Rule 16 and Rules 30-37 referring thereto) concerning discovery meetings will not be applicable in any adversary proceeding pending or filed. (Adopted January 2, 2007, effective January 1, 2007; amended December 27, 2010, effective January 1, 2011.)

### **STATUTORY NOTES**

**Advisory Committee Notes:** This rule continues the provisions of General Order 101 of the U.S. Court and U.S. Bankruptcy Court

for the District of Idaho, which were made effective December 1, 1993.

### **Rule 7037.1. Discovery Motions.**

(a) **Obligation to Confer.** The Court will not consider a motion made pursuant to Fed. R. Bankr. P. 7026 to 7037 or Fed. R. Bankr. P. 9016 unless, prior to the filing of the motion the parties have conferred and attempted to resolve their differences in good faith. The mere sending of a written, electronic, or voicemail communication does not satisfy this requirement. Rather, this requirement can be satisfied only through direct dialogue and discussion in person or in a telephone conversation.

(b) **Certificate of Compliance.** Counsel for the moving party shall include in the motion a certificate of compliance with this Rule. The certificate of compliance shall indicate that the parties have conferred in good faith and shall set forth sufficient facts in the motion to allow the court to evaluate the adequacy of the compliance with this Rule.

(c) **Certificate of Non-compliance.** In the event that the parties were unable to meet and confer as described in section (a) above, counsel for the moving party shall include in the motion a certificate setting forth sufficient facts to demonstrate that attempts to comply with this rule were made, and why the parties were unable to comply with this Rule. The moving party shall set forth facts sufficient to allow the Court to evaluate the adequacy of the attempts to confer.

(d) **Failure to Comply.** If counsel fails or refuses to comply with this Rule, the Court may deny any discovery motion and may order the payment of reasonable expenses, including attorneys’ fees. (Adopted January 1, 2008, effective January 1, 2008.)

**Rule 7041.1. Dismissal of Inactive Adversary Proceedings.**

(a) **Dismissal.** In the absence of a showing of good cause for retention, any adversary proceeding in which no action has been taken for a period of sixty (60) days may be dismissed, without prejudice, at any time.

(b) **Notice.** At least twenty-one (21) days prior to such dismissal, the clerk shall give notice of the pending dismissal to all attorneys of record and to any party appearing on its own behalf in such adversary proceeding. The notice shall be sent to the last address of such attorneys or parties as shown in the official court adversary proceeding file. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** The rule does not refer to “contested matters” under Fed. R. Bankr. P. 9014 since justification for a similar rule is not present for motions within a case.

**Rule 7041.2. Dismissal of Adversary Proceedings Contesting Discharge.**

An adversary proceeding objecting to entry of discharge of the debtor(s) or seeking to revoke entry of discharge of the debtor(s) shall be dismissed only upon compliance with the following conditions.

(a) **Motion.** The plaintiff shall file a motion that sets forth with particularity the grounds upon which the request for dismissal is based.

(b) **Affidavit.** Contemporaneously with such motion, there must be filed an affidavit of the plaintiff setting forth any consideration, monetary or otherwise, received in connection with such requested dismissal.

(c) **Service of Pleadings.** Proof of service of the motion and affidavit provided for in subdivisions (a) and (b) of this rule, reflecting service upon the trustee and upon any committee appointed under the Code, must be filed within seven (7) days of the motion.

(d) **Notice to Creditors and Hearing.** Notice of an intended dismissal and hearing shall be issued by the moving party and served upon all creditors and parties in interest in the debtor(s)’ case, and proof of such service filed with the clerk.

(1) This requirement of notice shall not apply to dismissal of adversary proceedings brought by a trustee to deny or revoke discharge on the grounds of failure to file tax returns, failure to amend schedules, or failure to turn over property or records. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

**STATUTORY NOTES**

**Advisory Committee Notes:** Fed. R. Bankr. P. 7041, and case precedent limit voluntary dismissal of complaints generally objecting to discharge of debtors (as contrasted with those actions under § 523 of the Code contesting discharge ability of individual



debts). This rule clarifies the requirements previously imposed by the court in most cases. Subdivision (b) is, in part, in reference to the criminal prohibition upon the giving, receiving, offering or seeking to obtain any money, property or other advantage in return for

acting or forbearing to act in a case under Title 11, U.S. Code.

**Compiler's notes.** This rule was renumbered from Rule 7001.1, effective December 1, 2009.

### **Rule 7054.1. Taxation of Costs.**

(a) Within fourteen (14) days after entry of judgment under which costs may be claimed, the prevailing party may serve and file a cost bill in the form prescribed by the court, requesting an itemized taxation of costs. The cost bill must itemize the costs claimed and be supported by a certificate of counsel that the costs are correctly stated, where necessarily incurred and are allowed by law. The court will enforce the provisions of 28 U.S.C. § 1927 in the event an attorney or other person admitted to practice in this court causes an unreasonable increase in costs. Not less than twenty-one (21) days after receipt of a party's cost bill, the clerk, after consideration of any objections, will tax costs and serve copies of the cost bill upon all parties of record. The cost bill should reflect the clerk's actions to each item contained therein. Within fourteen (14) days after service by any party of its cost bill, any party may file and serve specific objections to any items setting forth the grounds for the objection.

(b) Generally, the prevailing party is the one who successfully prosecutes the action or successfully defends against it, prevails on the merits of the main issue, and the one in whose favor the decision or verdict is rendered and judgment entered.

(c) Costs must be taxed in conformity with the provisions of 28 U.S.C. § 1920-1923 and other provisions of law as may be applicable and any directives as the court may issue from time to time. Taxable items include:

(1) **Clerk's Fees and Service Fees.** Clerks fees (see 28 U.S.C. § 1920) and service fees as allowed by statute.

(2) **Trial Transcripts.** The cost of the originals of a trial transcript, a daily transcript, or of a transcript of matters prior or subsequent to trial, furnished the court are taxable at the rate authorized by the Judicial Conference when either requested by the court or prepared pursuant to stipulation. Acceptance by the court does not constitute a request. Copies of transcripts for counsel's own use are not taxable unless approved in advance by the court.

(3) **Deposition Costs.** The prevailing party may recover the following costs relative to depositions used for any purpose in connection with the case:

(i) The cost of the original deposition plus one copy (where prevailing party was the noticing party;

(ii) The cost of a copy of a deposition (where prevailing party was not the noticing party; and

(iii) The cost of video-taped depositions.

The prevailing party who noticed the deposition may recover the reasonable expenses incurred for reporter fees, notary fees and the reporter's/

notary's travel and subsistence expenses. In addition, witness fees, whether or not the witness was subpoenaed are taxable at the same rate as attendance at trial. The reasonable fee for a necessary interpreter to attend a deposition is also taxable on behalf of the prevailing party. Attorney's fees and expenses incurred in arranging for or taking a deposition are not taxable.

(4) **Witness Fees, Mileage and Subsistence.** The rate for witness fees, mileage, and subsistence are fixed by statute (28 U.S.C. § 1821). Such fees are taxable even though the witness does not take the stand, provided the witness necessarily attends court. Such fees are taxable even though the witness attends voluntarily upon request and is not under subpoena. The mileage taxation is based on the most direct route. Mileage fees for travel and subsistence are taxable only for the reasonable period during which the witness is within the district. No party shall receive witness fees for testifying on their own behalf except where a party is subpoenaed to attend court by the opposing party. Witness fees for officers of a corporation are taxable if the officers are not defendants and recovery is not sought against the officers individually. Fees for expert witnesses are not taxable in a greater amount than is statutorily allowed for ordinary witnesses. Allowance of fees for a witness on deposition must not depend on whether the deposition is admitted in evidence.

(5) **Copies of Papers and Exhibits.** The cost of an exhibit necessarily attached to a document (or made part of a deposition transcript) required to be filed and served is taxable. The cost of reproducing the required number of copies of the clerk's record on appeal is allowable.

(6) **Maps, Charts, Models, Photographs, Summaries, Computations and Statistical Summaries.** The reasonable cost of maps, diagrams, visual aids, and charts are taxable if they are admitted into evidence. The cost of photographs are taxable if admitted into evidence or attached to documents required to be filed and served on opposing counsel. Enlargements greater than [than] 8" x 10" are not taxable except by order of the court. The cost of models is not taxable except by order of the court. The cost of compiling summaries, computations, and statistical comparisons is not taxable.

(7) **Interpreter and Translator Fees.** The reasonable fee of a competent interpreter is taxable if the fee of the witness involved is taxable. The reasonable fee of a competent translator is taxable if a document translated is necessarily filed or admitted in evidence.

(8) **Other Items.** Other items may be taxed with prior court approval.

(9) **Certificate of Counsel.** The certificate of counsel required by 28 U.S.C. § 1924 and the rules are *prima facie* evidence of the facts recited therein. The burden is on the opposing party to establish that a claim is incorrectly stated, unnecessary, or unreasonable.

(d) A review of the decision of the clerk in the taxation of costs may be taken by the court on a motion to retax by any party, pursuant to Fed. R. Bankr. P. 7054(b), upon written notice thereof, served and filed with the

clerk within seven (7) days after the costs have been taxed in the clerk's office, but not after. The motion to retax must specify the ruling of the clerk excepted to, and no others will be considered. The motion will be considered and determined upon the same papers and evidence used by the clerk and upon such memoranda of points and authorities as the court may require. A hearing may be scheduled at the discretion of the court. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009; amended effective January 1, 2012.)

### STATUTORY NOTES

**Advisory Committee Notes:** This rule is generally consistent with the Local Rules of Civil Practice for the United States District

Court for the District of Idaho, though there are minor differences. (Rev. 12/1/09)

### **Rule 7056.1. Motions for Summary Judgment and Proceedings Thereon.**

(a) **Motions.** A request by a party for summary judgment pursuant to Fed. R. Bankr. P. 7056 shall be made by motion filed, served and heard in compliance with the provisions of this rule, absent an order of the court providing otherwise.

(b) **Submissions and Hearings.**

(1) The motion, supporting affidavits or declarations, a statement of undisputed facts, a notice of hearing, and supporting brief shall be filed at least twenty-eight (28) days before the time fixed for the hearing.

(A) The moving party shall provide simultaneously with its motion, in a document separate from all others, a statement of asserted undisputed facts. The statement shall not be a narrative but shall set forth each fact in a separate, numbered paragraph. For each fact, the moving party shall provide a specific citation (including page, paragraph, and/or line number as appropriate) to an affidavit, deposition, or other portion of the record establishing such fact. Failure to submit such a statement in compliance with this rule constitutes grounds for denial of the motion without hearing.

(2) If the opposing party desires to file affidavits or other materials, that party shall do so at least fourteen (14) days before the date of the hearing. The opposing party shall also file a responsive brief, and a statement of disputed and undisputed facts, at least fourteen (14) days prior to the hearing.

(A) The opposing party's statement of disputed and undisputed facts shall respond to each of the moving party's asserted undisputed facts. The opposing party shall specifically identify whether such fact is disputed or undisputed. If disputed, the opposing party shall provide a specific citation (including page, paragraph, and/or line number as appropriate) to an affidavit, deposition, or other portion of the record establishing the basis of dispute.



(3) The moving party may thereafter file a reply brief not less than seven (7) days prior to the hearing.

(4) If an opposing party files a cross-motion for summary judgment, it must comply with the provisions of (b)(1) of this rule.

(5) All pleadings and documents filed under this rule shall be served on all other parties simultaneously with their filing.

(6) Other than as provided herein, absent an order of the Court to the contrary for good cause shown, no other pleadings or documents shall be filed on a summary judgment motion.

(c) **Oppositions Based on Unavailability of Facts.** If a party responding to a motion for summary judgment intends on opposing such motion through an affidavit or declaration pursuant to Fed. R. Civ. P. 56(d), incorporated by Fed. R. Bankr. P. 7056, such affidavit or declaration and a supporting brief must be filed within the time set forth in subdivision (b)(2) of this rule.

(d) **Noncompliance or Affidavits Made in Bad Faith.** If a party fails to comply with the requirements of this rule or with applicable orders entered by the Court related to motions or proceedings on summary judgment, or should it appear that affidavits are presented in bad faith or for purposes of delay, the court may continue the hearing and, after notice and a reasonable time to respond, may impose costs, attorney's fees and sanctions against a party, the party's attorney, or both. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009; amended December 27, 2010, effective January 1, 2011.)

#### STATUTORY NOTES

**Advisory Committee Notes:** If depositions or discovery responses are to be used in summary judgment proceedings, and if an order has not previously been entered allowing the filing of such discovery, *see* LBR 7005.1, the pertinent portions of such depositions or discovery responses (i.e., the portions

specifically cited to by the moving party in its statement of asserted undisputed facts, or by the opposing party in its statement of disputed and undisputed facts) should be attached to appropriate affidavits or declarations submitted in accordance with 28 U.S.C. § 1746.

#### **Rule 7067.1. Deposits (Registry Fund).**

(a) Whenever a party seeks an order for money to be deposited by the clerk in an interest bearing account, the party shall prepare a form of order in accord with the following.

(b) The following form of standard order shall be used for the deposit of registry funds into interest bearing accounts or the investment of such funds in an interest-bearing instrument:

IT IS ORDERED that the clerk invest the amount of \$\_\_\_\_\_ in Court Registry Investment System ("CRIS"), which is administered by the Administrative Office of the United States Courts under 28 USC § 2045, and said funds to remain invested pending further order of the Court.



IT IS FURTHER ORDERED that the Administrative Office of the Courts is authorized and directed by this Order to deduct the investment services fee for the management of investments in the CRIS and the registry fee for maintaining accounts deposited with the Court.

(Adopted January 5, 2006, effective January 1, 2006; amended effective January 1, 2013.)

**Rule 7067.2. Withdrawal of a Deposit.**

(a) **Order of the Court.** Funds may only be withdrawn upon an order of the court. Such order shall specify the amounts to be paid and the names of any person or company to whom the funds are to be paid.

(b) **Application Process.** Any person seeking withdrawal of monies, which were provided to the court under LBR 7067.1 and subsequently deposited into an interest-bearing account or instrument as required shall provide, on a separate paper attached to the motion seeking withdrawal of the funds, the social security number or tax identification number, and the mailing address of the ultimate recipient of the funds. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; amended effective January 1, 2013.)

**Rule 8001.1. Rules Applicable to Bankruptcy Appeals.**

(a) **Rules Applicable to Bankruptcy Appeals.**

(1) **All Appeals.** In addition to rules in Part VIII of the Federal Rules of Bankruptcy Procedure and Third Amended District Court General Order No. 38, LBR 8001.1 applies to all appeals from a judgment, order, or decree of a judge.

(2) **Bankruptcy Appellate Panel (BAP).** For the purposes of these Local Bankruptcy Rules, BAP shall mean the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(b) **Filing of Notice of Appeal.** An appellant shall file the notice of appeal together with the appropriate filing fee with the clerk of the bankruptcy court.

(c) **Form and Time of Consent to the BAP.**

(1) **Consent.** The consent of a party to allow an appeal to be heard and determined by the BAP shall be deemed to have been given unless written objection is filed with the clerk of the bankruptcy court either:

(A) by appellant with the notice of appeal or motion for leave to appeal; or

(B) by any other party within thirty (30) days from the date of service of notice of the appeal.

When an appellant files both a notice of appeal and a motion for leave to appeal, consent will be deemed revoked if an objection to BAP determination is filed with respect to either pleading.

(2) **Effect of Timely Objection.** Upon timely receipt of a written objection to an appeal being heard and determined by the BAP, jurisdic-

tion over the appeal shall be immediately transferred to the district court and the bankruptcy court clerk shall not forward any appeal documents, or any further documents, to the BAP. If the objection is timely, but filed after some of the appeal documents have been transferred to the BAP, the BAP clerk shall promptly return to the bankruptcy court clerk all appellate documents for administration.

(3) **Objection Filed with Notice of Motion.** If a written objection is filed with the notice of appeal or motion for leave to appeal, the bankruptcy court clerk shall not be required to forward any appeal documents to the BAP.

(d) **Transmittal of Record.** When the record is complete for purposes of appeal to either the district court or the BAP, a copy thereof will be transmitted, and the original bankruptcy court record shall remain in the office of the bankruptcy court clerk. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** The clerk will provide parties to an appeal, and to others upon request, copies of Amended General Order No. 38 as amended by General Order No. 113. In the event an appeal is heard by the BAP (*see* LBR 8001.1(c), the BAP rules

shall apply. Pursuant to LBR 1001.1(b) if an appeal is heard by the district court, it may order that the Local Rules of Civil Practice for the United States District Court for the District of Idaho shall apply. (Rev. 12/1/09)

#### Rule 9004.1. Form of Orders.

(a) **Separate Documents.** All orders must be submitted on a document separate from any attendant motion or stipulation.

(b) **Requisite Information.** All orders submitted must identify with specificity the application, motion, or other pleading to which it corresponds, and the court hearing, if any, from which it resulted. The order must also specifically identify the property or interest with which it deals.

(c) **Format.** All orders shall contain the proper case caption.. There shall be no attorney information (name, firm, address, etc.) above the caption. After the text of the order, the end of the text shall be indicated with the phrase “// end of text //”. Below the end of text designation, the submitting attorney shall indicate the name of the attorney(s) submitting the order and who they represent (e.g. order submitted by John Smith, Attorney for Debtor Jane Doe), the name of the party(s) represented, and any endorsements of the order by other parties. If the order is in regard to a Chapter 12 or a Chapter 13 case, other than in regard to an uncontested or stipulated stay relief motion, the order shall contain endorsements of the acting trustee.

(d) **Submission of Proposed Orders.** Proposed orders are to be submitted by e-mail in a format compatible with WordPerfect, unless expressly directed by the court to be submitted in a different format. A certificate of service is not required when submitting a proposed order.

(1) When e-mailing the proposed order in the correct format to the court, all proposed orders must list in the e-mail subject line, the following

items: (1) the case number; (2) judge's initials; (3) the docket number of the motion filed electronically, which is the subject of the proposed order; and (4) a description. (Example: 05-1234\_TLM\_10\_Order\_Dismissing-.wpd)

(2) Proposed orders shall be sent to the appropriate email address shown in the ECF Procedures. [http://www.id.uscourts.gov/docs/ECFProcedures\\_010109.pdf](http://www.id.uscourts.gov/docs/ECFProcedures_010109.pdf). (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised January 1, 2009, effective January 1, 2009; amended December 27, 2010, effective January 1, 2011.)

### STATUTORY NOTES

**Advisory Committee Notes:** Orders must also identify the related application, motion or other pleading. This should be done by reference to the title, date and/or docket number of such pleading.

Attorneys should refer to the current ECF Procedures available on the court's website for further information about the submission of proposed orders.

### **Rule 9010.1. Attorneys.**

#### **(a) Eligibility for Admission.**

(1) Any attorney who has been admitted to practice in the Supreme Court of the State of Idaho (including one admitted to reciprocity) is eligible for admission to the bar of this court. Any attorney admitted to practice before the district court for the District of Idaho is admitted to the bar of the bankruptcy court without further process.

(2) Each applicant for admission shall present to the clerk a written application stating the applicant's residence and office address and by what courts the applicant has been admitted to practice and the respective dates of admission to those courts.

(3) Each applicant for admission shall pay to the clerk the requisite admission fee.

**(b) Practice in this Court.** Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment, or enter satisfactions of judgments, decrees, or orders.

**(c) Attorneys for the United States.** An attorney, not admitted under this rule who is employed or retained by and representing the United States Government or any of its officers or agencies, may practice in this court in all actions and proceedings where the attorney is:

(1) A member in good standing of and eligible to practice before the bar of any United States Court, or of the highest court of any state or insular possession of the United States; and

(2) Who is of good moral character.

Attorneys permitted to practice in this court are subject to the jurisdiction of the court with respect to their conduct to the same extent as members of the bar of this court.



(d) **Admission *Pro Hac Vice*.**

(1) Any member in good standing of the bar of any United States Court, or of the highest court of any state or any territory or insular possession of the United States, who is of good moral character and has been retained to appear in this court, and who is not admitted to the bar of this court, may be permitted, after written application and without previous notice, to appear and participate in a particular case and related proceedings.

(2) The attorney filing *pro hac vice* must (1) designate a member of the bar of this court as co-counsel with the authority to act as attorney of record for all purposes, and (2) file with such designation the address, telephone number, and written consent of such designee. Designated local counsel shall be responsible both for filing the *pro hac vice* application through ECF and for payment of the prescribed fee. The *pro hac vice* application must be presented to the clerk and must state under penalty of perjury: the attorney's residence and office addresses; by what court(s) the attorney has been admitted to practice and the date(s) of admission; that the attorney is in good standing and eligible to practice in said court(s); and, that the attorney is not currently suspended, disbarred or subject to any pending disciplinary proceedings in any other court(s).

(A) Upon the electronic filing of the *pro hac vice* application and payment of fees by designated local counsel in ECF, out-of-state counsel shall immediately register for ECF.

(3) Unless otherwise ordered, the designee shall personally appear with the attorney on all matters heard and tried before the court.

(4) All pleadings filed with the clerk of court must contain the names, addresses and signatures, as prescribed in the ECF Procedures, of the attorney appearing *pro hac vice* and associated local counsel.

(e) **Appearances.**

(1) Only attorneys of this court may make appearances in this court, unless the party appears *in propria persona*. Whenever a party has appeared by an attorney, the party may not thereafter appear or act on their own behalf in the action, or take any steps therein unless a request for substitution or withdrawal, in accordance with this rule shall first have been made by that party and filed with the clerk. The court may, in its discretion, hear a party in open court notwithstanding the party has appeared or is represented by an attorney.

(A) At the discretion of the presiding judge, a legal intern who possesses a limited license issued by the Idaho State Bar may appear before the Bankruptcy Court in the presence of a supervising attorney, who shall be an attorney licensed to practice before this court.

(2) Persons representing themselves without an attorney must appear personally for such purpose and may not delegate that duty to any other person. Any person so represented without an attorney is bound by these Local Rules, the Federal Rules of Bankruptcy Procedure, and by the Federal Rules of Civil Procedure. Failure to comply therewith may be grounds for dismissal or judgment by default. In exceptional circumstances, a judge may modify these provisions to serve the ends of justice.



(3) Whenever a corporation, partnership or other entity desires or is required to make an appearance in this court, only an attorney of the bar of this court or an attorney permitted to practice under these rules shall make the appearance.

(4) In all Oregon cases heard before this court, and in all proceedings related thereto, Oregon counsel not previously admitted to the bar of this court under subdivision (a) of this rule may appear for the debtor(s) or a creditor or party in interest without compliance with the requirements of *pro hac vice* admission as set forth in subdivision (d) of this rule.

(5) For purposes of this rule, an appearance before this court does not include the preparation, signing, and filing by a creditor of:

(A) a proof of claim, or an amendment, withdrawal, or notice of assignment of such proof of claim,

(B) a stipulation for relief from the automatic stay,

(C) a reaffirmation agreement, or

(D) a request for service of documents.

**(f) Substitutions and Withdrawals.**

(1) When an attorney of record for any party ceases to act, that party shall appear in person or appoint another attorney by:

(A) A written substitution of attorney signed by the party, the attorney ceasing to act, and the newly appointed attorney or;

(B) By a written designation filed in the action and served upon the attorney ceasing to act.

(i) If the attorney ceasing to act is deceased, the designation shall so state and service of the designation shall not be required.

(2) No attorney of record for a party may withdraw from representation without leave of the court, upon notice to the client, all parties in interest, and notice and hearing. The withdrawing attorney may utilize this court's negative notice rules, LBR 2002.2(d), or set the matter for hearing. When appropriate, the withdrawing attorney shall submit a proposed order which directs the client to appear in person or appoint another attorney to appear, and to file a written notice with the court stating how the client will be represented within twenty-one (21) days from the date of the order authorizing withdrawal. The order shall also inform the client that no further proceedings will be held in the action that would affect the client's rights within those twenty-one (21) days but failure to appear in the action in person or through newly appointed counsel within that twenty-one (21) day period shall be sufficient grounds for entry of default or dismissal of the action without further notice.

(A) The withdrawing attorney shall continue to represent the client until the court enters and serves the order granting the attorney's motion to withdraw.

(B) Upon entry of the order, the court shall serve copies upon the withdrawing attorney, the former client and all parties entitled to notice under Federal Rule(s) of Bankruptcy Procedure or these rules.

(C) Upon the entry of the order, no further proceedings can be had in the action that will affect the rights of the party represented by the

withdrawing attorney for a period of twenty-one (21) days. If the party fails to appear in the action, either in person or through a newly appointed attorney within such twenty-one (21) day period, such failure shall be sufficient grounds for the entry of default against such party or dismissal of the action without further notice.

[3](4) Anything in this subsection (f) notwithstanding, any incoming debtor's attorney, whether by substitution, by an appearance following an order permitting withdrawal of another attorney or otherwise, shall forthwith give notice of the appearance as attorney of record to all parties in interest and file a proof of service with the court.

[4](5) Upon notice of the death of an attorney or other good cause for termination of an attorney-client relationship, the Court may enter and serve an order consistent with subsection (f)(2).

(g) **Standards of Professional Responsibility.** The members of the bar of this court shall adhere to the Rules of Professional Conduct promulgated and adopted by the Supreme Court of the State of Idaho. These provisions, however, shall not be interpreted to be exhaustive of the standards of professional conduct and responsibility. No attorney permitted to practice before this court shall engage in any conduct that degrades or impugns the integrity of the court or in any manner interferes with the administration of justice therein.

(h) **Attorney Discipline.** Discipline will be governed by the provisions of D. Id. L. Civ. R. 83.5.

(i) **Multiple Counsel.** If more than one attorney represents a party, only one attorney shall examine or cross-examine a single witness and only one attorney shall argue the merits before the court, unless the court otherwise permits. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009; amended December 27, 2010, effective January 1, 2011.)

#### STATUTORY NOTES

**Advisory Committee Notes:** The provision of (e)(4) is meant to continue current practice under which members of the bar of the District of Oregon may appear in those eastern Oregon bankruptcy cases and proceedings administered by this court through agreement with the U.S. Bankruptcy Court

for the District of Oregon. Such counsel need not be admitted to practice *pro hac vice*, but the authority to appear is limited solely to the Oregon case and its related proceedings.

A form of *pro hac vice* application and order can be viewed at [www.id.courts.gov](http://www.id.courts.gov).

#### **Rule 9011.1. Fairness and Civility.**

(a) Litigation, inside and outside the courtroom, in the United States District and Bankruptcy Court for the District of Idaho, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of

categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

(b) Civility in professional conduct is the responsibility of every lawyer, judge, and litigant in the federal system. While lawyers have an obligation to represent clients zealously, incivility to counsel, adverse parties, or other participants in the legal process, undermines the administration of justice and diminishes respect for both the legal process and our system of justice.

(c) The bar, litigants and judiciary, in partnership with each other, have a responsibility to promote civility in the practice of law and the administration of justice. The fundamental principles of civility that will be followed in the Bankruptcy Court for the District of Idaho, both in the written and spoken word, include the following:

(1) Treating each other in a civil, professional, respectful, and courteous manner at all times;

(2) Not engaging in offensive conduct directed towards others or the legal process;

(3) Not bringing the profession into disrepute by making unfounded accusations of impropriety;

(4) Making good faith efforts to resolve by agreement any disputes;

(5) Complying with the discovery rules in a timely and courteous manner, and

(6) Reporting acts of bias or incivility to the Clerk of the Court. The Clerk of the Court will then determine the appropriate judicial officer with whom to discuss the matter. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

### **Rule 9014.1. Witness Testimony at Hearings on Contested Matters.**

If a party intends to present evidence through witnesses at a hearing on a contested matter, such party shall so indicate on the initial or responsive pleadings or, alternatively, shall so indicate in a separate notice filed with the court and served on opposing parties not later than seven (7) days prior to such hearing. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

### **STATUTORY NOTES**

**Advisory Committee Notes:** This Local Rules provides a procedure consistent with Fed. R. Bankr. P. 9014(e). Parties are encouraged to alert the calendar clerk about their

intention to present witness testimony when the hearing is scheduled or when the response to the notice under this Rule is filed.

### **Rule 9015.1. Jury Trials.**

(a) **Applicability of Certain Federal Rules of Civil Procedure.** Fed. R. Civ. P. 38, 39, and 47 through 51, and Fed. R. Civ. P. 81(c) insofar as it applies to jury trials, apply in bankruptcy cases and adversary proceedings,



except that a demand made under Fed. R. Civ. P. Rule 38(b) shall be filed in accordance with Fed R. Bankr. P. 5005.

(b) **Consent to Have Trial Conducted by Bankruptcy Judge.** If the right to a jury trial applies, a timely demand has been filed under Fed. R. Civ. P. 38(b), and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent no later than fourteen (14) days after service of the demand. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007; revised effective December 1, 2009.)

#### STATUTORY NOTES

**Advisory Committee Notes:** This rule provides procedures relating to jury trials. This rule is not intended to expand or create

any right to trial by jury where such right does not otherwise exist.

#### Rule 9024.1. Changes to Judgments or Orders.

When a party seeks to correct a judgment or order of the court due to clerical mistakes and/or errors arising from oversight or omission, the request shall be made by filing a motion with the court. The motion must set forth the proposed changes, either in the motion or by attaching a redlined copy of the judgment or order as an exhibit to the motion. A separate order containing the proposed changes shall be submitted in accord with LBR 9004.1. (Adopted January 5, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

#### STATUTORY NOTES

**Advisory Committee Notes:** Parties sometimes submit a proposed order that would amend a prior order without filing a motion or otherwise alerting the court as to the errors or inaccuracies in the prior order or identifying the need or reason for entering an amended order. The motion required by this rule should clearly identify the prior order (preferably by date and docket number) and specify the proposed changes. This allows the court to examine the proposed modification(s) and evaluate the propriety of entering an amended order. Generally, no hearing would be required if the motion identifies only clerical

errors and parties in interest have received notice, or if affected parties have submitted a stipulation agreeing to the proposed changes or have endorsed the proposed order. However, when an objection is anticipated or filed, the hearing procedures of LBR 2002.2 should be followed.

Note that this rule is directed to motions made under Fed. R. Civ. P. 60(a), made applicable by Fed. R. Bankr. P. 9024. Requests for relief under the provisions of Fed. R. Civ. P. 60(b) are addressed under general motion practice.

#### Rule 9034.1. Transmittal of Documents to United States Trustee.

(a) **Transmittal of Documents.** The following documents shall be transmitted to the Office of the United States Trustee:

(1) **Cases.** Any document filed in cases under chapter 7, 9, 11 and 12 of the Bankruptcy Code, *except* proofs of claim, and *except* petitions and



accompanying materials that are included in the initial filing with the bankruptcy court.

(A) Copies of applications for approval of employment, or for allowance of interim or final compensation of professionals, together with all supporting affidavits, exhibits or other documents, shall be transmitted to the office of the United States Trustee at the time of filing.

(B) Copies of attorney's fees disclosure statements required under Fed. R. Bankr. P. 2016(b).

**(2) Adversary Proceedings.**

(A) Any document filed in any adversary proceeding related to a case under chapter 9 or 11, if such document is required to be filed with the bankruptcy court;

(B) Any document filed in any adversary proceeding objecting to discharge under 11 U.S.C. § 727; or

(C) Any document filed in any adversary proceeding where a bankruptcy trustee is named as a party defendant.

(b) **Manner of Transmittal.** All such documents which are filed with the bankruptcy court and which must be transmitted in accordance with this rule shall be accompanied by proof of such transmittal to the United States Trustee by ECF Procedures at [ustp.region18.bs.ecf@usdoj.gov](mailto:ustp.region18.bs.ecf@usdoj.gov) or by first class mail at the following address:

Office of the U.S. Trustee  
Washington Group Central Plaza  
720 Park Blvd, Ste 220  
Boise, ID 83712

(c) **Noncompliance.** The United States Trustee has exclusive standing to object to noncompliance with any provision of this rule, with the exception of transmittal of those items specifically enumerated in Fed R. Bankr. P. 9034 (Adopted January 6, 2006, effective January 1, 2006; revised January 2, 2007, effective January 1, 2007.)

**Rule 9037.1. Privacy Protection for Filings Made With the Court.**

(a) It is the sole responsibility of counsel and the parties to be sure that the redaction of personal identifiers pursuant to Fed. R. Bankr. P. 9037 is completed. The clerk will not review filings for redaction.

(b) A party wishing to file a document containing the personal data identifiers listed in Fed. R. Bankr. P. 9037 may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the court record is critical to the case. The document must contain the following heading in the document, "SEALED DOCUMENT PURSUANT TO FED. R. BANKR. P. 9037". This document shall be retained by the court as part of the record until further order of the court. The party must also electronically file a redacted copy of this document for the official record. (Adopted January 2, 2007, effective January 1, 2007; amended January 1, 2008, effective January 1, 2008.)

## STATUTORY NOTES

**Advisory Committee Notes:** The Judicial Conference policy on redaction of personal identifiers listed in Fed. R. Bankr. P. 9037, also requires Counsel to redact information contained in transcripts filed with the Court. Counsel should follow the transcript redaction procedures outlined on the Court's web site. <http://www.id.uscourts.gov/CourtReporter/Transcripts.pdf>.

In addition to the privacy items listed in Fed. R. Bankr. P. 9037, the Judicial Conference policy requires that the court not provide public access to the following documents: juvenile records; ex parte requests for expert or investigative services at court expense; and sealed documents.

Counsel should exercise caution when filing documents that contain the following:

- (1) Personal identification number, such as driver's license number;
- (2) Medical records, treatment and diagnosis;
- (3) Employment history;
- (4) Individual financial information;
- (5) Proprietary or trade secret information;
- (6) Information regarding an individual's cooperation with the government;
- (7) Information regarding the victim of any criminal activity;
- (8) National security information;
- (9) Sensitive security information as described in 49 U.S.C. § 114(s).

Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made.

## APPENDIX I. GUIDELINES REGARDING MOTIONS TO USE CASH COLLATERAL OR TO OBTAIN CREDIT, OR STIPULATIONS REGARDING THE SAME

The following guidelines apply to motions or agreements to use cash collateral or obtain postpetition credit or financing. LBR 4001.1(a)(9), (b)(7) and (c), require that both interim and final motions contain a statement of whether or not the motion proposes to grant, or whether the agreement of the parties includes, any provision contained in subsection (b) of these guidelines, and, if so, that the provision be clearly identified.

(a) **Provisions Normally Approved.** The court will normally approve, or may require, inclusion of the following provisions:

(1) Withdrawal of consent to use cash collateral or termination of further financing, upon occurrence of a default or conversion to chapter 7;

(1) [(2)] Securing any postpetition diminution in the value of the secured party's collateral with a lien on postpetition collateral of the same type as the secured party had prepetition;

(3) Reservation of rights under § 507(b), unless that provision also calls for modification pursuant to § 726(b);

(4) Reasonable financial and other appropriate reporting requirements;

(5) Reasonable requirements for proof of insurance;

(6) Reasonable requirements for access to property for inspection appraisal;

(7) Reasonable budgets and use restrictions; and

(8) Expiration date for the order.

(b) **Other Provisions.** The following provisions are approved, rarely, if ever, on an interim basis. Approval following final hearing is dependent on adequate notice and cause having been shown. Inclusion of any of these provisions will be scrutinized by the court even in the absence of an objection by a party in interest.

(1) Cross-collateralization clauses that secure prepetition debt by postpetition assets in which the secured party would not otherwise have a security interest by virtue of its prepetition security agreement.

(2) Provisions or findings of fact that bind the estate or all parties in interest, other than the debtor with respect to the validity, perfection or amount of the secured party's lien or debt.

(3) Provisions or findings of fact that bind the estate or all parties in interest, other than the debtor, with respect to the relative priorities of the secured party's lien and liens held by persons who are not party to the agreement.

(4) Provisions securing new advances or value diminution with a lien on postpetition collateral not the same type that the secured party had prepetition.

(5) Provisions that prime the liens and/or security interests of secured creditors who are not parties to the agreement, unless consented to by the affected creditor.

(6) Provisions that waive Bankruptcy Code § 506(c) except to the extent effective only during the period in which the debtor in possession or trustee is authorized to use cash collateral or obtain credit.

(7) Provisions that preclude a future trustee with a duty to care for, preserve, and/or liquidate collateral from recovering the expenses of administration.

(8) Provisions that characterize any postpetition payments as payments of interest, fees, or costs on prepetition obligations.

(9) Provisions that operate specifically or as a practical matter to divest the debtor, or any other party in interest, of any discretion in the formulation of a plan or administration of the estate, or limit access to the court to seek any relief under applicable provisions of law.

(10) Releases of liability for the creditor's prepetition torts, breaches of contract, or lender liability, as well as releases of prepetition or postpetition defenses and/or counterclaims.

(11) Provisions that waive causes of action.

(12) Provisions granting a security interest or lien in causes of action or recoveries arising under the Bankruptcy Code.

(13) Relief from the automatic stay of Bankruptcy Code § 362(a) upon default, conversion to chapter 7, or the appointment of a trustee, without notice.

(14) Provisions that waive the right to move for a court order under Bankruptcy Code § 363(c)(2)(B) or § 364(c) and (d) authorizing the use of cash collateral in the absence of the secured party's consent.

(15) Provisions that carve out administrative expenses that do not treat all such expenses equally or on a pro rata basis.

(16) Provisions that create an unreasonably short period of limitations for any party in interest (including a successor trustee) to bring claims or causes of action against the lender or secured creditor.

(17) Provisions that waive the procedural requirements for foreclosure or repossession mandated under applicable nonbankruptcy law.



(18) Provisions applicable in the event of a dispute under the order or agreement that place jurisdiction or venue in another court.

(19) Provisions applicable in the event of a dispute or default under the agreement wherein the debtor waives service of process, the doctrine of forum non conveniens, notice and hearing, or the right to a jury trial.

(20) Findings of fact on matters extraneous to the approval process or without testimony or evidence.

## **APPENDIX II MODEL RETENTION AGREEMENT**

### **RIGHTS AND RESPONSIBILITIES AGREEMENT BETWEEN CHAPTER 13 DEBTORS AND THEIR ATTORNEYS**

#### **UNITED STATES BANKRUPTCY COURT DISTRICT OF IDAHO**

Chapter 13 gives debtors important rights, such as the right to keep property that could otherwise be lost through repossession or foreclosure – but Chapter 13 also puts burdens on debtors, such as the burden of making complete and truthful disclosures of their financial situation. It is important for debtors who file a Chapter 13 bankruptcy case to understand their rights and responsibilities in bankruptcy. In this connection, the advice of an attorney is crucial. Debtors are entitled to expect certain services will be performed by their attorneys, but debtors also have responsibilities to their attorneys. In order to assure that debtors and their attorneys understand their rights and responsibilities in the Chapter 13 process, the Bankruptcy Court for the District of Idaho has approved the following agreement, setting out the rights and responsibilities of both debtors in Chapter 13 and their attorneys. By signing this agreement, debtors and their attorney accept these responsibilities.

#### **I. BEFORE THE CASE IS FILED**

##### **A. THE DEBTOR AGREES TO:**

1. Discuss with the attorney the debtor's objectives in filing the case.
2. Provide the attorney with full, accurate and timely information, financial and otherwise, including properly documented proof of income.

##### **B. THE ATTORNEY AGREES TO:**

1. Personally counsel the debtor regarding the advisability of filing either a Chapter 13 or a Chapter 7 case, discuss both procedures (as well as non-bankruptcy options) with the debtor, and answer the debtor's questions.
2. Personally explain to the debtor that the attorney is being engaged to represent the debtor on all matters arising in this case, as required by Local Bankruptcy Rule and explain how and when the attorney's fees and the trustee's fees are determined and paid.
3. Review with the debtor and sign the completed petition, plan, statements, and schedules, as well as all amendments thereto, whether filed with the petition or later.



4. Timely prepare and file the debtor's petition, plan, statements, and schedules.

5. Explain to the debtor how, when, and where to make all necessary payments, including both payments that must be made directly to creditors and payments that must be made to the Chapter 13 trustee, with particular attention to housing and vehicle payments.

6. Advise the debtor of the need to maintain appropriate insurance.

## **II. AFTER THE CASE IS FILED**

### **A. THE DEBTOR AGREES TO:**

1. Make the required payments to the trustee and to whatever creditors are being paid directly, or, if required payments cannot be made, to notify the attorney immediately.

2. Appear at the meeting of creditors (also called the "§ 341(a) meeting") with recent proof of income, picture identification, and proof of the debtor's social security number, and any other required information.

3. Notify the attorney and the trustee of any change in the debtor's address or telephone number.

4. Inform the attorney of any wage garnishment, levies, liens or repossessions of or on assets that occur or continue after the filing of the case.

5. Contact the attorney immediately if the debtor loses employment, has a significant change in income, or experiences any other significant change in financial situation (such as serious illness, lottery winnings, or an inheritance.)

6. Notify the attorney if the debtor is sued or wishes to file a lawsuit (including divorce.)

7. Provide the attorney and the trustee with copies of income tax returns, and provide the trustee with any refunds received, as required by the Court's Income Tax Order. Inform the attorney if any tax refunds to which the debtor is entitled are seized or not received when due from the IRS, the State of Idaho, or other entities.

8. Contact the attorney before buying, refinancing or selling any property, real or personal, and before entering into any loan agreement.

9. Cooperate with the attorney and the trustee in regard to questions about the allowance or disallowance of claims.

### **B. THE ATTORNEY AGREES TO:**

1. Advise the debtor of the requirement to attend the meeting of creditors, and notify the debtor of the date, time, and place of that meeting.

2. Inform the debtor that the debtor must be punctual and, in the case of a joint filing, that both spouses must appear at the same meeting.

3. Provide knowledgeable legal representation for the debtor at the § 341(a) meeting of creditors and at any motion hearing, plan confirmation hearing, and/or plan modification hearing.

4. If the attorney finds it necessary for another attorney to appear and attend the § 341(a) meeting or any court hearing, personally explain to the debtor, in advance, the role and identity of the other attorney and provide the other attorney with the file in sufficient time to review it and properly represent the debtor.

5. Ensure timely submission to the trustee of properly documented proof of income for the debtor, including business reports for self-employed debtors.

6. Timely respond to objections to plan confirmation and, where necessary, prepare, file, and serve an amended plan.

7. Timely prepare, file, and serve any necessary amended statements and schedules and any change of address, in accordance with information provided by the debtor.

8. Be available to respond to the debtor's questions throughout the term of the plan.

9. Prepare, file, and serve timely modifications to the plan after confirmation, when necessary, including modifications to suspend, lower, or increase plan payments.

10. Prepare, file, and serve necessary motions to buy or sell property and to incur debt.

11. Evaluate claims which are filed and, where appropriate, object to filed claims.

12. Timely respond to the trustee's motion to dismiss the case, such as for payment default, or unfeasibility, and to motions to increase the payments into the plan.

13. Timely respond to motions for relief from stay.

14. Prepare, file, and serve all appropriate motions to avoid liens, if not included in the plan.

15. Provide any other legal services necessary for the administration of this case before the bankruptcy court.

#### ALLOWANCE AND PAYMENT OF ATTORNEYS' FEES

Any attorney retained to represent a debtor in a Chapter 13 case is responsible for representing the debtor on all matters arising in the case, unless otherwise ordered by the court. For such services, as set forth above, the attorney will be paid a fixed fee of \$ \_\_\_\_\_ (exclusive of court filing fees).

In extraordinary circumstances, the attorney may apply to the court for additional compensation. Any such application must be accompanied by an affidavit of the attorney, and include an itemization of the services rendered, showing the date, the time expended, the identity of the attorney or other person performing the services, the rate(s) charged, and the total amount sought. Such an application must be set for a hearing before the court. The debtor must be served with a copy of the application, affidavit, and notice of hearing, and advised of the right to appear in court to comment on or object to such application. The debtor is hereby informed that, in the event of such

a request, fees shall be calculated or claimed at the following rate(s):

\_\_\_\_\_.

The attorney may receive some portion of the described fixed fee before the filing of the case. The attorney may not receive payment on the fee directly from the debtor after the filing of the case, but must receive any remaining portion of such fee through the plan. In addition to other disclosures required by the Rules, the attorney shall disclose, in any application for additional fees, any and all fees previously paid by the debtor.

If the debtor disputes the sufficiency or quality of the legal services provided or the amount of the fees charged by the attorney, including this fixed fee, the debtor may file an objection with the court and request a hearing.

If the attorney believes that the debtor is not complying with the debtor’s responsibilities under this agreement or is otherwise not engaging in proper conduct, the attorney may apply for an order allowing the attorney to withdraw from the case.

The debtor may discharge the attorney at any time.

/s/ _____	Date: _____
Debtor	
/s/ _____	Date: _____
Joint Debtor (if applicable)	
/s/ _____	Date: _____
Attorney for Debtor(s)	

**APPENDIX III. INTERIM BANKRUPTCY RULES**

**UNITED STATES DISTRICT AND BANKRUPTCY COURT  
DISTRICT OF IDAHO**

	)	
	)	
Order Rescinding General	)	
Orders 199, 200 and 211	)	
Regarding Adoption of	)	General Order 226
Federal Interim Rules of	)	
Bankruptcy Procedure	)	
	)	
	)	
	)	
	)	
_____	)	

Based on the recommendation of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the District of Idaho adopted Interim Bankruptcy Rules in order to uniformly implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. See General Orders 199, 200 and 211. These rules were adopted effective October 17, 2005 and October 1, 2006.

As of December 1, 2008, the Interim Rules have been incorporated into the Federal Rules of Bankruptcy Procedure.

THEREFORE, General Orders 199, 200, and 211 are rescinded effective December 1, 2008.

DATED this 1st day of December, 2008

B. Lynn Winmill  
Chief District Judge

Terry L. Myers  
Chief Bankruptcy Judge

UNITED STATES DISTRICT AND BANKRUPTCY COURT  
DISTRICT OF IDAHO

# Adoption of Federal Interim Rule of Bankruptcy Procedure 1007-1

) ) ) ) ) ) ) ) ) )

## General Order 229

Whereas, the Advisory Committee on Bankruptcy Rules requested approval of Interim Rule 1007-I and an amendment to Official Form 22A to implement the *National Guard and Reservists Debt Relief Act of 2008*, Pub. L. No. 110-438, and,

Whereas, acting on behalf of the Judicial Conference, the Executive Committee approved revision of Form 22A and transmission of the Interim Rule to the district courts with a recommendation that it be adopted through a local rule or standing order;

IT IS HEREBY ORDERED that, pursuant to 28 U.S.C. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, attached Interim Rule 1007-I, as recommended by the Executive Committee of the Judicial Conference of the United States, is adopted in its entirety without change by the judges of the U.S. District and Bankruptcy Court for the District of Idaho, to be effective December 19, 2008 and to apply to cases commenced in the three-year period beginning December 19, 2008.

DATED this 16th day of December, 2008

B. Lynn Winmill  
Chief District Judge

Terry L. Myers  
Chief Bankruptcy Judge



**Rule 1007-I. Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion.**

**(a) List of Creditors and Equity Security Holders, and Corporate Ownership Statement.**

\* \* \* \* \*

(4) **Chapter 15 Case.** Unless the court orders otherwise, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition a list containing the name and address of all administrators in foreign proceedings of the debtor, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code.

(5) **Extension of Time.** Any extension of time for the filing of lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under § 705 or appointed under § 1102 of the Code, or other party as the court may direct.

**(b) Schedules, Statements, and Other Documents Required.**

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:

(A) schedules of assets and liabilities;

(B) a schedule of current income and expenditures;

(C) a schedule of executory contracts and unexpired leases;

(D) a statement of financial affairs;

(E) copies of all payment advices or other evidence of payment, if any, with all but the last four digits of the debtor's social security number redacted, received by the debtor from an employer within 60 days before the filing of the petition; and

(F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(3) Unless the United States trustee has determined that the credit counseling requirement of § 109(h) does not apply in the district, an individual debtor must file a statement of compliance with the credit counseling requirement, prepared as prescribed by the appropriate Official Form which must include one of the following:

(A) an attached certificate and debt repayment plan, if any, required by § 521(b);

(B) a statement that the debtor has received the credit counseling briefing required by § 109(h)(1) but does not have the certificate required by § 521(b);

(C) a certification under § 109(h)(3); or

(D) a request for a determination by the court under § 109(h)(4).

\* \* \* \* \*

(4) Unless either: (A) § 707(b)(2)(D)(i) applies, or (B) § 707(b)(2)(D)(ii) applies and the exclusion from means testing granted therein extends beyond the period specified by Rule 1017(e), an individual debtor in a chapter 7 case with primarily consumer debts shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the debtor has current monthly income greater than the applicable median family income for the applicable state and household size, the calculations in accordance with § 707(b), prepared as prescribed by the appropriate Official Form.

(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.

(6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the debtor has current monthly income greater than the median family income for the applicable state and family size, a calculation of disposable income in accordance with § 1325(b)(3), prepared as prescribed by the appropriate Official Form.

(7) An individual debtor in a chapter 7 or chapter 13 case shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form.

(8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under § 522(b)(3)(A) in an amount in excess of the amount set out in § 522(q)(1) in property of the kind described in § 522(p)(1), the debtor shall file a statement as to whether there is pending a proceeding in which the debtor may be found guilty of a felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B).

(c) **Time Limits.** In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), (h) and (n) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 15 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, if the debtor has filed a statement under subdivision (b)(3)(B), the documents required by subdivision (b)(3)(A) shall be filed within 15 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision

(b)(7) within 45 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1328(b). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time for the filing of the schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

\* \* \* \* \*

**(n) Time Limits for, and Notice to, Debtors Temporarily Excluded from Means Testing.**

(1) An individual debtor who is temporarily excluded from means testing pursuant to § 707(b)(2)(D)(ii) of the Code shall file any statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of the temporary exclusion if the expiration occurs within the time specified by Rule 1017(e) for filing a motion pursuant to § 707(b)(2).

(2) If the temporary exclusion from means testing under § 707(b)(2)(D)(ii) terminates due to the circumstances specified in subdivision (n)(1), and if the debtor has not previously filed a statement and calculations required by subdivision (b)(4), the clerk shall promptly notify the debtor that the required statement and calculations must be filed within the time specified in subdivision (n)(1).

**Committee Note:** This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to

file the statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already

filed the required statement and calculations, prompt notice to the debtor of the time for  
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## Introduction

### COURT STRUCTURE AND PROCEDURES

#### A. Physical Facilities

The headquarters of the Court are located at 95 Seventh Street, San Francisco, California 94103. The mailing address is P.O. Box 193939, San Francisco, California 94119-3939, and the telephone number is (415) 355-8000. There are divisional clerk's offices in Pasadena, Seattle and Portland.

#### B. Emergency Telephone Number

The Clerk's Office provides 24-hour telephone service for calls placed to the main Clerk's Office number, (415) 355-8000. Messages left at times other than regular office hours are recorded and monitored on a regular basis by staff attorneys.

The emergency telephone service is to be used only for matters of extreme urgency that must be handled by the Court before the next business day. Callers should make clear the nature of the emergency and the reason why next-business-day treatment is not sufficient.



### C. Judges and Supporting Personnel

(1) **Judges.** The Court has an authorized complement of 28 judgeships. Upon the attainment of senior status, a judge may continue, within statutory limitations, to function as a member of the Court. There are several senior circuit judges who regularly hear cases before the Court.

Although San Francisco is the Court's headquarters, most of the active and senior judges maintain their residence chambers in other cities within the circuit. The residences and chambers of the Court's judges, including its senior judges, are indicated in the listing of judges within these Rules.

The Court has established three regional administrative units to assist the chief judge of the circuit to discharge his administrative responsibilities. They are the Northern, Middle and Southern units. The senior active judge in each unit is designated the administrative judge of the unit.

- The Northern Unit includes the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington.
- The Middle Unit includes the districts of Arizona, Nevada, Hawaii, Guam, Northern and Eastern California, and the Northern Mariana Islands.
- The Southern Unit includes the districts of Central and Southern California.

Cases arising from the Northern Unit will normally be calendared in Seattle or Portland, from the Middle Unit in San Francisco, and from the Southern Unit in Pasadena. Cases may also be heard in such other places as the Court may designate.

(2) **Appellate Commissioner.** The Appellate Commissioner is an officer appointed by the Court to rule on and to review and make recommendations on a variety of non-dispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act, and to serve as a special master as directed by the Court.

(3) **Clerk's Office.** Office hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, except federal holidays. In addition to the San Francisco office, the Court has permanent, but not full service, Clerk's offices in Seattle, Pasadena, and Portland. Court information, including Court rules, the general orders, calendars and opinions are available on the Court's website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov).

Clerk's office personnel are authorized by Circuit Rule 27-7 to act on certain procedural motions (see Circuit Advisory Committee Note to Rule 27-7, *infra*); are authorized by FRAP 42(b) to handle stipulations for dismissal; and are authorized by Circuit Rule 42-1 to dismiss cases for failure to prosecute.

Inquiries concerning rules and procedures may be directed to the San Francisco, Pasadena, Seattle, or Portland Clerk's office. On matters requiring special handling, counsel may contact the Clerk for information and assistance. It should be emphasized, however, that legal advice will not be given by a judge or any member of the Court staff.



(4) **Office of Staff Attorneys.** The staff attorneys perform a variety of tasks for the Court and work for the entire Court rather than for individual judges.

(a) **Inventory.** After briefing has been completed, the case management attorneys review the briefs and record in each case in order to identify the primary issues raised in the case and to assign a numerical weight to the case reflecting the relative amount of judge time that likely will have to be spent on the matter.

(b) **Research.** The research attorneys review briefs and records, research legal issues, and prepare memorandum dispositions for oral presentation to three-judge panels, in cases that are not calendared for oral argument.

(c) **Motions.** The motions attorneys process all motions, except for procedural motions disposed of by the Clerk, filed in a case prior to assignment of a particular panel for disposition on the merits. The motions attorneys also process emergency motions filed pursuant to Circuit Rules 27-3 and 27-4, and motions for reconsideration of orders filed by motions panels.

(5) **Circuit Court Mediators.** Shortly after a new case is docketed, the Circuit Court Mediators will review the Mediation Questionnaire to determine if a case appears suitable for the Court's settlement program. See Circuit Rules 3-4 and 15-2. The Circuit Court Mediators are permanent members of the Court staff. They are experienced appellate practitioners who have had extensive mediation and negotiation training.

(6) **Library.** The staff of the Ninth Circuit library system serve circuit, district, bankruptcy and magistrate judges, as well as staff of other Court units. Services provided include reference and other information services, acquisition of publications for Court libraries and judges' chambers, organization and maintenance of library collections and management of the Circuit library system. The Ninth Circuit library system, headed by the Circuit Librarian, consists of 21 staffed libraries including the headquarters library and 20 branch libraries located throughout the Circuit. The administrative office and the headquarters library are located in San Francisco.

Court libraries may make their collections available to members of the bar and the general public depending on local Court rules. Hours for the headquarters library in San Francisco are Monday through Friday, 9:00 p.m. to 5:00 p.m. and 8:00 a.m. to 5:00 p.m. during Court week. Information regarding the location and hours of operation for other branch libraries may be obtained by calling the headquarters library reference desk at (415) 355-8650.

(7) **Circuit Executive's Office.** The Circuit Executive's office is the arm of the Circuit's Judicial Council that provides administrative support to appellate, district and bankruptcy judges in the circuit.

#### **D. The Judicial Council**

The Judicial Council, established pursuant to 28 U.S.C. § 332, is currently composed of the Chief Judge, four circuit judges, and four district judges.

## IDAHO COURT RULES

The Council convenes regularly to consider and take required action upon any matter affecting the administration of its own work and that of all federal courts within the circuit, including the consideration of some complaints of judicial misconduct.

### **E. Court Procedures for Processing and Hearing of Cases**

(1) **Classification of Cases.** After the briefing is completed, the case management attorneys inventory cases in order to weigh them by type, issue, and difficulty. The weight of a case is merely an indication of the relative amount of judicial time that will probably be consumed in disposing of the case. The inventory process enables the Court to balance judges' workloads and hear at a single sitting unrelated appeals involving similar legal issues.

(2) **Designation of Court Calendars.** Under the direction of the Court, the Clerk sets the time and place of court calendars, taking into account, for at least six months in advance, the availability of judges, the number of cases to be calendared, and the places of hearing required or contemplated by statute or policy. The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the workload among the judges. At the time of assigning judges to panels, the Clerk does not know which cases ultimately will be allocated to each of the panels.

(3) **Disclosure of Judges on Panels.** The names of the judges on each panel are released to the general public on the Monday of the week preceding argument. At that time, the calendar of cases scheduled for hearing is posted in the San Francisco, Pasadena, Seattle, and Portland offices of the Clerk of Court and is forwarded for posting to the clerks of the district courts within the circuit. This provision permits the parties to prepare for oral argument before particular judges. Once the calendar is made public, motions for continuances will rarely be granted.

(4) **Allocation of Cases to Calendars.** Direct criminal appeals receive preference pursuant to FRAP 45(b)(2) and are placed on the first available calendar after briefing is completed. Many other cases are accorded priority by statute or rule. *See* Circuit Rule 34-3. Their place on the court's calendar is a function of both the statutory priority and the length of time the cases have been pending. Pursuant to FRAP 2, the Court also may in its discretion order that any individual case receive expedited treatment.

The Court makes every effort to ensure that calendars are prepared objectively and that no case is given unwarranted preference. The only exception to the rule of random assignment of cases to panels is that a case heard by the Court on a prior appeal may be set before the same panel upon a later appeal. If the panel that originally heard the matter does not specify its intent to retain jurisdiction over any further appeal, the parties may file a motion to have the case heard by the original panel. Matters on remand from the United States Supreme Court are referred to the panel that previously heard the matter.

## U.S. COURT OF APPEALS FOR NINTH CIRCUIT

Normally, court calendars are held each year in the following places:

- 12 in San Francisco (usually the second week of each month),
- 12 in Pasadena (usually the first week of each month),
- 12 in Seattle (usually the first week of each month),
- 6 in Portland,
- 3 in Honolulu; and
- 1 in Anchorage.

Each court calendar usually consists of one week of multiple sittings.

(5) **Selection of Panels.** The Clerk of Court sets the time and place of the calendars. The Clerk utilizes a matrix composed of all active judges and those senior judges who have indicated their availability. The aim is to enable each active judge to sit with every other active and senior judge approximately the same number of times over a two-year period and to assign active judges an equal number of times to each of the locations at which the Court holds hearings.

At present, all panels are composed of no fewer than two members of the Court, at least one of whom is an active judge. Every year, each active judge, except the Chief Judge, is expected to sit on 32 days of oral argument calendars; one oral screening panel; one motions panel; and one certificate of appealability panel. Senior judges are given a choice as to how many cases they desire to hear.

The Court on occasion calls upon district judges to sit on panels when there are insufficient circuit judges to constitute a panel. It is Court policy that district judges not participate in the disposition of appeals from their own districts. In addition, the Court attempts to avoid assigning district judges to appeals of cases over which other judges from their district have presided (either on motions or at trial) as visiting judges in other districts.

All active judges and some senior judges serve on a motions panel, whose membership changes monthly. The identity of the motions panel is posted on the first day of the month on the Court's website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Calendar > Motions Panel*.

(6) **Pre-Argument Preparation.** After the cases have been allocated to the panels, the briefs and excerpts of record in each case are distributed to each of the judges scheduled to hear the case. The documents are usually received in the judges' chambers six weeks prior to the scheduled time for hearing, and it is the policy of the Court that each judge read all of the briefs prior to oral argument.

(7) **Oral Argument.** The Clerk sends a master calendar notice to all counsel of record about five weeks prior to the date of oral argument. If counsel finds it impossible to meet the assigned hearing date, a motion for continuance should be filed immediately. Delay in submitting such a motion will militate against the Court's granting the relief requested.



Once the identity of the judges are announced, motions for continuance will rarely be granted.

Counsel should inform the Court promptly if the case has become moot, settlement discussions are pending, or relevant precedent has been decided since the briefs were filed.

The Location of Hearing Notice indicates how much time will be allotted to each side for oral argument. If oral argument is allowed, the amount of time, which is within the Court's discretion, generally ranges between 10 and 20 minutes per side. If counsel wishes more time, a motion to that effect must be filed as soon as possible after the notice is received.

Daily court calendars usually commence at 9:00 a.m., Monday through Friday. Counsel are expected to check in with the courtroom deputy at least 30 minutes prior to the start of the calendar. Arguments are digitally recorded for the use of the Court, and the recording does not represent an official record of the proceedings. The recording may be accessed the day following argument via the Court's website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Audio Recordings*. Members of the public may also request a tape recording of the proceedings.

(8) **Case Conferences.** At the conclusion of each day's argument, the judges on each panel confer on the cases they have heard. Each judge expresses his or her tentative views and votes in reverse order of seniority. The judges reach a tentative decision regarding the disposition of each case and whether it should be in the form of a published opinion. The presiding judge then assigns each case to a judge for the preparation and submission of a disposition.

### Rule 1-1. Title.

The rules of the United States Court of Appeals for the Ninth Circuit are to be known as Circuit Rules. (rev. 7-5)

## JUDICIAL DECISIONS

**This Rule cannot incorporate Federal Rules of Civil Procedure, Rule 11 by reference;** accordingly, Rule 11 sanctions may no longer be imposed in this circuit on appeal. *Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991).

### Rule 1-2. Scope of Circuit Rules.

In cases where the Federal Rules of Appellate Procedure (FRAP) and the Rules of the United States Court of Appeals for the Ninth Circuit (Circuit Rules) are silent as to a particular matter of appellate practice, any relevant rule of the Supreme Court of the United States shall be applied.

### Rule 3-1. Filing the Appeal.

In appeals from the district court, appellant's counsel shall simultaneously submit to the clerk of the district court the notice of appeal, the filing fee, and the appellate docket fee. In appeals from the bankruptcy appellate panel and the Tax Court, the notice of appeal and fees shall be submitted to



the Clerk of the court from which the appeal is taken. Petitions for review and applications to enforce federal agency orders, and fees for those petitions and applications, shall be submitted to the Clerk of the Court of Appeals. If the fees are not paid promptly, the Court of Appeals Clerk will dismiss the case after transmitting a warning notice.

The above rules are subject to several exceptions. The docket fee need not be paid upon filing the notice of appeal when: (a) the district court or this Court has granted in forma pauperis or Criminal Justice Act status; (b) an application for in forma pauperis relief or for a certificate of appealability is pending; or (c) the appellant, e.g., the Government, is exempt by statute from paying the fee. Counsel shall advise the Clerk at the time the notice of appeal is filed if one of these conditions exists. (*See* FRAP 24 regarding appeals in forma pauperis.) If a party has filed a petition for permission to appeal pursuant to FRAP 5, the filing fee and docket fee will become due in the district court upon an order of this Court granting permission to appeal. A notice of appeal need not be filed. (*See* FRAP 5.) (Amended effective December 1, 2009.)

### **Rule 3-2. Representation Statement.**

(a) No FRAP 12(b) Representation Statement is required in: (1) criminal cases; (2) appeals arising from actions filed pursuant to 28 U. S. C. §§ 2241, 2254, and 2255; and (3) appeals filed by pro se appellants.

(b) In all other cases, a party filing an appeal shall attach to the notice a Representation Statement that identifies all parties to the action along with the names, addresses and telephone numbers of their respective counsel, if any. (Rev. 7/94)

### **STATUTORY NOTES**

**Cross References.** FRAP 12(b), Filing a Representation Statement.

### **Rule 3-3. Preliminary Injunction Appeals.**

(a) Every notice of appeal from an interlocutory order (i) granting, continuing, modifying, refusing or dissolving a preliminary injunction or (ii) refusing to dissolve or modify a preliminary injunction shall bear the caption “PRELIMINARY INJUNCTION APPEAL.” Immediately upon filing, the notice of appeal must be transmitted by the district court clerk’s office to the Court of Appeals clerk’s office.

(b) Within 7 days of filing a notice of appeal from an order specified in subparagraph (a), the parties shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties desire to be included in the record on appeal. Within 28 days of the docketing in the district court of a notice of appeal from an order specified in subparagraph (a), the appellant shall file an opening brief and excerpts of record. Appellee’s brief and any supplemental excerpts of record shall be filed within 28 days of service of

appellant's opening brief. Appellant may file a brief in reply to appellee's brief within 14 days of service of appellee's brief. (Rev. 12-1-02)

(c) If a party files a motion to expedite the appeal or a motion to grant or stay the injunction pending appeal, the Court, in resolving those motions, may order a schedule for briefing that differs from that described above. (Amended effective July 1, 2006; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 8, Stay or Injunction Pending Appeal; Circuit Rule 27-2, Motions for Stays Pending Appeal; Circuit Rule 27-3, Emergency and Urgent Motions; FRAP 10, The Record on Appeal; Circuit Rule

10-2, Contents of the Record on Appeal; Circuit Rule 10-3, Ordering the Reporter's Transcript; Circuit Rule 30-1, The Excerpts of Record; FRAP 34, Oral Argument; Circuit Rule 34-3, Priority Cases.

#### Rule 3-4. Mediation Questionnaire.

(a) The Court encourages the parties in Ninth Circuit civil appeals to engage in mediation. To that end, except as provided in section (b) below, within 7 days of the docketing of a civil appeal, the appellant(s) shall, and the appellee(s) may, complete and submit the Ninth Circuit Mediation Questionnaire. The Clerk shall transmit the Mediation Questionnaire to counsel with the time scheduling order. Counsel shall return it according to the instructions contained in the Mediation Questionnaire. The sole purpose of the Mediation Questionnaire is to provide information about new appeals to the Court's Mediation Office.

Appellant's failure to comply with this rule may result in dismissal of the appeal in accordance with Circuit Rule 42-1.

(b) The requirement for filing a Mediation Questionnaire shall not apply to:

- (1) an appeal in which the appellant is proceeding without the assistance of counsel;
- (2) an appeal from an action filed under 28 U.S.C. §§ 2241, 2254, 2255; and,
- (3) petitions for a writ under 28 U.S.C. § 1651. (Adopted effective December 1, 2009.)

**Compiler's notes.** Prior to the 2009 adoption of the current version of this rule, the

heading read "Civil Appeals Docketing Statement."

#### STATUTORY NOTES

**Cross References.** Circuit Rule 15-2, Mediation Questionnaire in Agency Cases; FRAP

33, Appeal Conferences; Circuit Rule 33-1, Mediation Office — Appeal Conferences.

#### Rule 3-5. Procedure for Recalcitrant Witness Appeals.

Every notice of appeal from an order holding a witness in contempt and directing incarceration under 28 U.S.C. §1826 shall bear the caption "RECALCITRANT WITNESS APPEAL." Immediately upon filing, the notice of appeal must be transmitted by the district court clerk's office to the

Court of Appeals clerk's office. It shall also be the responsibility of the appellant to notify directly the motions unit of the Court of Appeals that such a notice of appeal has been filed in the district court. Such notification must be given by telephone (415/355-8000) within 24 hours of the filing of the notice of appeal.

A failure to provide such notice may result in sanctions against counsel imposed by the Court. (Adopted effective July 1, 1997; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 27, Motions; Circuit Rule 27-1, Filing of Motions; Circuit Rule 27-10, Motions for Reconsideration; Circuit Rule 27-13, Sealed Documents; Motions to Seal; Circuit Rule 10-1, Notice of Filing Appeal; Circuit Rule 25-1, Principal Office of Clerk.

**Circuit Advisory Committee Note to Rule 3-5.** A recalcitrant witness summarily ordered confined pursuant to 28 U.S.C. § 1826(a) is entitled to have the appeal from the order of confinement decided within 30 days after the filing of the notice of appeal. In the interest of obtaining a rapid disposition of the appeal, the Court impresses upon counsel that the record on appeal and briefs must be

filed with the Court as soon as possible after the notice of appeal is filed. The Court will establish an expedited schedule for filing the record and briefs and will submit the appeal for decision on an expedited basis. If expedited treatment is sought for an interlocutory appeal, motions for expedition, summary affirmation or reversal, or dismissal may be filed pursuant to Circuit Rule 27-4. A party may file documents using a Doe designation or under seal to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. The party should file an accompanying motion to use such a designation. (Rev. 12/1/09)

#### **Rule 3-6. Summary Disposition of Civil Appeals.**

At any time prior to the completion of briefing in a civil appeal if the Court determines:

(a) that clear error or an intervening court decision or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings; or

(b) that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the Court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order.

At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the Court may issue an order dismissing the appeal without notice or further proceedings. (Eff. 7/95)

#### **Rule 4-1. Counsel in Criminal Appeals.**

This rule applies to appeals in categories of cases listed in 18 U.S.C. § 3006A.

(a) **Continuity of Representation on Appeal.** Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the



defendant pro se in accordance with this rule. If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, counsel's appointment automatically shall continue on appeal.

(b) **Application for Indigent Status on Appeal.** A person for whom counsel was appointed by the district court under section 3006A of the Criminal Justice Act may appeal to this Court without prepayment of fees and costs or security therefor and without filing the affidavit required by 28 U.S.C. § 1915(a).

If the district court did not appoint counsel, but the defendant or petitioner appears to qualify for appointment of counsel on appeal, retained counsel, or the defendant if the defendant proceeded pro se before the district court, shall file on the client's behalf a financial affidavit (CJA Form 23). If the notice of appeal is filed at the time of sentencing, the motions to proceed on appeal in forma pauperis and for appointment of counsel shall be presented to the district court at that time. If the district court finds that appointment of counsel is warranted, the Court shall appoint the counsel who represented the defendant in district court, a Criminal Justice Act defender, or a panel attorney to represent the defendant or petitioner on appeal. The district court shall require appointed counsel and the court reporter to prepare the appropriate CJA form for preparation of the reporter's transcript. A copy of the order appointing counsel on appeal shall be transmitted forthwith by the Clerk of the district court to the Clerk of this Court. Substitute counsel shall within 14 days of appointment file a notice of appearance in this Court.

If the district court declines to appoint counsel on appeal, and if counsel below believes that the district court erred, counsel shall, within 14 days from the district court's order, file with the Clerk of this Court a motion for appointment of counsel accompanied by a financial affidavit (CJA Form 23).

(c) **Withdrawal of Counsel After Filing the Notice of Appeal.** A motion to withdraw as counsel on appeal after the filing of the notice of appeal, where counsel is retained in a criminal case or appointed under the Criminal Justice Act, shall be filed with the Clerk of this Court within 21 days after the filing of the notice of appeal and shall be accompanied by a statement of reasons and:

(1) A substitution of counsel which indicates that new counsel has been retained to represent defendant; or

(2) A motion by retained counsel for leave to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23);

(3) A motion by appointed counsel to be relieved and for appointment of substitute counsel;

(4) A motion by defendant to proceed pro se; or

(5) An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.



Any motion filed pursuant to this section shall be served on defendant; the proof of service shall include defendant's current address. (Rev. 7/1/06)

(6) Alternatively, if after conscientious review of the record appointed counsel believes the appeal is frivolous, on or before the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and an opening brief that identifies anything in the record that might arguably support the appeal, with citations to the record and applicable legal authority. The motion and brief shall be accompanied by proof of service on defendant. *See Anders v. California*, 386 U.S. 738 (1967), and *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990). The cover of the opening brief shall state that the brief is being filed pursuant to *Anders v. California*. The filing of a motion to withdraw as counsel along with a proposed *Anders* brief serves to vacate the previously established briefing schedule.

To facilitate this Court's independent review of the district court proceedings, counsel shall designate all appropriate reporter's transcripts, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include the transcripts in the excerpts of record. Counsel are advised to consult Circuit Rule 30-1.

When an appointed attorney has properly moved for leave to withdraw pursuant to *Anders* and has included all appropriate reporter's transcripts, this Court will establish a briefing schedule permitting the defendant to file a pro se supplemental opening brief raising any issues that defendant wishes to present. The order will also direct appellee by a date certain either to file its answering brief or notify the Court by letter that no answering brief will be filed. (Added 01/2001)

**(d) Motions for Leave to Proceed Pro Se in Direct Criminal Appeals.** The Court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se the Court finds that appointment of counsel is essential to a just and orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn. (Added 07/2001)

**(e) Post Appeal Proceedings.** If the decision of this Court is adverse to the client, in part or in full, counsel, whether appointed or retained, shall, within 14 days after entry of judgment or denial of a petition for rehearing, advise the client of the right to initiate further review by filing a petition for a writ of certiorari in the United States Supreme Court. *See* Sup. Ct. R. 13, 14. If in counsel's considered judgment there are no grounds for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition, *see* Sup. Ct. R. 10, counsel shall further notify the client that counsel intends to move this Court for leave to withdraw as counsel of record if the client insists on filing a petition in violation of Sup. Ct. R. 10.

In cases in which a defendant who had retained counsel or proceeded pro se in this Court wishes to file a petition for writ of certiorari in the United States Supreme Court or wishes to file an opposition to a certiorari petition, and is financially unable to obtain representation for this purpose, this Court will entertain a motion for appointment of counsel within 21 days from judgment or the denial of rehearing. It is the duty of retained counsel to assist the client in preparing and filing a motion for appointment of counsel and a financial affidavit under this subsection.

If requested to do so by the client, appointed or retained counsel shall petition the Supreme Court for certiorari only if in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review. *See* Sup. Ct. R. 10.

Any motion by appointed or retained counsel to withdraw as counsel of record shall be made within 21 days of judgment or the denial of rehearing and shall state the efforts made by counsel to notify the client. A cursory statement of frivolity is not a sufficient basis for withdrawal. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); Sup. Ct. R. 10. Within this same period, counsel shall serve a copy of any such motion on the client. If relieved by this Court, counsel shall, within 14 days after such motion is granted, notify the client in writing and, if unable to do so, inform this Court.

Unless counsel is relieved of his or her appointment by this Court, counsel's appointment continues through the resolution of certiorari proceedings and includes providing representation when an opposing party files a petition for certiorari.

(f) **Counsel's Claim for Fees and Expenses.** An attorney appointed by the Court shall be compensated for services and reimbursed for expenses reasonably incurred as set forth in the Criminal Justice Act. All vouchers claiming compensation for services rendered in this Court under the Criminal Justice Act shall be submitted to the Clerk of this Court no later than 45 days after the final disposition of the case in this Court or after the filing of a petition for certiorari, whichever is later. Subsequent work on the appeal may be claimed on a supplemental voucher. A voucher for work on a petition for a writ of certiorari must be accompanied by a copy of the petition. If a party wishes interim payment, a request for such relief may be filed.

The Clerk shall refer all vouchers, including those requesting payment in excess of the statutory maximum, to the Appellate Commissioner, for approval of such compensation as the Appellate Commissioner deems reasonable and appropriate under the Criminal Justice Act. If the Appellate Commissioner concludes that an amount less than that requested by the attorney is appropriate, he or she shall communicate to the attorney the basis for reducing the claim. The Appellate Commissioner will offer the attorney an opportunity to respond regarding the propriety and reasonableness of the voucher before approving a reduction in the amount. If the amount requested is reduced, and the attorney seeks reconsideration, the

Appellate Commissioner shall receive and review the request for reconsideration and may grant it in full or in part. If the Appellate Commissioner does not grant a request for reconsideration in full or in part, the request shall be referred to and decided by: (1) the authoring judge on the merits panel if the case was submitted to a merits panel; or (2) the appropriate administrative judge if the case was resolved before submission to a merits panel.

Whenever the Appellate Commissioner certifies payment in excess of the statutory maximum provided by the Criminal Justice Act, the Clerk shall forward the voucher to the appropriate administrative judge for review and approval. (Adopted July 1, 1995; amended January 1, 1999; amended July 1, 2006; amended December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 42, Voluntary Dismissal; FRAP 46(c), Attorneys; 27-9.1, Voluntary Dismissals.

#### **Rule 5-1. Civil Appeals Docketing Statement in Appeals By Permission Under FRAP 5.**

[Abrogated 12/1/09]

#### **Rule 5-2. Number of Copies.**

Petitioner shall file an original of petitions and any supporting papers and appendices filed pursuant to FRAP 5. If the answer is not required to be filed electronically, respondent shall file an original of an answer. (Adopted effective July 1, 2000; amended effective December 1, 2009.)

**Cross References.** Circuit Rule 25-5(b), Documents Excluded From Electronic Filing.

#### **Rule 6-1. Appeals from Final Decisions of the Supreme Court of the Commonwealth of the Northern Mariana Islands.** [Abrogated.]

#### STATUTORY NOTES

**Compiler's Notes.** Abrogated January 1, 2005.

**Circuit Advisory Committee Note To Rule 6-1.**  
Abrogated January 1, 2005.

**Rule 6-2. Petition for writ of certiorari to review final decisions of the Supreme Court of Guam. [Abrogated.]**

**Circuit Advisory Committee Note To Rule 6-2(b) and (c).** Abrogated January 1, 2005.

**Rule 9-1. Release in Criminal Cases.**

**Rule 9-1.1. Release Before Judgment of Conviction.**

(a) Every notice of appeal from a release or detention order entered before or at the time of a judgment of conviction shall bear the caption "FRAP 9(a) Appeal." Immediately upon filing, the district court shall transmit the notice of appeal to the Court of Appeals Clerk's Office. Upon filing the notice of appeal, counsel shall contact the Court of Appeals' motions unit to notify the Court that such an appeal has been filed. Unless otherwise directed by the Court, appellant shall file a memorandum of law and facts in support of the appeal within 14 days of filing the notice of appeal. Appellant's memorandum shall be accompanied by the district court's release or detention order and, if the appellant questions the factual basis of the order, a transcript of the district court's bail proceedings. If unable to obtain a transcript of the bail proceedings, the appellant shall state in an affidavit the reasons why the transcript has not been obtained. (Rev. 1/2003)

(b) Unless otherwise directed by the Court, appellee shall file a response to appellant's memorandum within 10 days of service. (Rev. 1/2003)

(c) Unless otherwise directed by the Court, appellant may file a reply within 7 days of service of the response. The appeal shall be decided promptly upon the completion of briefing. (Amended effective January 1, 2003; amended effective December 1, 2009.)

**Rule 9-1.2. Release Pending Appeal.**

(a) A motion for bail pending appeal or for revocation of bail pending appeal, made in this Court, shall be accompanied by the district court's bail order, and, if the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court. If unable to obtain a transcript of the bail proceedings, the movant shall state in an affidavit the reason why the transcript has not been obtained.

(b) A movant for bail pending appeal shall also attach to the motion a certificate of the court reporter containing the name, address, and telephone number of the reporter who will prepare the transcript on appeal and the reporter's verification that the transcript has been ordered and that satisfactory arrangements have been made to pay for it, together with the estimated date of completion of the transcript. A motion for bail which does not comply with part (b) of this rule will be prima facie evidence that the appeal is taken for the purpose of delay within the meaning of 18 U.S.C. § 3143(b).



(c) Unless otherwise directed by the Court, the non-moving party shall file an opposition or statement of non-opposition to all motions for bail or revocation of bail pending appeal of a judgment of conviction within 10 days of service of the motion.

(d) Unless otherwise directed by the Court, the movant may file an optional reply within 7 days of service of the response.

(e) If the appellant is on bail at the time the motion is filed in this Court, that bail will remain in effect until the Court rules on the motion. (Amended effective January 1, 2001; Amended effective January 1, 2003; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 27-1, Filing of Motions; Circuit Rule 27-3, Emergency and Urgent Motions.

#### **Rule 10-1. Notice of Filing Appeal.**

When the notice of appeal is filed in the district court, the clerk of the district court shall immediately transmit the notice to the Court of Appeals. (Amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 3, Appeal as of Right — How Taken; Circuit Rule 3-1, Filing the Appeal.

#### **Rule 10-2. Contents of the Record on Appeal.**

Pursuant to FRAP 10(a), the complete record on appeal consists of:

(a) the official transcript of oral proceedings before the district court (“transcript”), if there is one; and

(b) the district court clerk’s record of original pleadings, exhibits and other papers filed with the district court (“clerk’s record”). (Rev. 7/95; Rev. 12/1/09) (Amended effective July 1, 1995; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 30-1, The Excerpts of Record.

#### **Rule 10-3. Ordering the Reporter’s Transcript.**

##### **Rule 10-3.1. Civil Appeals.**

(a) **Appellant’s Initial Notice.** Unless the parties have agreed on which portions of the transcript to order, or appellant intends to order the entire transcript, appellant shall serve appellee with a notice specifying which portions of the transcript appellant intends to order from the court reporter,

as well as a statement of the issues the appellant intends to present on appeal. In the alternative, appellant shall serve on appellee a statement indicating that appellant does not intend to order any transcripts. This notice and statement shall be served on appellee within 10 days of the filing of the notice of appeal or within 10 days of the entry of an order disposing of the last timely filed motion of a type specified in FRAP 4(a)(4).

(b) **Appellee's Response.** Within 10 days of the service date of appellant's initial notice, appellee may respond to appellant's initial notice by serving on appellant a list of any additional portions of the transcript that appellee deems necessary to the appeal.

(c) **No Transcripts Necessary.** If the parties agree that no transcripts are necessary, appellant shall file in the district court a notice stating that no transcripts will be ordered, and provide copies of this notice to the court reporter and the Court of Appeals.

(d) **Ordering the Transcript.** Within 30 days of the filing of the notice of appeal, appellant shall file a transcript order in the district court, using the district court's transcript designation form and shall provide a copy of the designation form to the court reporter.

In ordering the transcripts, appellant shall either order all portions of the transcript listed by both appellant and appellee or certify to the district court pursuant to subsection (f) of this rule that the portions listed by appellee in the response to appellant's initial notice are unnecessary.

(e) **Paying for the Transcript.** On or before filing the designation form in the district court, appellant shall make arrangements with the court reporter to pay for the transcripts ordered. The United States Judicial Conference has approved the rates a reporter may charge for the production of the transcript and copies of a transcript. Appellant must pay for the original transcript.

The transcript is considered ordered only after the designation form has been filed in the district court and appellant has made payment arrangements with the court reporter or the district court has deemed the transcripts designated by appellee to be unnecessary and appellee has made financial arrangements. Payment arrangements include obtaining authorization for preparation of the transcript at government expense.

(f) **Paying for Additional Portions of the Transcript.** If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.1(b), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not. **L L**

If such a certificate is filed in the district court, with copies to the court reporter and this Court, the district court shall determine which party shall pay for which portions of the transcript. Appellant may ask the Court of Appeals for an extension of time to make arrangements with the court reporter to pay for the transcripts pending the district court's resolution of the issue. (Amended effective July 1, 1997; amended effective December 1, 2009.)

**Rule 10-3.2. Criminal Appeals.**

(a) **Early Ordering of the Transcript in Criminal Trials Lasting 10 Days or More.** Where criminal proceedings result in a trial lasting 10 days or more, the district court may authorize the preparation of the transcript for the appeal and payment of the court reporter after the entry of a verdict but before the filing of a notice of appeal. In addition to filing a CJA Form 24 (Authorization and Voucher for Payment of Transcript), appointed counsel shall certify to the district court that defendant is aware of the right to appeal, and that the defendant has instructed counsel to appeal regardless of the nature or length of the sentence imposed.

Retained counsel must make a similar certification to the district court along with financial arrangements with the court reporter to pay for the transcripts before obtaining early preparation authorization.

The Court of Appeals waives the reduction on transcript price for transcripts ordered pursuant to this subsection from the date of the initial order to the date the transcripts would otherwise be ordered, i.e., 7 days from the filing of the notice of appeal.

The parties shall comply with all other applicable parts of Circuit Rule 10-3.2(b)-(f).

(b) **Appellant's Initial Notice.** Unless parties have agreed on which portions of the transcript to order or appellant intends to order the entire transcript, appellant shall serve appellee with a notice listing the portions of the transcript appellant will order from the court reporter, as well as a statement of the issues the appellant intends to present on appeal. In the alternative, the appellant shall serve appellee with a statement indicating that no transcripts will be ordered. This notice and statement shall be served on appellee within 7 days of the filing of the notice of appeal or within 7 days of the entry of an order disposing of the last timely filed motion of a type specified in FRAP 4(b).

(c) **Appellee's Response.** Within 7 days of the service of appellant's initial notice, the appellee may serve on the appellant a response specifying what, if any, additional portions of the transcript are necessary to the appeal.

(d) **Ordering the Transcript.** Within 21 days from the filing of the notice of appeal, appellant shall file a transcript order in the district court using the district court's transcript designation form and shall provide a copy of this designation form to the court reporter. Appellant shall order all the portions of the transcript listed by both appellant and appellee, or certify to the district court pursuant to subsection (f) of this rule that the portions of the transcript listed by appellee in the response to appellant's initial notice are unnecessary.

(e) **Paying for the Transcript.** Where appellant is represented by retained counsel, counsel shall make arrangements with the court reporter to pay for the transcripts on or before the day the transcript designation form is filed in the district court. Appellee shall make financial arrangements when the district court has deemed the transcripts designated by



appellee to be unnecessary and appellee desires production of those transcripts.

Where the appellant is proceeding in forma pauperis, appellant shall prepare a CJA Voucher Form 24 and submit the voucher to the district court along with the designation form. In either case, failure to make proper arrangements with the court reporter to pay for the ordered transcripts may result in sanctions pursuant to FRAP 46(c).

In either case, failure to make proper arrangements with the court reporter to pay for the ordered transcripts may result in sanctions pursuant to Fed. R. App. P. 46(c).

(f) **Paying for Additional Portions of the Transcript.** If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.2(c), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not.

If such a certificate is filed in the district court, with copies to the court reporter and this Court, the district court shall determine which party shall pay for which portions of the transcript. Appellant may ask the Court of Appeals for an extension of time to make arrangements with the court reporter to pay for the transcripts pending the district court's resolution of the issue. (Amended effective July 1, 1997; amended effective December 1, 2002; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 10-3.** The intent of the requirement of a statement of the issues is to provide the appellee with notice of those transcripts necessary for resolution of the issues to be raised by the appellant on appeal. While failure to comply with this rule may, in the Court's discretion, result in dismissal of the appeal, dismissal is not mandated if the record is otherwise sufficient to permit resolution of the issues on appeal. See *United States v. Alerta*, 96 F.3d 1230, 1233-34 (9th Cir. 1996); *Syncom Capitol Corp. v. Wade*, 924 F.2d 167

(9th Cir. 1991). Similarly, the omission of a given issue from the statement of the issues does not bar appellant from raising that issue in the brief if any transcript portions necessary to support that argument have been prepared.

A party who subsequently determines that the initially designated transcripts are insufficient to address the arguments advanced on appeal may seek leave to file a supplemental transcript designation and, if necessary, to expand the record to include that transcript.

### **Rule 11-1. Filing the Reporter's Transcript.**

#### **Rule 11-1.1. Time for Filing the Reporter's Transcript.**

The reporter's transcript shall be filed in the district court within 30 days from the date the Transcript Designation/Ordering Form is filed with the district court, pursuant to the provisions of FRAP 11(b) and in accordance with the scheduling orders issued by the Court for all appeals. Upon motion by a reporter, the Clerk of the Court of Appeals or a designated deputy clerk may grant a reasonable extension of time to file the transcript. The grant of an extension of time does not waive the mandatory fee reduction for the late delivery of transcripts unless such waiver is stated in the order.



**Rule 11-1.2. Notice of Reporter Defaults.**

In the event the reporter fails to prepare the transcripts in accordance with the scheduling order issued by the Court or within an extension of time granted by this Court, appellant shall notify this Court of the need to modify the briefing schedule. Such notice shall be filed within 21 days after the due date for filing of the transcripts. The notice shall indicate when the transcripts were designated, when financial arrangements were made or the voucher was prepared, the dates of hearings for which transcripts have not been prepared and the name of the reporter assigned to those hearings. Prior to submitting any notice, appellant shall contact the court reporter and court reporter supervisor in an effort to cause preparation of the transcripts. The notice shall be accompanied by an affidavit or declaration that describes the contacts appellant has made with the reporter and the supervisor. A copy of the notice and affidavit/declaration shall be served on the court reporter supervisor. (Rev. 1/93, 7/1/06)

**STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 11-1.2.** The filing of a motion for an extension of time by a reporter relieves appellant of the requirement to file the notification described in Circuit Rule 11-1.2 as to that reporter. (Rev. 7/94)

**Rule 11-1.3. Form and Content of the Reporter's Transcript.**

The pages of the transcript shall be consecutively numbered throughout all volumes if all proceedings were reported by one individual. If proceedings were reported by multiple reporters, consecutive numbering is not required. It shall include an index with the names of witnesses, the direct, cross, redirect and other examinations, and exhibit numbers, when offered and received or rejected, as well as instructions and colloquy on instructions. The index shall refer to the number of the volume and the page, shall be cumulative for all volumes, and shall be placed in the first volume. The original set of the transcript shall serve as the copy required by 28 U.S.C. § 753(b). (Amended effective January 1, 1993; amended effective December 1, 2009.)

**Rule 11-2. The Certificate of Record.**

[Abrogated 12/1/09]

**Rule 11-3. Retention of the Transcript and Clerk's Record in the District Court During Preparation of the Briefs.**

[Abrogated 12/1/09]

**Rule 11-4. Retention of Physical Exhibits in the District Court, Transmittal of Clerk's Record on Request.****Rule 11-4.1. Retention of Clerk's Record in the District Court.**

[Abrogated 12/1/09]

**Rule 11-4.2. Retention of Physical Exhibits in the District Court.**

All physical exhibits in all cases shall be retained in the district court until the mandate issues unless requested by the Court of Appeals. (Amended effective December 1, 2009.)

**Rule 11-4.3. Transmittal of Reporter's Transcript.**

[Abrogated 12/1/09]

**Rule 11-4.4. Transmittal of Clerk's Record Upon Requests.**

When the Court of Appeals at any time requires all or part of the clerk's record, the Clerk of the Court of Appeals will request the record from the district court. The district court clerk shall transmit the record, including state court or agency records lodged or filed with the district court during the district court proceedings, to the Court within 7 days of receiving the request. In appeals from the Bankruptcy Appellate Panel, records will be treated in the same fashion as records on appeal in cases arising from the district court. (Amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 22-1, Certificate of Appealability (COA).

**Rule 11-5. Transmittal of the Clerk's Record and Reporter's Transcript and Exhibits in All Other Cases.**

[Abrogated 12/1/09]

**Rule 11-6. Preparation of the Clerk's Record for Transmittal.****Rule 11-6.1. Preparation of the Clerk's Record for Transmittal.**

In cases where the clerk's record is to be transmitted to the Court of Appeals pursuant to Circuit Rule 11-4.4 and where the record is not available electronically, the district court clerk shall tab and identify each document by the docket control number assigned when the document was initially entered on the district court docket. The documents shall be assembled in sequence according to filing dates, with a certified copy of the docket entries at the beginning. Papers shall be bound in a volume or volumes with each document individually tabbed showing the number corresponding to the district court docket entry. The docket sheet shall serve as the index. (Amended effective December 1, 2009.)

**Rule 11-6.2. Number of Copies.**

[Abrogated 12/1/09]

**Rule 12-1. Notice of Emergency Motions in Capital Cases.**

Upon the filing of a notice of appeal in a capital case in which the district court has denied a stay of execution, the clerk of the district court shall immediately notify the clerk of this Court by telephone of such filing and transmit the notice of appeal by the most expeditious method. (Amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 22, Rules Applicable to all Death Penalty Cases; Circuit Rule 27-3, Emergency and Urgent Motions.

**Rule 12-2. Representation Statement.**

Parties filing appeals need file the Representation Statement specified in FRAP 12(b) only as required by Circuit Rule 3-2. (Rev. 7/94)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 3-2, Representation Statement.

**Rule 13-1. Filing Notice of Appeal in Tax Court Cases.**

The content of the notice of appeal and the manner of its filing shall be as prescribed for other civil cases by FRAP 3. Appellants also shall comply with Circuit Rules 3-2 and 3-4. (Rev. 7/94)

**Rule 13-2. Excerpts of Record in Tax Court Cases.**

Review of the decisions of the Tax Court shall be in accordance with FRAP 13, except that preparation and filing of the excerpts of record in such cases shall be in accordance with Circuit Rule 30-1. Each reference in Circuit Rule 30-1 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court, respectively. (Rev. 7/94)

**Rule 13-3. Transmission of the Record in Tax Court Cases.**

When the Court of Appeals at any time requires the record, the Clerk will request the record from the tax court. The tax court clerk shall transmit the record to the Court within 14 days of receiving the request. (Amended effective January 1, 2009; amended effective December 1, 2009.)

**Rule 14-1. Applicability of Other Rules to Review Decisions of the Tax Court.**

All provisions of these Circuit Rules are applicable to review of a decision of the Tax Court, except that any Circuit Rules accompanying FRAP 4-9, 15-20, and 22 and 23 are not applicable.

**Rule 15-1. Review or Enforcement of Agency Orders.**

Review of an order of an administrative agency, board, commission or officer (hereinafter “agency”) and application for enforcement of an order of an agency shall be governed by FRAP 15.

**Rule 15-2. Mediation Questionnaire in Agency Cases.**

(a) The Court encourages the parties in Ninth Circuit agency cases to engage in mediation. To that end, except as provided in section (b) below, within 7 days of the docketing of the petition for review, the petitioner(s) shall, and the respondent(s) may, complete and submit the Ninth Circuit Mediation Questionnaire. The Clerk shall transmit the Mediation Questionnaire to counsel with the time scheduling order. Counsel shall return it according to the instructions contained in the Mediation Questionnaire. The sole purpose of the Mediation Questionnaire is to provide information about new petitions to the Court’s Mediation Office.

Petitioner’s failure to comply with this rule may result in dismissal of the petition in accordance with Circuit Rule 42-1.

(b) The requirement for filing a Mediation Questionnaire shall not apply to:

(1) a petition in which the petitioner is proceeding without the assistance of counsel; and

(2) a petition for review of an order of the Board of Immigration Appeals. (Adopted July 1, 1997; amended effective December 1, 2009.)

**Compiler’s notes.** Before the revision of this rule in 2009, the heading read “Civil Appeals Docketing Statement in Agency Cases.”

**STATUTORY NOTES**

**Cross References.** Circuit Rule 3-4, Mediation Questionnaire; FRAP 33, Appeal Conferences; Circuit Rule 33-1, Mediation Office — Appeal Conferences.

**Circuit Advisory Committee Note to Rule 15-2.** Although petitioners challenging Board of Immigration Appeals orders are exempt from the requirement to file Mediation Questionnaires, the parties in these cases are

invited to contact the Court Mediation Unit when there is potential for mediation. Petitioners will normally be required to demonstrate eligibility for any requested relief. When making a request for mediation based on applications or circumstances that are not documented in the administrative record, petitioners shall provide supporting documents to the mediators.

**Rule 15-3. Procedures for Review under the Pacific Northwest Electric Power Planning and Conservation Act.****Rule 15-3.1. Contents of Petition.**

The petition for review of a rate-making decision shall be labeled “Petition for Review of (specify) Rates,” identifying rates at issue. Any other petition shall be labeled “Petition for Review under the Northwest Power Act” and shall on the face of the petition identify any other known petitions for review of the same order or action.



**Rule 15-3.2. Service, Consolidation and Intervention.**

(a) Petitions shall, to the extent possible, comply with the service requirements of FRAP 15(c). If petitioners believe that compliance with FRAP 15(c) is impracticable or unreasonable in the circumstances, they may file a motion for a determination that service may be effected in a different fashion.

(b) All petitions for review of the same rates will be automatically consolidated by the clerk. All petitions for review of the same order or action will be automatically consolidated by the clerk. Other petitions may be consolidated by motion.

(c) Any petitioners in 1 of 2 or more consolidated cases will be deemed to have intervened in all consolidated cases. A party granted leave to intervene in 1 of a number of 2 or more consolidated cases will be deemed to have intervened in all consolidated cases. Intervention otherwise should be sought by motion under FRAP 15(d).

**STATUTORY NOTES**

**Cross References.** Circuit Rule 1-2, Scope of Circuit Rules.

**Rule 15-4. Petitions for Review of Board of Immigration Appeals Decisions.**

A petition for review of a Board of Immigration Appeals decision shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. The petition shall be (1) accompanied by a copy of the Board of Immigration Appeals order being challenged, (2) include the petitioner's alien registration number in the caption and (3) filed in an original. Adopted effective January 1, 2005; amended effective December 1, 2009.)

**Cross References.** Circuit Rule 25-5(b), Documents Excluded From Electronic Filing.

**Rule 17-1. Excerpts of Record on Review or Enforcement of Agency Orders.****Rule 17-1.1. Purpose.**

Parties are required to prepare excerpts of record unless Circuit Rule 17-1.2 applies. The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. The parties shall ensure that, in accordance with the limitations of Circuit Rule 17-1, those parts of the record necessary to permit an informed analysis of their positions are included in the excerpts. (Amended effective December 1, 2009.)

**Rule 17-1.2. Parties Exempt from Excerpts Requirement.**

(a) Unrepresented Parties: Petitioners and respondents proceeding without counsel need not file excerpts, supplemental excerpts and further excerpts of record.

(b) Petitioners challenging a Board of Immigration Appeals order need not file the initial excerpts and further excerpts; respondent need not file supplemental excerpts. (Adopted effective January 1, 2005; amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 28-2.7, Addendum to Briefs.

**Rule 17-1.3. Petitioner's Initial Excerpts of Record.**

At the time the petitioner's opening brief is submitted, the petitioner shall, unless exempt pursuant to Circuit Rule 17-1.2, submit 4 copies of the excerpts of record bound separately from the briefs. The petitioner shall serve one copy of the excerpts on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. (Amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 25-5(b)(11), Documents excluded from electronic filing requirement.

**Rule 17-1.4. Required Contents of the Excerpts of Record.**

(a) When review or enforcement of an agency order is sought, the excerpts of record shall include:

- (i) the agency docket sheet, if there is one;
- (ii) the agency order to be reviewed;
- (iii) any opinion, findings of fact or conclusions of law filed by the agency, board, commissioner or officer which relates to the order to be reviewed;
- (iv) except as provided in Circuit Rule 17-1.4(b), where an issue raised in the petition is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;
- (v) except as provided in Circuit Rule 17-1.4(b), where an issue raised in the petition is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript

recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(vi) where an issue raised in the petition is based on a written exhibit (including affidavits), those specific portions of the exhibit necessary to resolve the issue;

(vii) any other specific portions of any documents in the record that are cited in petitioner's briefs and are necessary to the resolution of an issue on review; and

(viii) where the petition is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on review.

(b) In addition to the items required by Circuit Rule 17-1.4(a), where the petition seeks review of an agency adjudication regarding the grant or denial of benefits, the excerpts of record shall also include the entire reporter's transcript of proceedings before the administrative law judge. (Amended effective January 1, 2005; amended effective December 1, 2009.)

#### **Rule 17-1.5. Items Not to Be Included in the Excerpts of Record.**

The excerpts of record shall not include briefs or other memoranda of law unless necessary to the resolution of an issue on review, and shall include only those pages necessary therefor. (Amended effective December 1, 2009.)

#### **STATUTORY NOTES**

**Cross References.** Circuit Rule 17-2,  
Sanctions for Failure to Comply with Circuit  
Rule 17-1.

#### **Rule 17-1.6. Form of the Excerpts of Record.**

If the excerpts exceed 75 pages, the first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, and any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the agency, board, commissioner or officer that relate to the orders to be reviewed. All additional documents shall be included in subsequent volumes of the excerpts. (New 7/1/07)

The form of the excerpts shall otherwise be governed by Circuit Rule 30-1.6, with references in Circuit Rule 30-1.6 to appellant and the district court to be read as references to petitioner and agency, respectively. (Amended effective July 1, 2007.)

#### **Rule 17-1.7. Respondent's Supplemental Excerpts of Record.**

The provisions for respondent's supplemental excerpts shall be governed by Circuit Rule 30-1.7, with references in Circuit Rule 30-1.7 to appellee to be read as references to respondent.

**Rule 17-1.8. Further Excerpts of Record.**

The provisions for further excerpts shall be governed by Circuit Rule 30-1.8, with references in Circuit Rule 30-1.8 to appellant to be read as references to petitioner.

**Rule 17-1.9. Additional Copies of the Excerpts of Record.**

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional 20 copies of the excerpts of record. (Rev. 7/95) (Amended effective July 1, 1995.))

**Rule 17-2. Sanctions for Failure to Comply with Circuit Rule 17-1.**

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the Court may take one or more of the following actions:

- (a) strike the excerpts and order that they be corrected and resubmitted;
- (b) order that the excerpts be supplemented;
- (c) if the Court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the Court deems to be excessive; and/or
- (d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

**Rule 20-1. Applicability of Other Rules to Review of Agency Decisions.**

All provisions of these Circuit Rules are applicable to review or enforcement of orders of agencies, except that any Circuit Rules accompanying FRAP 3 through 14, and FRAP 22 and 23 are not applicable. As used in any applicable rule, in proceedings to review or enforce agency orders, the term "appellant" includes a petitioner, the term "appellee" includes a respondent, and the term "appeal" includes a petition for review or enforcement. (Amended effective December 1, 2009.)

**Rule 21-1. Extraordinary Writ.**

Petitions for extraordinary writs shall conform to and be filed in accordance with the provisions of FRAP 21(a). (Amended 7/93)

**Rule 21-2. Extraordinary Writs Format; Number of Copies.**

(a) Petitions for writs of mandamus, prohibition or other extraordinary relief directed to a district judge or magistrate judge, or bankruptcy judge shall bear the title of the appropriate court and shall not bear the name of the judge as respondent in the caption. Petitions shall include in the caption: the name of each petitioner; the name of the appropriate court as respondent; and the name of each real party in interest. Other petitions for extraordinary writs shall include in the caption: the name of each petitioner; and the name of each appropriate adverse party below as respondent.



(b) The petitioner shall file an original of the petition and any supporting papers and appendices. (Adopted effective July 1, 2000; amended effective December 1, 2009.)

**Cross References.** Circuit Rule 25-5(b), Documents Excluded From Electronic Filing.

### **Rule 21-3. Certificate of Interested Parties.**

Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the corporate disclosure statement required by FRAP 26.1 and the statement of related cases required by Circuit Rule 28-2.6.

### **Rule 21-4. Answers to Petitions.**

No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response. If the answer is not required to be filed electronically, respondent shall file an original of the answer. (Amended effective December 1, 2009.)

## **STATUTORY NOTES**

**Cross References.** FRAP 22, Habeas Corpus and Section 2255 Proceedings; Circuit Rule 27-1, Filing of Motions; Circuit Rule 27-2, Motions for Stays Pending Appeal; Circuit Rule 27-3, Emergency and Urgent Motions.

**Circuit Advisory Committee Note to Rules 21-1 to 21-4.** A petition for writ of mandamus, writ of prohibition or other extraordinary relief is processed by the clerk and motions attorneys in the same fashion as a motion. If the panel does not believe that the petition makes a prima facie showing justifying issuance of the writ, it will deny the petition forthwith. That denial is not regarded as a decision on the merits of the claims. In other instances, the panel will direct that an answer and reply may be filed within specified times. The panel may also issue a stay or injunction pending further consideration of the petition. After receipt of

the answer and reply, or expiration of the times set therefor, the matter is then forwarded to a new motions panel unless the first panel directs otherwise. The panel may grant or deny the petition or set it for oral argument. If the panel decides to set the petition for argument, it may be calendared before a regular panel of the Court or before the motions panel.

In emergency circumstances, an individual judge may grant temporary relief to permit a motions panel to consider the petition, may decline to act, or may order that an answer be filed. If the judge determines that immediate action on the merits is necessary, the judge will contact the members of the Court currently sitting as a motions panel until two or more judges can consider whether to grant or deny the petition. Except in extreme emergencies, the judges will not grant a petition without calling for an answer to the petition.

### **Rule 21-5. Petition for Writ of Mandamus Pursuant to 18 U.S.C. § 3771(d)(3).**

A petition for writ of mandamus filed pursuant to 18 U.S.C. § 3771(d)(3) shall bear the caption “PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(d)(3).” Before filing such a petition, the petitioner’s counsel, or the petitioner if appearing pro se, must notify the motions unit of the Court of Appeals that such a petition will be filed, and must make arrangements for the filing and immediate service of the petition on the relevant parties. Such notification must be by telephone (415/355-8020 or

8000). The real party in interest must telephonically notify the Court when it becomes aware of the filing of the petition. (Rev. 1/1/07)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 21-5.** A failure to notify this Court ahead of time that such a filing is being made will adversely affect this Court's ability to

decide any such petition with 72 hours of filing as contemplated by the statute.

**Cross Reference:** Circuit Rule 27-3, Emergency and Urgent Motions.

#### **Rule 22-1. Certificate of Appealability (COA).**

(a) **General Procedures.** Petitioners appealing the district court's judgment in either a 28 U.S.C. § 2254 or a § 2255 proceeding shall follow the procedures set forth in FRAP 4 and 22(b). A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, the Court shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will not act on a motion for a COA if the district court has not ruled first.

(b) **District Court Records.** If the district court denies a COA in full in a § 2254 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a COA in full in a § 2255 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion.

(c) **Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues, a briefing schedule will be established by the Court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. (Rev. 1/1/04; 3/11/04)

(d) **Denial in Full by District Court.** If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals within 35 days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court of appeals appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion.

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within 35 days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA.

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration.

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified or otherwise proceed according to section (e), below.

(e) **Briefing Uncertified Issues.** Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, “Certified Issues,” and then, in the same brief, shall discuss any uncertified issues under the heading, “Uncertified Issues.” Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the Court will not extend the length of the brief to accommodate uncertified issues.

(f) **Response to Uncertified Issues.** Respondent may, but need not, address any uncertified issues in its responsive brief. The Court will afford respondent an opportunity to respond before relief is granted on any previously uncertified issue. (Adopted effective January 1, 2004; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross Reference:** FRAP 27, Motions; Circuit Rule 11-4.2, Retention of Physical Exhibits in the District Court; Circuit Rule 27-1, Filing of Motions; FRAP 32, Form of Briefs, Appendices, and Other Papers.

**Circuit Advisory Committee Note to Rule 22-1.** The Court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncerti-

fied issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, “Certified Issues” and then, in the same brief, shall discuss uncertified issues under the heading, “Uncertified Issues.” The Court may decline to address uncertified issues if they are not raised and designated as required by this Rule.

#### **Rule 22-2. Direct Criminal Appeals, First Petitions, and Stays of Execution: Capital Cases.**

(a) **Assignment.** In direct criminal appeals and section 2241, section 2254, and section 2255 appeals which involve judgments of death and finally dispose of the case, the Clerk, upon the completion of briefing, will assign the appeal to a death penalty panel composed of active judges and senior judges willing to serve on death penalty panels. However, when an execution is scheduled and no stay is in place, the Clerk may select a panel to hear the appeal and any emergency motion whenever in the Clerk’s discretion it would be prudent to do so.

(b) **Related Civil Proceedings.** The Court may apply the provisions of Circuit Rule 22 to any related civil proceedings challenging an execution as



being in violation of federal law, including proceedings filed by the prisoner or someone else on his or her behalf.

(c) **Duties.** Once a case is assigned to a death penalty panel, the panel will handle all matters pertaining to the case, including motions for leave to file a second or successive petition or motion, appeals from authorized second or successive petitions or motions, any related civil proceedings, and remands from the Supreme Court of the United States. When a case is pending before a death penalty en banc court, any additional applications for relief pertaining to that case will be assigned to the panel with responsibility for that case, unless the question presented is such that its decision would resolve an issue then before the en banc court, in which event the additional application will be assigned to the en banc court. The determination as to whether the case is assigned to the panel or the en banc court is made by the Chief Judge in consultation with the concerned panel and the en banc court.

(d) **The En Banc Court.** The Clerk shall include in the pool of the names of all active judges, the names of those eligible senior judges willing to serve on the en banc court. An eligible senior judge is one who sat on the panel whose decision is subject to review. Judges shall be assigned by random drawing from the pool, and in accordance with Circuit Rule 35-3. Review by the en banc court may include not only orders granting or denying applications for a certificate of appealability and motions to stay or vacate a stay of execution, but may extend to all other issues on appeal.

(e) **Stays of Execution.** Counsel shall communicate with the Clerk of this Court by telephone as soon as it becomes evident that emergency relief will be sought from this Court. Any motion for a stay of execution filed before a case has been assigned to a death penalty panel will be presented for decision to a motions panel. Once a death penalty panel has been assigned, that panel then must decide all subsequent matters (unless the case is then before the en banc court).

If a motion for a stay of execution is presented to a judge of this Court not on the death penalty panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk, unless the execution is imminent. If an execution is imminent and the death penalty panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote, the panel may vacate such a stay of execution.

A motion for stay of execution shall state whether relief was sought in the district court and, if so, whether all grounds advanced in support thereof in this Court were submitted to the district court and if not, why the matter should not be remanded to the district court or relief denied for that reason. If a majority of the panel votes to deny the stay, it shall enter an order to that effect and, unless impracticable, state the issues presented and the reasons for the denial. If no execution date is set, the ordinary rules for



obtaining en banc review of a three-judge panel decision shall apply on a first petition or motion.

When the panel affirms a denial or reverses a grant of a first petition or motion, it shall enter an order staying the mandate pursuant to FRAP 41(b). If the panel affirms the denial of a first section 2254 petition or section 2255 motion in a capital case and denies a stay of execution, any judge of the Court may request en banc rehearing and issue a temporary stay of execution. (Amended effective December 1, 2009.)

**Rule 22-3. Applications for Authorization to File Second or Successive 2254 Petition or 2255 Motion — All Cases; Stay of Execution — Capital Cases.**

(a) **Applications.** Any petitioner seeking authorization to file a second or successive 2254 petition or 2255 motion in the district court must file an application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C. § 2254 or § 2255. See Form 12. An original of the application must be filed with the Clerk of the Court of Appeals. No filing fee is required. If a second or successive petition or motion, or an application for authorization to file such a petition or motion, is mistakenly submitted to the district court, the district court shall refer it to the court of appeals.

The application must:

(1) include a copy of the second or successive 2254 petition or 2255 motion which the applicant seeks to file in the district court; and

(2) state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and

(3) state how the requirements of sections 2244(b) or 2255 have been satisfied.

(b) **Attachments.** If reasonably available to the petitioner, the application must include copies of all relevant state court orders and decisions and all dispositive district court orders in prior federal proceedings. If attachments filed by petitioner are incomplete, respondent may file supplemental attachments.

(c) **Service.** The petitioner must serve a copy of the application and all attachments on the respondent, and must attach a certificate of service to the application filed with the Court.

(d) **Response.** In noncapital cases, no response is required unless ordered by the Court. In capital cases where an execution date is scheduled and no stay is in place, respondent shall respond to the application and file supplemental attachments as soon as practicable. Otherwise, in capital cases, respondent shall respond and file supplemental attachments within 14 days of the date the application is served.

(e) **Decision.** The application will be determined by a three-judge panel. In capital cases where an execution date is scheduled and no stay is in place, the Court will grant or deny the application, and state its reasons therefore, as soon as practicable.

(f) **Stays of Execution.** If an execution date is scheduled and no stay is in place, any judge may, if necessary, enter a stay of execution, see Circuit Rule 22-2(e), but the question will be presented to the panel as soon as practicable. If the Court grants leave to file a second or successive application, the Court shall stay petitioner's execution pending disposition of the second or successive petition by the district court. (Amended effective December 1, 2009.)

**Cross References.** Circuit Rule 25-5(b),  
Documents Excluded From Electronic Filing.

#### **Rule 22-4. Appeals from Authorized Second or Successive 2254 Petitions or 2255 Motions.**

This rule applies to appellate proceedings involving any authorized second or successive ("SOS") section 2254 petition or 2255 motion.

(a) **Necessary Documents.** A petitioner appealing the denial of an authorized SOS petition or motion and filing a motion for a certificate of appealability and/or a stay of execution, shall file with the Clerk of the Court of Appeals the following documents in an attachment:

- (1) the original application for a certificate of appealability ("COA") and/or a motion for stay of execution;
- (2) all papers filed in the subsequent proceeding in district court;
- (3) all orders issued by the district court in the subsequent proceeding;
- (4) a copy of any state or federal court opinion or judgment or, if there is no written opinion or judgment, a copy of the relevant portions of the transcript; and
- (5) a copy of the notice of appeal.

If all documents referred to in this provision are not filed, petitioner shall state why the documents are unavailable and where they may be obtained. If petitioner does not provide the documents, respondent shall provide them or state in any response why they are not available.

If petitioner appeals the district court's denial of an authorized SOS petition or motion and the district court has denied in full an application for a COA, petitioner shall file with the Clerk of the Court of Appeals a motion for a COA. Circuit Rule 22-1 shall apply to the extent not inconsistent with this rule.

(b) **Capital Cases, Emergency Motions.** In capital cases when the district court has denied an authorized SOS petition or motion and an execution is scheduled and imminent, counsel shall adhere to Circuit Rule 27-3 regarding emergency motions, except to the extent that it may be inconsistent with these rules.

(c) **Capital Cases, COA Applications.** In all capital cases where the district court has denied an authorized SOS petition or motion and denied a COA in full, the Clerk shall refer the motion for a COA to the death penalty panel. Oral argument may be held at the request of any member of the panel. Any member of the panel may grant a COA. If the panel votes unanimously to deny a COA in full, it shall enter an order setting forth the

issues presented and the reasons why a COA should not issue. A copy of the order shall be circulated by the Clerk to all judges.

(d) **En Banc Review.** Any active or senior judge of the Court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. If an execution date is scheduled and imminent, the Clerk shall notify the parties when a request for rehearing en banc is made and of the time frame for voting or, if no such request has been made, the Clerk shall notify the parties upon expiration of the period to request en banc rehearing. Such a request for rehearing en banc shall result in en banc review if a majority of active judges votes in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review. The en banc coordinator, if time permits, may set a schedule in which other judges may respond to the points made in the request for en banc review. If a majority of active judges votes in favor of en banc review, the Clerk shall notify the parties that the matter will receive en banc review, and identify the members of the en banc court.

Any active judge may request a rehearing of the decision of the en banc court by all the active judges of the Court. If no stay is in effect, such judge may issue a temporary stay. The eleven-judge en banc court by majority vote may vacate such a temporary stay, and in that event there will be no stay in effect unless a stay is granted by the full court.

(e) **Stays of Execution.** In all capital cases where petitioner seeks a stay of execution, the Clerk shall refer any motion for a stay of execution to the death penalty panel. Oral argument may be held at the request of any member of the panel. If a majority of the panel votes to deny the stay, it shall enter an order setting forth the issues presented and the reasons for the denial.

If the panel denies a stay of execution and the execution date is imminent, any judge of the Court who requests en banc review may issue a temporary stay of execution. That stay shall lapse and be dissolved if a majority of active judges does not vote in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review.

If the matter receives en banc review, the stay shall remain in effect until the en banc court completes voting on the question of granting a stay. Voting is complete when all available judges have been polled and a majority of the en banc court has voted either to grant or deny a stay. If at the completion of voting, a majority of the en banc court has not voted to grant the stay, there will be no stay in effect unless granted by the full court.

If a motion for a stay of execution is presented to a judge of this Court not on the panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk for determination by the panel, unless the execution is imminent. If an execution is imminent and the panel has not yet determined whether to grant a stay pending final disposition of the appeal,



any judge of the Court may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote the panel may vacate such a stay of execution.

If a motion for a stay of execution is presented to a judge of this Court not on the panel, counsel presenting such motion shall include in the materials presented a declaration that shall reflect:

(i) why the motion is being presented to a single judge instead of the Clerk of the Court of Appeals for reference to the panel;

(ii) the name of any other judge to whom the motion has been presented, including any district judge, and the date when such application was made, and any ruling on the motion;

(iii) what petitions, applications, motions and appeals are then pending before this Court in any case involving the same prisoner, together with a report of the status of each such proceeding.

Before presenting such a motion to a single judge, the applicant shall make every practicable effort to notify the Clerk and opposing counsel and to serve the motion at the earliest possible time. A certificate of counsel for the applicant shall follow the cover page of the motion and shall contain:

(iv) the telephone numbers and office addresses of the attorneys for the parties;

(v) facts showing the existence and nature of the claimed emergency; and

(vi) when and how counsel for the other parties were notified and served with the motion, or, if not notified and served, why that was not done.

If the relief sought was available in the district court, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, and, if not, why the matter should not be remanded to the district court or the relief denied for that reason. (New 12/1/09) (Amended effective December 1, 2009.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Circuit Rule 22-4.** If a prisoner has been granted relief, in whole or in part, a petition or motion challenging a subsequent conviction or sentence shall be considered as a “first

petition” or “first motion” and this rule shall apply. Such a petition or motion will be assigned to the same panel to which the initial petition or motion was assigned. (Rev. 12/1/09)

#### **Rule 22-5. Subsequent Petitions or Motions; Related Civil Proceedings.**

[Abrogated 12/1/09]

#### **Rule 22-6. Rules Applicable to All Death Penalty Cases.**

(a) **Notice of Emergency Motions.** Upon the filing of a notice of appeal where the district court has denied a stay of execution, the clerk of the district court shall immediately notify the Clerk of this Court by telephone of such filing and transmit the notice of appeal. Counsel shall communicate



with the Clerk of this Court by telephone as soon as it becomes evident that emergency relief will be sought from this Court.

(b) [Abrogated, see Circuit Rule 32-4, 1/1/99]

(c) **Excerpts of Record.** The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or part of the record shall so notify the Court. In addition to the documents listed in Circuit Rule 30-1.2, excerpts of record shall contain all final orders and rulings of all state courts in appellate and post-conviction proceedings. Excerpts of records shall also include all final orders of the Supreme Court of the United States involving the conviction or sentence.

(d) **Retention of Record.** The clerk shall keep all papers filed in the Court of Appeals for future use of the Court. (Amended effective July 1, 1997; amended effective December 1, 2009.)

### **Rule 23-1. Custody of Federal Prisoners Pending Appeals in Proceedings to Vacate Sentence.**

Pending an appeal from the final decision of any court or judge in a proceeding attacking a sentence under 28 U.S.C. § 2255, or an appeal from an order disposing of a motion made under Rules 33 or 35 of the Federal Rules of Criminal Procedure or any other proceeding in which a question of interim release is raised, the detention or release of the prisoner shall be governed by FRAP 23(b), (c) and (d).

### **Rule 24-1. Excerpts of Record Waiver. [Abrogated.]**

#### **STATUTORY NOTES**

**Compiler's Notes.** Abrogated January 1, 2005.

### **Rule 25-1. Principal Office of Clerk.**

The principal office of the Clerk shall be in the United States Court of Appeals, 95 Seventh Street, San Francisco, California.

The duties of the Clerk are set forth in FRAP 45.

### **Rule 25-2. Communications to the Court.**

All communications to the Court shall be in writing unless otherwise permitted by these rules. All communications to the Court shall comply with FRAP 32 and shall be filed electronically unless (1) counsel has been granted an exemption from electronic filing under FRAP 25(a)(2)(D); (2) the filer is a pro se party; or (3) the document is excluded from the electronic filing requirement by the Court's orders and/or rules.

If a paper document is to be submitted, the document shall be addressed to the Clerk at the United States Court of Appeals. Documents transmitted via commercial carrier shall be directed to the Court at 95 Seventh Street, San Francisco, CA 94103-1526; documents transmitted via the United

States Postal Service shall be directed to Post Office Box 193939, San Francisco, CA 94119-3939.

Parties and counsel shall not submit filings directly to any particular judge.

If adverse weather or other exceptional conditions render the San Francisco Clerk's Office inaccessible, the Court may by special order permit parties to submit paper documents to the Court's divisional offices. (Amended effective December 1, 2009.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 25-2.** Litigants are reminded that a commercial carrier's failure to deliver a document within the anticipated interval does not excuse the failure to meet a mandatory and jurisdictional deadline. *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007).

**Notice of Delay:** If an appeal or petition has been pending before the Court for any period in excess of those set forth below, the party is encouraged to communicate this fact to the Court. Such notice can be accomplished by a letter to the Clerk identifying the case and the nature of the delay. Generally, such a letter would be appropriate if:

(1) a motion has been pending for longer than 4 months;

(2) the parties have not received notice of oral argument or submission on the briefs within 15 months after the completion of briefing;

(3) a decision on the merits has not been issued within 9 months after submission;

(4) the mandate has not issued within 28 days after the time to file a petition for rehearing has expired; or

(5) a petition for rehearing has been pending for longer than 6 months.

A letter noting the pendency of the matters listed at (3) and (5) above may be submitted electronically or via paper copy. A non-electronically transmitted letter will not be recorded on the docket. (Rev. 12/1/09)

Litigants are advised that the complexity of a given matter may preclude court action within the noted time period. (New 1/01)

**Cross References.** Circuit Rule 27-1, Filing of Motions; Circuit Rule 27-2, Motions for Stays Pending Appeal; Circuit Rule 27-3, Emergency and Urgent Motions.

### Rule 25-3. Facsimile and E-mail Filing.

#### Rule 25-3.1. Direct Filing.

The Court does not accept for filing documents transmitted by telephone facsimile machine ("fax") or by e-mail, except in extreme emergencies and with advance permission of court personnel. Any party who transmits a document to the Court without authorization may be sanctioned.

Any document transmitted to the Court by fax or e-mail must show service on all other parties by fax, e-mail, or hand delivery, unless another form of service is authorized by the Court. (Amended effective December 1, 2009.)

#### Rule 25-3.2. Third Party Filing.

The Court accepts for filing documents transmitted to third parties by fax and subsequently delivered by hand to the Court if the party is exempt from the electronic filing requirement, the document is excluded from the electronic filing requirement by the Court's orders and/or rules, or the party has obtained permission for a third party filing. Documents filed in this

fashion must comply with all applicable rules, including requirements for service, number of copies and colors of covers.

The filing party shall designate one copy of the filed document as the “fax original.” It shall be of laser quality and shall bear the notation “fax original.” Other copies shall not bear that notation. (Amended effective December 1, 2009.)

### **Rule 25-3.3. Electronic Service.**

[Abrogated 12/1/09]

### **Rule 25-4. Calendared Cases.**

After a case has been scheduled for oral argument, has been argued, is under submission or has been decided, all documents submitted to the Court for filing, including FRAP 28(j) letters, must include the latest of the date of argument, submission or decision. If known, the names of the panel members shall be included. This information shall be included on the initial page and/or cover, if any, immediately below the case number. (Adopted effective July 1, 2000, amended effective July 1, 2006; amended effective December 1, 2009.)

### **Rule 25-5. Electronic Filing.**

(a) **Participation.** All attorneys and court reporters are required to submit all filings electronically using the Court’s Appellate Electronic Case Files (“ECF”) system unless the Court grants a request to be exempted from the requirement. Filers seeking an exemption must complete the Appellate ECF Exemption Form found on the Court’s website. If granted, the exemption will be applicable to pending and future cases for one calendar year. If an exempt filer registers for the Appellate ECF system, that registration will abrogate the exemption.

Use of the Appellate ECF system is voluntary for all parties proceeding without counsel.

If a technical malfunction prevents access to the Appellate ECF system for a protracted period, the Court by special order may permit paper filings pending restoration of electronic access.

#### **(b) Documents excluded from electronic filing requirement.**

(1) Petitions for review of agency orders under FRAP 15 and Circuit Rule 15-3;

(2) Applications for enforcement of agency orders under FRAP 15 and Circuit Rules 15-3 and 15-4;

(3) Petitions for permission to appeal under FRAP 5 and Circuit Rule 5-2;

(4) Petitions for writs of mandamus or prohibition under FRAP 21 and Circuit Rules 21-2 and 21-3;

(5) Applications for leave to file second or successive petitions under 28 U.S.C. § 2254 or motions under 28 U.S.C. § 2255 and Circuit Rule 22-3;

(6) Presentence reports and related documents under Circuit Rule 30-1.10;

(7) Requests for compensation for services and reimbursement for expenses under the Criminal Justice Act, 18 U.S.C. § 3006a and Circuit Rule 4-1(f);

(8) Motions under the Criminal Justice Act for interim payment, advance authorization for expert services and advance travel authorization;

(9) Documents to be maintained under seal and motions seeking leave to file a document under seal under Circuit Rule 27-13;

(10) Motions filed before the assignment of a 9th Circuit docket number; and

(11) Excerpts of Record under Circuit Rules 17-1 and 30-1.

(c) **Deadlines.**

(1) **When permitted.** Electronic filing is permitted at any time other than when precluded by system maintenance. Filings will be processed by the Court during the Court's business hours.

(2) **Timeliness.** An electronic filing successfully completed by 11:59 p.m. Pacific Time will be entered on the Court's docket as of that date. The Court's Appellate ECF system determines the date and time a filing is completed. If technical failure prevents timely electronic filing of any document, the filing party shall preserve documentation of the failure and seek appropriate relief from the Court.

(d) **Technical requirements.** All documents must be submitted in Portable Document Format ("PDF"). The version filed with the Court must be generated by publishing to PDF from the original word processing file to permit the electronic version of the document to be searched and copied. PDF images created by scanning paper documents are prohibited; however, exhibits submitted as attachments to a document may be scanned and attached if the filer does not possess a word processing file version of the attachment. Attachments shall not exceed 5MB in size. Attachments that exceed that size must be divided into subvolumes.

(e) **Signature.** Electronic filings shall indicate each signatory by using an "s" in addition to the typed name of counsel or an unrepresented party. Documents filed on behalf of separately represented parties or multiple pro se parties must indicate one signatory by using an "s" in addition to the typed name and attest that all other parties on whose behalf the filing is submitted concur in the filing's content.

(f) **Service.** All filings require a certificate of service. A sample certificate may be found on the Court's website. When a document is submitted electronically, the Appellate ECF system will automatically notify the other parties and counsel registered for electronic filing of the submission; no service of paper copies upon other parties and counsel registered for electronic filing is necessary. Registration for the Appellate ECF system constitutes consent to electronic service. If a counsel has successfully applied for an exemption from the electronic filing requirement, that counsel must serve paper copies consistent with the applicable provisions of FRAP 25(c)(1); other parties to the litigation must serve the exempt counsel in that fashion.



(g) **Court-Issued Documents.** Except as otherwise provided by these rules or court order, electronically filed and distributed orders, decrees, and judgments constitute entry on the docket under FRAP 36 and 45(b). Orders also may be issued as “text-only” entries on the docket without an attached document. Such orders are official and binding. (Adopted effective December 1, 2009.)

**Cross References.** FRAP 25(a)(5), Privacy Protection; Circuit Rule 26-2, Three Day Service Allowance.

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 25-5.** The parties are reminded of their obligations under FRAP 25(a)(5) to redact personal identifiers.

Additional information regarding the electronic filing and the Appellate ECF system

may be found at the Court’s website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov); <http://pacer.psc.uscourts.gov>; and the informational materials provided to the parties upon the docketing of a case.

#### **Rule 26-1. Filing Deadlines for the Districts of Guam and the Northern Mariana Islands.**

Except as provided by order of the Court, or by FRAP 26(b) and 31, all deadlines for filing set forth in FRAP or these rules are extended by 7 days in cases arising from the Districts of Guam and the Northern Mariana Islands.

#### **Rule 26-2. Three Day Service Allowance.**

The 3-day service allowance provided by FRAP 26(c) applies to documents served by the Appellate ECF system pursuant to Circuit Rule 25-5. (Adopted effective December 1, 2009.)

#### **Rule 27-1. Filing of Motions.**

##### **(1) Form of Motions.**

(a) [Abrogated July 1, 2006]

(b) If electronic filing of the motion, response or reply is not required, the Court requires an original of that filing. The Clerk may direct a party to submit additional paper copies of a motion, response and/or reply when paper copies would aid the Court’s review of the motion.

(c) The provisions of FRAP 27(d)(1) otherwise govern the format of motions. (Added 1/ 1/06)

(2) **Position of Opposing Counsel.** If counsel for the moving party learns that a motion is unopposed, counsel shall so advise the Court. (Adopted January 1, 1999; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 25-2, 25-5(b), Documents Excluded From Electronic Filing; Circuit Rule

**Circuit Advisory Committee Note to Rule 27-1.**

(1) **Motions Acted on by the Appellate Commissioner.** The Appellate Commissioner is an officer appointed by the Court. The Court has delegated broad authority under FRAP 27(b) to the Appellate Commissioner to review a wide variety of motions, e.g., appointment, substitution, and withdrawal of counsel and motions for reinstatement. The Appellate Commissioner may deny a motion for dispositive relief, but may not grant such a request other than those filed under FRAP 42(b).

(2) **Motions Acted on by a Single Judge.** Under FRAP 27(c), a single judge may grant or deny any motion which by order or rule the Court has not specifically excluded, but a single judge may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge may grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. In addition, some types of motions may be ruled on by a single judge by virtue of a particular rule or statute.

(3) **Motions Acted on by Motions Panels.**

(a) **Motions Heard by the Motions Panels.** The motions panel shall rule on substantive motions, including motions to dismiss, for summary affirmance, and similar motions. The Court has determined that in the interest of uniformity, motions for bail are considered by a three-judge motions panel.

(b) **Selection of Motions Panels.** Judges are ordinarily assigned to the three-judge motions panel on a rotating basis by the Clerk for a term of one month. A single motions panel is appointed for the entire circuit.

(c) **Procedures for Disposition of Motions by the Motions Panel.** All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they ordinarily decide the motion. The third judge participates only if

- (i) one of the other members of the panel is disqualified or is otherwise unavailable; or
- (ii) the other members of the panel disagree on the disposition of a motion or he or she is requested to participate by the other members of the panel.

A motions panel sits in San Francisco for several days each month. If necessary, emergency motions are acted on by telephone. (See Cir. R. 27-3 through 27-4 and Advisory Committee Notes thereto.)

(4) **Motions for Clarification, Reconsideration or Rehearing.** Motions for clarification, reconsideration or rehearing of a motion are disfavored by the Court and are rarely granted. The filing of such motions is discouraged. (See Circuit Rule 27-10 as to time limits on filing motions for reconsideration.)

(5) **Position of Opposing Counsel.** Unless precluded by extreme time urgency, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position.

(6) **Request to Amend the Briefing Schedule.** A party may request modification of the briefing schedule in conjunction with any request for other relief. The request for modification of the briefing schedule should be included in the legend as well as the body of the motion for other relief.

(7) **Requests for Judicial Notice.** Requests for judicial notice and responses thereto filed during the pendency of the case are retained for review by the panel that will consider the merits of a case. The parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request.

(Amended January 1, 2011.)

**Cross References.** Circuit Advisory Committee Note to Rule 27-3 regarding emergency motions; Circuit Rule 25-2, Communications to the Court; FRAP 32(c), Form of Other Papers; Circuit Rule 40-1, Format; Number of Copies.

## **Rule 27-2. Motions for Stays Pending Appeal.**

If a district court stays an order or judgment to permit application to the Court of Appeals for a stay pending appeal, an application for such stay shall be filed in the Court of Appeals within 7 days after issuance of the district court's stay. (Amended effective December 1, 2009.)

## STATUTORY NOTES

**Cross References.** Circuit Rule 27-3, Emergency and Urgent Motions; FRAP 8, Stay or Injunction Pending Appeal.

**Rule 27-3. Emergency and Urgent Motions.**

(a) **Emergency Motions.** If a movant certifies that to avoid irreparable harm relief is needed in less than 21 days, the motion shall be governed by the following requirements:

(1) before filing the motion, the movant shall make every practicable effort to notify the Clerk and opposing counsel, and to serve the motion, at the earliest possible time.

(2) the motion shall be filed electronically or, if proceeding pro se or if counsel is exempt from using the Appellate ECF system, by paper with the Clerk in San Francisco.

(3) Any motion under this Rule shall have a cover page bearing the legend "Emergency Motion Under Circuit Rule 27-3" and the caption of the case.

A certificate of counsel for the movant, entitled "Circuit Rule 27-3 Certificate," shall follow the cover page and shall contain:

(i) The telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties;

(ii) Facts showing the existence and nature of the claimed emergency; and

(iii) When and how counsel for the other parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.

(4) If the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and, if not, why the motion should not be remanded or denied.

(b) **Urgent Motions.** If a movant certifies that to avoid irreparable harm, action is needed by a specific date or event but not within 21 days as in (a) above, the motion shall be governed by the following requirements.

(1) before filing the motion, the movant shall notify opposing counsel and serve the motion at the earliest possible time;

(2) the movant shall file the motion electronically or, if proceeding pro se or if counsel is exempt from using the Appellate ECF system, by paper with the Clerk in San Francisco;

(3) any motion under this section shall have a cover page bearing the legend "Urgent Motion Under Circuit Rule 27-3(b)," the caption of the case, and a statement immediately below the title of the motion that states the date or event by which action is necessary;

(4) if the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all



grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and if not, why the motion should not be remanded or denied.

The motion shall otherwise comport with FRAP 27. (Adopted July 1, 2000; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 8, Stay or Injunction Pending Appeal; FRAP 25, Filing and Service; Circuit Rule 27-5, Emergency Motions for Stay of Execution of Sentence of Death.

#### **Circuit Advisory Committee Note to Rule 27-3.**

(1) **Procedures for Motions.** When an emergency motion is filed with the Clerk in San Francisco, it is immediately referred to the motions attorney unit. A motions attorney will contact the lead judge of the motions panel, or, if he or she is unavailable, the second judge and then the third judge of the motions panel. (See Advisory Committee Note to Rule 27-1.) That judge then may either grant temporary relief or convene the motions panel (usually by telephone) to decide the motion.

(2) **Emergency Telephone Number.** The clerk's office provides 24-hour telephone service for calls placed to the main clerk's office number, (415) 355-8000. Messages left at times other than regular office hours are

recorded and monitored on a regular basis by the motions attorneys.

Messages should be left only with regard to matters of extreme urgency that must be handled by the Court before the next business day. Callers should make clear the nature of the emergency and the reasons why next-business-day treatment is not sufficient.

(3) **Appropriate Application of Rule.** The provisions of Circuit Rule 27-3 are intended to be employed in instances where the absence of a response from the Court by a date certain would result in irreparable or significant harm to a party, e.g., a motion to reinstate an immigration petition where petitioner faces imminent removal or to stay enforcement of a district court order. The provisions of the rule are not intended for application to requests for procedural relief, e.g., a motion for an extension of time to file a brief.

Amended December 1, 2009.

**Cross References.** Advisory Committee Notes to Rules 31-2.2 and 32-2.

#### **Rule 27-4. Emergency Criminal Interlocutory Appeals.**

If emergency treatment is sought for an interlocutory criminal appeal, motions for expedition, summary affirmances or reversal, or dismissal may be filed pursuant to Circuit Rule 27-3. To avoid delay in the disposition of such motions, counsel should include with the motion all material that may bear upon the disposition of the appeal, including: information concerning the scheduled trial date; information regarding codefendants; and information concerning other counts contained in the indictment but not in issue. (Amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 4(b), Appeals in Criminal Cases; FRAP 22, Habeas Corpus and Section 2255 Proceedings; Circuit Rule 22-1, Certificate of Appealability (COA); Circuit Rule 22-2, Direct Criminal Appeals, First Petitions, and Stays of Execution: Capital Cases; Circuit Rule 22-3, Applications for Authorization to File Second or Successive 2254

Petition or 2255 Motion — All Cases; Stay of Execution — Capital Cases; Circuit Rule 22-4, Appeals from Authorized Second or Successive 2254 Petitions or 2255 Motions; Circuit Rule 22-5, Subsequent Petitions or Motions; Related Civil Proceedings; Circuit Rule 22-6, Rules Applicable to all Death Penalty Cases.



**Rule 27-5. Emergency Motions for Stay of Execution of Sentence of Death. [Abrogated]****Rule 27-6. No Oral Argument Unless Otherwise Ordered. [Abrogated.]****STATUTORY NOTES**

**Compiler's Notes.** Abrogated January 1999.

**Rule 27-7. Delegation of Authority to Act on Motions.**

The Court may delegate to the Clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the Court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10. (Rev. 1/1/04)

**STATUTORY NOTES****Circuit Advisory Committee Note to Rule 27-7.**

(a) **Procedural Motions.** Most non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by court staff under the supervision of the clerk, the appellate commissioner, or the chief circuit mediator. Court staff may act on procedural motions whether opposed or unopposed, but if there is

any question under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner or the chief circuit mediator. Through its General Orders, the Court has delegated authority to act on specific motions and to take other actions on its behalf. See, in particular, General Orders, Appendix A, (which are available on the Court's website). (Rev. 1-1-04)

**Rule 27-8. Required Recitals in Criminal and Immigration Cases.****Rule 27-8.1. Criminal Cases.**

Every motion in a criminal appeal shall recite any previous application for the relief sought and the bail status of the defendant.

**Rule 27-8.2. Immigration Petitions.**

Every motion in a petition for review of a decision of the Board of Immigration Appeals shall recite any previous application for the relief sought and inform the Court if petitioner is detained in the custody of the Department of Homeland Security or at liberty. (Adopted January 1, 2005; amended effective December 1, 2009.)

**Rule 27-9. Motions to Dismiss Criminal Appeals.****Rule 27-9.1. Voluntary Dismissals.**

Motions or stipulations for voluntary dismissals of criminal appeals shall, if made or joined in by counsel for appellant, be accompanied by appellant's written consent thereto, or counsel's explanation of why appellant's consent was not obtained.

## STATUTORY NOTES

**Cross References.** FRAP 42, Voluntary Dismissal.

**Rule 27-9.2. Involuntary Dismissals.**

Motions by appellees for dismissal of criminal appeals, and supporting papers, shall be served upon both appellant and appellant's counsel, if any. If the ground of such motion is failure to prosecute the appeal, appellant's counsel, if any, shall respond within 10 days. If appellant's counsel does not respond, the clerk will notify the appellant of the Court's proposed action.

If the appeal is dismissed for failure to prosecute, the Court may impose sanctions on appellant's counsel. Counsel will be provided with 14 days notice and an opportunity to respond before sanctions are imposed. (Amended effective December 1, 2009.)

**Rule 27-10. Motions for Reconsideration.****(a) Filing for Reconsideration**

(1) **Orders that terminate the case.** A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this Court must comply with the time limits and other requirements of FRAP 40 and Circuit Rule 40-1.

(2) **All other orders.** Unless the time is shortened or enlarged by order of this Court, a motion for clarification, modification or reconsideration of a court order that does not dispose of the entire case on the merits, terminate a case or otherwise conclude proceedings in this Court must be filed within 14 days of the date of the order.

(3) **Required showing.** A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

(b) **Court Processing.** A timely motion for clarification or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing of the motion. A party may file only one motion for clarification or reconsideration of a panel order. No answer to such a motion is permitted unless requested by the Court, but ordinarily the Court will not grant such a motion without requesting an answer. The rule applies to any motion seeking review of a motions panel order, either by the panel or en banc, and supersedes the time limits set forth in FRAP 40(a)(1) with respect to such motions.

A motion to reconsider an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or appellate commissioner is initially directed to the individual who issued the order. If that individual is disinclined to grant the requested relief, the motion for reconsideration shall be processed as follows:

(1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;

(2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;

(3) if the order was issued by an appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel. (Adopted effective January 1, 2004; amended effective January 1, 2009; amended effective December 1, 2009.)

### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 27-10.** Motions for clarification, reconsideration or rehearing of orders entered by a motions panel are not favored by the Court and should be utilized only where counsel

believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief.

### **Rule 27-11. Motions; Effect on Schedule.**

(a) Motions requesting the types of relief noted below shall stay the schedule for record preparation and briefing pending the Court's disposition of the motion: (Rev. 1/1/03)

- (1) dismissal;
- (2) transfer to another tribunal;
- (3) full remand;
- (4) in forma pauperis status in this Court;
- (5) production of transcripts at government expense; and
- (6) appointment or withdrawal of counsel.

(b) The schedule for record preparation and briefing shall be reset as necessary upon the Court's disposition of the motion. Motions for reconsideration are disfavored and will not stay the schedule unless otherwise ordered by the Court.

### **Rule 27-12. Motions to Expedite.**

Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause. "Good cause" includes, but is not limited to, situations in which: (1) an incarcerated criminal defendant contends that the valid guideline term of confinement does not extend beyond 12 months from the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant occurs within 12 months from the filing of the notice of appeal; or (3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot. The motion shall set forth the status of transcript preparation and opposing counsel's position or reason why moving counsel has been unable to determine that position. The motion may also include a proposed briefing schedule and date for argument or submission.

A motion pursuant to this rule may include a request for (i) a stay of the order on appeal, or (ii) release of a prisoner pending appeal. (Added 7/95)

## STATUTORY NOTES

**Cross References.** Circuit Rule 27-3, Emergency and Urgent Motions.

**Rule 27-13. Sealed Documents; Motions to Seal.**

(a) **Procedures.** Sealed documents, notifications under subsection (b), and motions under subsection (c) of this rule must be filed in paper format.

(b) **Filing Under Seal.** If the filing of any specific document or part of a document under seal is required by statute or a protective order entered below, the filing party shall file the materials or affected parts under seal together with an unsealed and separately captioned notification setting forth the reasons the sealing is required. Notification as to the necessity to seal based on the entry of a protective order shall be accompanied by a copy of the order. Any document filed under seal shall have prominently indicated on its cover and first page the words "under seal."

(c) **Motions to Seal.** A motion to seal may be made on any grounds permitted by law. Any motion to file a brief, excerpts of record, or other material under seal shall be filed simultaneously with the relevant document, which may be filed provisionally under seal. The motion shall indicate whether the party wishes to withhold from public disclosure any specific information, such as the names of the parties, and shall state whether the motion itself as well as the referenced materials should be maintained under seal. The document will remain sealed on a provisional basis until the Court rules on the motion.

Unless otherwise requested in the motion or stated in the order, the seal will not preclude court staff from viewing sealed materials.

(d) **Motions to Unseal.** A motion to unseal may be made on any grounds permitted by law. During the pendency of an appeal, any party may file a motion with this Court requesting that matters filed under seal either in the district court or this Court be unsealed. Any motion shall be served on all parties. (Adopted effective July 1, 1995; amended effective December 1, 2009.)

## STATUTORY NOTES

**Cross References.** Circuit Rule 25-5(b)(9), Documents excluded from electronic filing requirement.

**Circuit Advisory Committee Note to Rule 27-13.** Absent an order to the contrary, any portion of the district court or agency record that was sealed below shall remain under seal upon transmittal to this Court.

The Court does not automatically close oral argument to the public when briefs or the record have been filed under seal. A party seeking a closed hearing must move for such relief. (Rev. 7/1/12)

**Cross References.** Circuit Advisory Committee Note to Rule 3-5; 30-1.10. Presentence Reports.

**Rule 28-1. Briefs, Applicable Rules.**

(a) Briefs shall be prepared and filed in accordance with the Federal Rules of Appellate Procedure except as otherwise provided by these rules.



See FRAP 28, 29, 31 and 32. Briefs not complying with FRAP and these rules may be stricken by the Court.

(b) Parties must not append or incorporate by reference briefs submitted to the district court or agency or this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal.

(c) Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph. If an appellant uses the informal brief form, the optional reply brief need not comply with the technical requirements of FRAP 28(c) or 32(a).

#### STATUTORY NOTES

**Cross References.** FRAP 28(j), Citation of Supplemental Authorities.

**Circuit Advisory Committee Note to Rule 28-1.** Abrogated July 1, 2006.

#### **Rule 28-2. Contents of Briefs.**

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

#### **Rule 28-2.1. Certificate as to Interested Parties. [Abrogated.]**

#### STATUTORY NOTES

**Compiler's Notes.** Abrogated January 1, 2005.

#### **Rule 28-2.2. Statement of Jurisdiction.**

In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court.

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of one or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading. (Amended effective December 1, 2009.)

**Rule 28-2.3. Attorneys Fees. [Abrogated.]****STATUTORY NOTES**

**Compiler's Notes.** Abrogated July 1, 1997.

**Rule 28-2.4. Bail/Detention Status.**

(a) The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

(b) The opening brief in a petition for review of a decision of the Board of Immigration Appeals shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. (Adopted effective January 1, 2005; amended effective December 1, 2009.)

**Rule 28-2.5. Reviewability and Standard of Review.**

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth. (Amended effective December 1, 2009.)

**Rule 28-2.6. Statement of Related Cases.**

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;

(b) are cases previously heard in this Court which concern the case being briefed;

(c) raise the same or closely related issues; or

(d) involve the same transaction or event.

If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

**Rule 28-2.7. Addendum to Briefs.**

**Statutory.** Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review

or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of \_\_\_\_\_ .

**Orders Challenged in Immigration Cases.** All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief but separated from the brief by a distinctively colored page. (Adopted effective July 1, 2007; amended effective December 1, 2009.)

#### **Rule 28-2.8. Record References.**

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found. (Amended effective July 1, 1998; amended effective December 1, 2009.)

#### **Rule 28-2.9. Bankruptcy Appeals.**

[Abrogated 12/1/09]

#### **STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 28-2.** Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. *See Mitchell v. General Elec. Co.*, 689 F.2d 877 (9th Cir. 1982).

#### **Rule 28-3. Length of Briefs; Motions to Exceed Page Limits.** [Abrogated.]

#### **STATUTORY NOTES**

See FRAP 32, Form of Briefs, Appendices, and Other Papers; FRAP 32(a)(7) and Circuit Rule 32, Form of Brief.

#### **Rule 28-4. Extensions of Time and Enlargements of Size for Consolidated and Joint Briefing.**

In a case or consolidated cases involving multiple separately represented appellants or appellees, all parties on a side are encouraged to join in a single brief to the greatest extent practicable. As set forth below, the Court will grant a reasonable extension of time and enlargement of size for filing

such a joint brief or for filing a brief responding to a joint brief or to multiple briefs.

**Notice Procedure.** If no previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited, the Court will grant a 21-day extension of time and an enlargement of five (5) pages, 1,400 words or 130 lines of monospaced text for a joint brief upon the filing of the notice at Appendix of Forms, No. 7 to these rules.

If no previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited, the Court will grant a 21-day extension of time and an enlargement of five (5) pages, 1,400 words or 130 lines of monospaced text to a party filing a single response to a joint brief or multiple briefs upon the filing of the notice at Appendix of Forms, No. 7.

Upon receipt of such a notice, a corresponding adjustment to the responsive brief's due date will be recorded on the docket.

All notices described in this rule must be filed at least 7 days prior to the brief's due date and signed by counsel for all parties on that side. If the parties on a side have different due dates for their briefs, the notice must be filed at least 7 days before the earliest due date and the extended due date shall be calculated from the latest due date.

**Motion Procedure.** If parties filing a joint brief or responding to multiple briefs or joint briefs wish to obtain a lengthier extension of time or greater enlargement of brief size than described above, or if the case has been previously expedited, the extension or enlargement request must be made by written motion. Motions for extensions of time must be filed at least 7 days prior to the brief's due date; joint motions for extensions of time and/or to enlarge brief size must be signed by all counsel filing the motion. If the parties on a side have different due dates for their briefs, the motion must be filed at least 7 days prior to the earliest due date.

The previous grant of an extension of time under Circuit Rule 31-2.2(a) precludes a request for relief under this rule absent a showing of extraordinary and compelling circumstances. (Amended effective July 1, 1997; amended effective July 1, 2000; amended effective December 1, 2002; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 31-2.2, Extensions of Time for Filing Briefs; Circuit Rule 32-1, Form of Briefs: Certificate of Compliance; Circuit Advisory Committee Note to Rule 33-1.

**Circuit Advisory Committee Note to Rule 28-4.** Rule 28-4 encourages separately represented parties to file a joint brief to avoid burdening the Court with repetitive presentations of common facts and issues. Such joint briefing may require additional time and size. Accordingly, upon written notice, the Court

will grant a 21-day extension of time for filing a joint brief or a brief responding to multiple briefs. Similarly, upon written notice, the Court will grant five (5) additional, double-spaced pages, 1,400 additional words, or 130 lines of monospaced text for filing a joint brief or a brief responding to a joint brief or to multiple briefs. A further enlargement of time or size may be granted upon written motion supported by a showing of good cause.

In exceptionally complex, multi-party criminal cases, the parties may request a case



conference before the appellate commissioner.  
See Circuit Advisory Committee Note to Rule  
33-1, Section B.

### **Rule 28-5. Multiple Reply Briefs.**

If multiple answering briefs or multiple combined answering and reply cross-appeal briefs are filed, an appellant or group of jointly represented appellants is limited to filing a single brief in response to the multiple briefs.

In the absence of a specifically scheduled due date for the reply brief, the due date for a brief that replies to multiple answering or cross-appeal briefs is calculated from the service date of the last served answering brief. (Amended effective January 1999.)

### **Rule 28-6. Citation of Supplemental Authorities.**

The body of a letter filed pursuant to FRAP 28(j) shall not exceed 350 words. If the letter is not required to be filed electronically, litigants shall submit an original of a FRAP 28(j) letter. (Adopted effective December 1, 2002; amended effective December 1, 2009.)

#### **STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 28-6.** In the interests of promoting full consideration by the Court and fairness to all sides, the parties should file all FRAP 28(j) letters as soon as possible. When practical, the parties are particularly urged to file

FRAP 28(j) letters at least 7 days in advance of any scheduled oral argument or within 7 days after notification that the case will be submitted on the briefs.

**Cross References.** Circuit Rule 25-4, Cal-endarred Cases.

### **Rule 29-1. Reply Brief of an Amicus Curiae.**

No reply brief of an amicus curiae will be permitted. (Amended effective December 1, 2009.)

#### **STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 29-1.** The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.

Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. If the letter is not required to be filed electronically, the letter shall be provided in an original. (Rev. 7/94; Rev. 12/1/09)

### **Rule 29-2. Brief Amicus Curiae Submitted to Support or Oppose a Petition for Panel or En Banc Rehearing or During the Pendency of Rehearing.**

(a) **When Permitted.** An amicus curiae may be permitted to file a brief when the Court is considering a petition for panel or en banc rehearing or when the Court has granted rehearing. The United States or its officer or

agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and include the recitals set forth at FRAP 29(b).

(c) **Format/Length.**

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words or 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the Court, a brief submitted after the Court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) **Number of Copies.**

(1) If a petition for rehearing en banc has been granted and the brief is not required to be submitted electronically, an original and 20 copies of the brief shall be submitted.

(2) For all other briefs described by this rule that are not required to be submitted electronically, an original shall be submitted.

The Clerk may order the submission of paper copies or additional copies of any brief filed pursuant to this rule.

(e) **Time for Filing.**

(1) **Brief Submitted to Support or Oppose a Petition for Rehearing.** An amicus curiae must serve its brief along with any necessary motion no later than 10 days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than 10 days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) **Briefs Submitted During the Pendency of Rehearing.** Unless the Court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than 21 days after the petition for rehearing is granted. Unless the Court orders otherwise, an amicus curiae supporting the position of the responding party must serve its

brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) **Circulation.** Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the Court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court. (Adopted effective July 1, 2007; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** FRAP 29, Brief of an Amicus Curiae; Circuit Rule 25-4, Calendared Cases.

**Circuit Advisory Committee Note to Rule 29-2.** Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae briefs submitted during the pendency of rehearing. The Court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-

disposition deliberations involve novel or particularly complex issues.

The Court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the Court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief. (New 7/ 1/07)

#### Rule 29-3. Motions for Leave to File Amicus Curiae Briefs.

A motion for leave to file an amicus brief shall state that movant endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. (Adopted effective January 1, 2012.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 29-3.** FRAP 29(a) permits the timely filing of an amicus curiae brief without leave

of the Court if all parties consent to the filing of the brief; obtaining such consent relieves the Court of the need to consider a motion.

#### Rule 30-1. The Excerpts of Record.

##### Rule 30-1.1. Purpose.

(a) In the Ninth Circuit the appendix prescribed by FRAP 30 is not required. Instead, Circuit Rule 30-1 requires the parties to prepare excerpts of record. The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. The parties should ensure that in accordance with the limitations of Circuit Rule 30-1, those parts of the record necessary to permit an informed analysis of their positions are included in the excerpts.

(b) Excerpts of record must be filed in all cases, unless Circuit Rule 30-1.2 applies. The requirements for petitions for review and applications for

enforcement of agency decisions are set forth at Circuit Rule 17-1. In appeals from district court decisions reviewing agency actions, the excerpts of record shall comply with Circuit Rule 30-1 and shall include as well the materials required by Circuit Rule 17-1. (Amended effective December 1, 2009.)

**Rule 30-1.2. Unrepresented Litigants.**

Appellants and appellees proceeding without counsel need not file the initial excerpts, supplemental excerpts or further excerpts of record described in this section. (Adopted effective January 1, 2005; amended effective December 1, 2009.)

**Rule 30-1.3. Appellant's Initial Excerpts of Record.**

At the time the appellant's opening brief is submitted, the appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, submit 4 copies of the excerpts of record bound separately from the briefs. The appellant shall serve one copy of the excerpts on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. (Amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 25-5(b)(11), Documents excluded from electronic filing requirement.

**Rule 30-1.4. Required Contents of the Excerpts of Record.**

(a) In all appeals, the excerpts of record shall include:

- (i) the notice of appeal;
- (ii) the trial court docket sheet;
- (iii) the judgment or interlocutory order appealed from;
- (iv) any opinion, findings of fact or conclusions of law relating to the judgment or order appealed from;
- (v) any other orders or rulings, including minute orders, sought to be reviewed;
- (vi) any jury instruction given or refused which presents an issue on appeal;
- (vii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;
- (viii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was



delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(ix) where an issue on appeal is based upon a challenge to the allowance or rejection of jury instructions, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the instructions at issue, including the ruling or order, and objections;

(x) where an issue on appeal is based on written exhibits (including affidavits), those specific portions of the exhibits necessary to resolve the issue; and

(xi) any other specific portions of any documents in the record that are cited in appellant's briefs and necessary to the resolution of an issue on appeal.

(b) In addition to the items required by Circuit Rule 30-1.4(a), in all criminal appeals and motions for relief under 28 U.S.C. § 2255, the excerpts of record shall also include:

(i) the final indictment; and

(ii) where an issue on appeal concerns matters raised at a suppression hearing, change of plea hearing or sentencing hearing, the relevant portions of reporter's transcript of that hearing.

**Cross Reference:** Circuit Rule 30-1.10, Presentence Reports.

(c) In addition to the items required by Circuit Rule 30-1.4(a), in civil appeals the excerpts of record shall also include:

(i) the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final complaint and answer, petition and response, or other pleadings setting out those issues, and;

(ii) where the appeal is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on appeal; and

(iii) where the appeal is from a district court order reviewing an agency's benefits determination, the entire reporter's transcript of proceedings before the administrative law judge if such transcript was filed with the district court. (Added effective January 1, 2003.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 28-2.5,  
Reviewability and Standard of Review.

#### **Rule 30-1.5. Items Not to Be Included in the Excerpts of Record.**

The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor.

## STATUTORY NOTES

**Cross References.** Circuit Rule 30-2,  
Sanctions for Failure to Comply with Circuit  
Rule 30-1.

**Rule 30-1.6. Format of Excerpts of Record.**

(a) **Excerpts of record that exceed 75 pages.** The first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the district, magistrate, bankruptcy judge, bankruptcy appellate panel, and, in proceedings governed by 28 U.S.C. § 2254, the state reviewing court disposition, that relate to the issues being appealed. All additional documents shall be included in subsequent volumes of the excerpts. The documents in the first volume of the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. The documents in subsequent volumes also normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The trial court docket shall always be the last document in the excerpts. The 4 copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The cover shall include the volume number. The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. The excerpts shall be filed in multiple volumes, with each volume containing three hundred (300) pages or fewer.

(b) **Excerpts of Record that do not exceed 75 pages.** The documents in the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The document with the most recent file date should appear under the first tab or should be paginated beginning with page 1. The trial court docket shall always be the last document in the excerpts. The 4 copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be

securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording “Excerpts of Record” shall be substituted for “Brief of Appellant.” The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk’s record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter’s transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. (Amended effective July 1, 1998; amended effective December 1, 2002; amended effective July 1, 2007; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 30-1.6.** Although presentation of the excerpts’ contents in chronological order is the customary method to proffer the docu-

ments, the parties may employ an alternative method of organization if that method seems better suited to the arguments offered in the brief. (New 7/1/07)

#### **Rule 30-1.7. Appellee’s Supplemental Excerpts of Record.**

If the appellee believes that the excerpts of record filed by the appellant exclude items which are required under this rule, or if argument in the answering brief requires review of portions of the reporter’s transcript or documents not included by appellant in the excerpts, the appellee shall, unless exempt pursuant to Circuit Rule 30-1.2, at the time of the appellee’s brief is submitted, submit supplemental excerpts of record, prepared pursuant to this rule, comprised of the omitted items. Appellee shall submit 4 copies of the supplemental excerpts. The appellee shall serve one copy of the supplemental excerpts of record on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief.

If appellant did not file excerpts of record under subsection 30-1.3 of this rule, the contents of appellee’s supplemental excerpts are limited to the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portions of the record cited in appellee’s brief. (Adopted effective January 1, 2005; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Compiler’s Notes.** Former Rule 30-1.7 was renumbered as present Rule 30-1.9.

5(b)(11), Documents excluded from electronic filing requirement.

**Cross References.** Circuit Rule 25-

**Rule 30-1.8. Further Excerpts of Record.**

(a) If the reply brief requires review of portions of the reporter's transcript or documents not included in the previously filed excerpts, appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, at the time the reply brief is submitted, submit supplemental excerpts of record. Appellant shall submit 4 copies of the supplemental excerpts and shall serve one copy of such excerpts of record on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. (Rev. 12/1/09)

(b) If a supplemental brief filed pursuant to court order requires review of portions of the reporter's transcript or documents not included in any previously filed excerpts, the party filing the supplemental brief, shall, at the time the supplemental brief is submitted, submit additional excerpts of record. The party shall submit 4 copies of the excerpts and shall serve one copy of such excerpts of record on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. (Adopted effective July 1, 1998; amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 25-5(b)(11), Documents excluded from electronic filing requirement.

**Compiler's Notes.** Former Rule 30-1.8 was renumbered as present Rule 30-1.10.

**Rule 30-1.9. Additional Copies of the Excerpts of Record.**

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional 20 copies of the excerpts of record.

**STATUTORY NOTES**

**Compiler's Notes.** This Rule was formerly compiled as Rule 30-1.7

**Rule 30-1.10. Presentence Reports.**

In all cases in which the presentence report is referenced in the brief, the party filing such brief must forward 4 paper copies of the presentence report and may forward 4 copies of any other relevant confidential sentencing documents under seal to the Clerk of the Court of Appeals. This filing shall be accomplished by mailing the 4 copies of the presentence report in a sealed envelope which reflects the title and number of the case and that 4 copies of the presentence report are enclosed. The copies of the presentence report shall accompany the excerpts of record. The presentence report shall remain



under seal but be provided by the Clerk to the panel hearing the case. (Amended effective January 1, 1996; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Compiler's Notes.** This rule was formerly compiled as Rule 30-1.8.

Documents excluded from electronic filing requirement; Circuit Rule 27-13, Sealed Documents; Motions to Seal.

**Cross References.** Circuit Rule 25-5(b)(6),

#### **Rule 30-2. Sanctions for Failure to Comply with Circuit Rule 30-1.**

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the Court may take one or more of the following actions:

- (a) strike the excerpts and order that they be corrected and resubmitted;
- (b) order that the excerpts be supplemented;
- (c) if the Court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the Court deems to be excessive; and/or
- (d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

#### **Rule 30-3. Prisoner Appeals Without Representation by Counsel.**

In cases involving appeals by prisoners not represented by counsel, the clerk of the district court shall, within 21 days from the receipt of the prisoner's written request, forward to the prisoner copies of the documents to comprise the excerpts of record. (Amended effective December 1, 2009.)

#### **Rule 31-1. Number of Briefs.**

In lieu of the 25 copies required by FRAP 31(b), an original and 7 copies of each brief shall be filed. Parties submitting a brief electronically shall defer submission of paper copies of the brief pending a directive from the Clerk to do so, but must serve any unregistered party or exempt counsel with one paper copy of the brief on the day that the brief is submitted electronically. If a petition for hearing or rehearing en banc is granted, each party shall file 20 additional copies of its briefs. The appellant shall also file 20 additional copies of the excerpts of record. (Amended effective July 1, 2005; amended effective December 1, 2009.)

#### **Rule 31-2. Time for Service and Filing.**

##### **Rule 31-2.1. Requirement of Timely Filing.**

(a) Parties shall observe the briefing schedule set by an order of the Court of Appeals. Specific due dates set by Court order are not subject to the additional 3-day allowance for service of previous papers by mail set forth in FRAP 26(c) or Circuit Rule 26-2. The filing of the appellant's brief before the due date shall not advance the due date for the appellee's brief.

(b) [Abrogated 12/1/09.]

(c) [Abrogated 1/99.] (Amended effective December 1, 2009.)

### **Rule 31-2.2. Extensions of Time for Filing Briefs.**

(a) If good cause is shown, the clerk or a designated deputy may grant an oral request for a single extension of time of no more than 14 days to file an opening, answering or reply brief. Such extensions may be applied for and granted or denied by telephone. The grant or denial of the extension shall be entered on the court docket. Application for such an extension shall be conditioned upon prior notice to the opposing party. The grant of an extension of time under this rule will bar any further motion to extend the brief's due date unless such a motion, which must be in writing, demonstrates extraordinary and compelling circumstances. The previous filing of a motion under Circuit Rule 31-2.2(b) precludes an application for an extension of time under this subsection.

(b) In all other cases, an extension of time may be granted only upon written motion supported by a showing of diligence and substantial need.

The motion shall be filed at least 7 days before the expiration of the time prescribed for filing the brief, and shall be accompanied by a declaration stating:

- (1) when the brief is due;
- (2) when the brief was first due;
- (3) the length of the requested extension;
- (4) the reason an extension is necessary;
- (5) movant's representation that movant has exercised diligence and that the brief will be filed within the time requested;
- (6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position; and
- (7) that the court reporter is not in default with regard to any designated transcripts.

A conclusory statement as to the press of business does not constitute a showing of diligence and substantial need. (Amended effective January 1, 1996; amended effective December 1, 2009.)

### **STATUTORY NOTES**

**Cross References.** Circuit Rule 11-1.2, Notice of Reporter Defaults.

**Circuit Advisory Committee Note to Rule 31-2.2.** If a party files a motion for a first extension of time to file a brief on or before the due date for the brief, and the Court does not rule on the motion until shortly before the due date, or on or after the due date for the brief, the Court ordinarily will grant some additional time to file the brief even if the Court does not grant the motion in full. Multiple motions for extension of time to file a brief are

disfavored, however, and the Court may decline to grant relief if a successive motion fails to demonstrate diligence and substantial need.

If the Court does not act on a motion for extension of time to file a brief before the requested due date, the Court nonetheless expects the moving party to file the brief within the time requested in the motion. The brief should be accompanied by a letter stating that a motion for an extension of time is pending. (New 01/01; Rev. 12/1/09)

**Rule 31-2.3. Failure to File Briefs.**

If the appellant fails to file a brief within the time allowed by FRAP 31(a) or an extension thereof, the Court may dismiss the appeal pursuant to Circuit Rule 42-1. If appellee does not elect to file a brief, appellee shall notify the Court by letter on or before the due date for the answering brief. Failure to file the brief timely or advise the Court that no brief will be filed will subject counsel to sanctions. (Amended effective July 1, 1993; amended effective December 1, 2009.)

**STATUTORY NOTES**

**Cross References.** Circuit Rule 42-1, Dismissal for Failure to Prosecute.

**Rule 32. Form of Brief. [Abrogated.]** *See* Fed. R. App. P. 32, effective December 1, 1998.

**Rule 32-1. Form of Briefs: Certificate of Compliance.**

All briefs submitted under Circuit Rule 28-4 or Circuit Rule 32-4, must include a certificate with language identical to and a format substantially similar to Form 8 in the Appendix of Forms attached to these rules. (Amended effective December 1, 2002.)

**Rule 32-2. Motions to Exceed the Page or Type-volume Limitation.**

The Court looks with disfavor on motions to exceed the applicable page or type-volume limitations. Such motions will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the page or type-volume limitations set forth at FRAP 32(a)(7) (A) or (B) must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion.

Any such motions shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count. The cost of preparing and revising the brief will not be considered by the Court in ruling on the motion.

**STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 32-2.** If the Court does not grant the requested relief or grants the relief only in part, the Court ordinarily will provide the party a reasonable interval after the entry of

the order to file a brief as directed by the Court. Any order that decides a motion will make adjustments to the due date(s) for any further briefing. (Rev. 1/1/07)

**Rule 32-3. Briefs Filed Pursuant to Court Order.**

All briefs filed pursuant to court order must conform to the format requirements of FRAP 32.

If an order of this Court sets forth a page limit, the affected party may comply with the limit by

- (1) filing a monospaced brief of the designated number of pages, or
- (2) filing a monospaced brief for which the number of lines divided by 26 does not exceed the designated page limit, or
- (3) filing a monospaced or proportionally spaced brief in which the word count, divided by 280, does not exceed the designated page limit.

**Rule 32-4. Briefs and Excerpts of Record in Capital Cases.**

**Briefs.** The requirements of FRAP 32 shall apply to appeals from district court judgments which finally dispose of a capital case, except that the following page or type-volume limitations apply:

- (1) A proportionally spaced principal brief must not exceed 21,000 words and a reply brief must not exceed 9,800 words.
- (2) Briefs prepared in monospaced typeface shall either: (a) not exceed 75 pages (1,950 lines) for a principal brief and 35 pages (910 lines) for a reply brief, or (b) conform to the word count set forth in (1) above.

**Excerpts.** The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or parts of the record shall so notify the Court.

In addition to the documents listed in Circuit Rule 30-1.3, excerpts of record in capital cases shall contain all final orders and rulings of all state courts in appellate and post-conviction proceedings. Excerpts of record shall also include all final orders involving the conviction or sentence issued by the Supreme Court of the United States.

**Rule 32-5. Unrepresented Litigants.**

If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, neither the optional reply brief nor any petition for rehearing need comply with FRAP 32.

Alternatively, if an unrepresented litigant elects to file a brief that complies with FRAP 28 and Circuit Rule 28-2 but not with FRAP 32, any principal brief shall not exceed 40 pages, and an optional reply brief shall not exceed 20 pages.

**STATUTORY NOTES**

**Cross References.** FRAP 32, Form of Briefs, Appendices, and Other Papers; Circuit Rule 30-1, The Excerpts of Record.

**Rule 33-1. Mediation Office — Appeal Conferences.**

The primary purpose of a prehearing conference shall be to explore settlement of the dispute that gave rise to the appeal. The judge or court mediator may require the attendance of parties and counsel. Information disclosed to the judge or court mediator in settlement discussions shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the settlement program participants.



In the context of a settlement or mediation in a civil appeal, the parties who have otherwise settled the case may stipulate to have one or more issues in the appeal submitted to an appellate commissioner for a binding determination. (Amended effective July, 1994; amended effective July 1, 2001; amended effective December 1, 2009.)

### STATUTORY NOTES

#### **Circuit Advisory Committee Note to Rule 33-1.**

(a) **Mediation Conferences.** The Circuit Mediation Office is staffed with experienced attorney mediators and is an independent unit in the Court. In any case, the Court may direct that a conference be held, in-person or over the telephone, with counsel, or with counsel and the parties or key personnel, including insurance representatives. A judge who conducts a settlement conference pursuant to this rule will not participate in the decision on any aspect of the case, except that he or she may vote on whether to take a case en banc.

Requests by counsel for a conference will be accommodated whenever possible. Parties may request conferences confidentially, either by telephone or by letter directed to the Chief Circuit Mediator.

The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's office pursuant to Circuit Rule 31-2.2.

Counsel should discuss settlement with their principals prior to a conference scheduled under this rule.

(b) **Appeal Case Management Conference.** In any case the Court may direct either sua sponte or upon request of a party that a telephone or in-person case management conference be held before an Appel-

late Commissioner, a senior staff member in the Clerk's office, or a staff attorney. The purpose of a case management conference is to manage the appeal effectively and develop a briefing plan for complex appeals. If a case is selected for a case management conference, counsel shall be notified by order of the date and time of the conference. Case management conferences are held only in exceptional circumstances, such as complex cases involving numerous separately represented litigants or extensive district court/agency proceedings.

(c) **Binding Determinations by Appellate Commissioner.** In the context of a settlement or mediation in a civil appeal, the parties may stipulate to having one or more issues in their appeal referred for a binding determination by an Appellate Commissioner. Where the parties enter into such a stipulation, the matter may be handled with abbreviated and accelerated briefing and a guaranteed opportunity for in-person or telephonic oral argument before the Appellate Commissioner. The Appellate Commissioner will issue a determination and, if requested, a written statement of reasons. The determination will have no precedential effect and will be final and nonreviewable. Cases will ordinarily be referred to the Appellate Commissioner through the Court's mediation program. In some instances, the Court's pro se unit may also alert parties to the availability of this program. For further information, please contact the Circuit Mediation Office at (415) 355-7900. (New 7/01)

### **Rule 34-1. Place of Hearing.**

Appeals, applications for original writs, and petitions to review or enforce orders or decisions of administrative agencies may be heard at any session of the Court in the circuit, as designated by the Court. Cases are generally heard in the administrative units where they arise. Petitions to enforce or review orders or decisions of boards, commissions or other administrative bodies shall be heard in the administrative unit in which the person affected by the order or decision is a resident, unless another place of hearing is ordered by the Court.

**Rule 34-2. Change of Time or Place of Hearing.**

No change of the day or place assigned for hearing will be made except by order of the Court for good cause. Only under exceptional circumstances will the Court grant a request to vacate a setting within 14 days of the date set.

**Rule 34-3. Priority Cases.**

Any party who believes the case before the Court is entitled to priority in hearing date by virtue of any statute or rule, shall so inform the Clerk in writing no later than the filing of the first brief.

Criminal appeals shall have first priority in hearing or submission date.

Civil appeals in the following categories will receive hearing or submission priority:

- (1) Recalcitrant witness appeals brought under 28 U.S.C. § 1826;
- (2) Habeas corpus petitions brought under Chapter 153 of Title 28;
- (3) Applications for temporary or permanent injunctions;
- (4) Appeals alleging deprivation of medical care to the incarcerated or other cruel or unusual punishment;
- (5) Appeals entitled to priority on the basis of good cause under 28 U.S.C. § 1657.

Any party who believes the case is entitled to priority in scheduling the date of hearing or submission solely on the basis of good cause under 28 U.S.C. § 1657 shall file a motion for expedition with the clerk at the earliest opportunity.

**Rule 34-4. Classes of Cases to Be Submitted Without Oral Argument. [Abrogated effective January 1, 1999.] (See FRAP 34(a)(2))**

**Circuit Advisory Committee Note to Rules 34-1 to 34-3.**

(1) **Appeals Raising the Same Issues.** When other pending cases raise the same legal issues, the Court may advance or defer the hearing of an appeal so that related issues can be heard at the same time. Cases involving the same legal issue are identified during the Court's inventory process. The first panel to whom the issue is submitted has priority. Normally, other panels will enter orders vacating submission and advise counsel of the other pending case when it appears that the first panel's decision is likely to be dispositive of the issue.

Panels may also enter orders vacating submission when awaiting the decision of a related case before another court or administrative agency.

(2) **Oral Argument.** Any party to a case may request, or all parties may agree to request, a case be submitted without oral argument. This request or stipulation requires the approval of the panel. Oral argu-

ment will not be vacated if any judge on the panel desires that a case be heard. See FRAP 34(f). The Court thoroughly reviews the briefs before oral argument. Counsel therefore should not unnecessarily repeat information and arguments already sufficiently covered in their briefs. Counsel should be completely familiar with the factual record, so as to be prepared to answer relevant questions.

(3) **Disposition.** One judge prepares a draft disposition. The draft is sent to the other two judges for the purpose of obtaining their comments, concurrences, or dissents. Upon adoption of a majority disposition, the author sends it to the Clerk along with any separate concurring or dissenting opinions.

(4) **Mandate.** The mandate of the Court shall issue to the lower tribunal 7 days after expiration of the period to file a petition for rehearing unless the time is shortened or enlarged by order. (See FRAP 41.) This allows time for filing a petition for rehearing, petition for rehearing en banc, and motion for stay of mandate pending application for writ of certiorari.

### **Rule 35-1. Petition for Rehearing En Banc.**

Where a petition for rehearing en banc is made pursuant to FRAP 35(b) in conjunction with a petition for panel rehearing, a reference to the petition for rehearing en banc, as well as to the petition for panel rehearing, shall appear on the cover of the petition.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc. (Amended effective December 1, 2009.)

### **Rule 35-2. Opportunity to Respond.**

Where a party petitions for hearing or rehearing en banc, the Court will not order a hearing or rehearing en banc without giving the other parties an opportunity to express their views whether hearing or rehearing en banc is appropriate. Where no petition for en banc review is filed, the Court will not ordinarily order a hearing or rehearing en banc without giving counsel an opportunity to respond on the appropriateness of such a hearing. (Amended effective December 1, 2009.)

### **Rule 35-3. Limited En Banc Court.**

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside. (Rev. 1/1/06, 7/1/07)

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot. (Rev. 1/1/06)

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc. (Amended effective January 1, 2006; amended effective July 1, 2007.)

### **STATUTORY NOTES**

**Cross References.** FRAP 40, Petition for Panel Rehearing.

**Circuit Advisory Committee Note to Rules 35-1 to 35-3**

(1) **Calculation of Filing Deadline.** Calculation of Filing Deadline. Litigants are reminded that a petition for rehearing en banc

must be received by the clerk in San Francisco on the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25-2; see also *United States v. James*, 146 F.3d 1183 (9th Cir. 1998). (Rev. 12/1/02; 12/1/09; 1/1/12)

(2) **Petition for Rehearing En Banc.** When the clerk receives a timely petition for



rehearing en banc, copies are sent to all active judges. If the panel grants rehearing it so advises the other members of the Court, and the petition for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing. Cases are rarely reheard en banc.

If no petition for rehearing en banc has been submitted and the panel votes to deny rehearing an order to that effect will be prepared and filed.

If a petition for rehearing en banc has been made, any judge may, within 21 days from receipt of the en banc petition, request the panel to make known its recommendation as to en banc consideration. Upon receipt of the panel's recommendation, any judge has 14 days to call for en banc consideration, whereupon a vote will be taken. If no judge requests or gives notice of an intention to request en banc consideration within 21 days of the receipt of the en banc petition, the panel will enter an order denying rehearing and rejecting the petition for rehearing en banc.

Any active judge who is not recused or disqualified and who entered upon active service before the request for an en banc vote is eligible to vote. A judge who takes senior status after a call for a vote may not vote or be drawn to serve on the en banc court. This rule is subject to two exceptions: (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a member of the en banc court may continue to serve on that court until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a

member of the en banc court when it reviews a decision of a panel of which the judge was a member.

The En Banc Coordinator notifies the judges when voting is complete. If the recommendation or request fails of a majority, the En Banc Coordinator notifies the judges and the panel resumes control of the case. The panel then enters an appropriate order denying en banc consideration. The order will not specify the vote tally.

(3) **Grant of Rehearing En Banc.** When the Court votes to rehear a matter en banc, the Chief Judge will enter an order so indicating. The vote tally is not communicated to the parties. The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court. (Rev. 1/ 1/2000)

After the en banc court is chosen, the judges on the panel decide whether there will be oral argument or additional briefing. If there is to be oral argument, the Chief Judge (or the next senior active judge as the case may be) will enter an order designating the date, time and place of argument. If no oral argument is to be heard, the Chief Judge will designate a date, time, and place for a conference of the en banc court. That date will ordinarily be the submission date of the case. If any issues have been isolated for specific attention, the order may also set forth those issues and additional briefing may be ordered. (Rev. 1/03; 12/1/09)

**Cross References.** FRAP 32, Form of Briefs, Appendices, and Other Papers; FRAP 32(c)(2), Other Papers; FRAP 40, Petition for Panel Rehearing.

#### **Rule 35-4. Format; Number of Copies.**

(a) **Format/Length of Petition and Answer** The format and length of a petition for rehearing en banc and any answer shall be governed by Circuit Rule 40-1(a).

The petition or answer must be accompanied by the completed certificate of compliance found at Form 11. (New 7/1/2000)

(b) **Number of Copies.** If the petition is not required to be filed electronically, a petition for rehearing en banc shall be filed in an original. (Amended effective July 1, 2000; amended effective December 1, 2009.)

#### **Rule 36-1. Opinions, Memoranda, Orders; Publication.**

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for



publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated “Per Curiam.”

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

### **Rule 36-2. Criteria for Publication.**

A written, reasoned disposition shall be designated as an OPINION if it:

- (a) Establishes, alters, modifies or clarifies a rule of federal law, or
- (b) Calls attention to a rule of law that appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel’s disposition of the case, or
- (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression. (Amended effective January 1, 2012.)

### **Rule 36-3. Citation of Unpublished Dispositions or Orders.**

(a) **Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(b) **Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007.** Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.

(c) **Citation of Unpublished Dispositions and Orders Issued before January 1, 2007.** Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders. (Added 7/1/2000; Rev. 1/1/07) (Added effective July 1, 2000; amended effective January 1, 2007.)

#### **Rule 36-4. Request for Publication.**

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this Court's disposition. A copy of the request for publication must be served on the parties to the case. The parties will have 14 days from the date of service to notify the Court of any objections they may have to the publication of the disposition. If such a request is granted, the unpublished disposition will be redesignated an opinion. (Amended effective December 1, 2009.)

#### **Rule 36-5. Orders for Publication.**

An order may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated when filed with the Clerk by the addition of the words "FOR PUBLICATION" on a separate line.

#### **Rule 36-6. Periodic Notice to Publishing Companies.**

[Abrogated 12/1/09]

### **STATUTORY NOTES**

**Circuit Advisory Committee Note to Rules 36-1 to 36-5.** The clerk's office is not given advance notice as to when a disposition will be delivered by the judges for filing and, therefore, cannot supply such information to counsel. When a disposition is filed, the Clerk mails or electronically transmits notice of entry of judgment and a copy of the disposition to counsel and the district judge from whom the appeal was taken. All dispositions are public unless ordered sealed by the Court. Once a disposition is filed with the Clerk,

anyone may obtain copies of printed decisions by making a written request to the clerk's office, accompanied by a \$2.00 fee and self-addressed envelope. Opinions are also available on the day of filing on the Court's website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) and by subscription to the Court's RSS feed at <http://www.ca9.uscourts.gov/rss/>. Opinions are subject to typographical error. The cooperation of the Bar in calling apparent errors to the attention of the clerk's office is solicited. (Rev. 12/1/09)

#### **Rule 39-1. Costs and Attorneys Fees on Appeal.**

##### **Rule 39-1.1. Bill of Costs.**

The itemized and verified bill of costs required by FRAP 39(d) shall be submitted on the standard form provided by this Court. It shall include the following information: (Rev. 1/1/05)

(1) The number of copies of the briefs or excerpts of record reproduced; and (Rev. 1/1/ 05)

(2) The actual cost per page for each document. (Amended effective January 1, 2005.)

#### **Rule 39-1.2. Number of Briefs and Excerpts.**

Costs will be allowed for the required number of paper copies of briefs and one additional copy. Costs will also be allowed for any paper copies of the briefs that the eligible party was required to serve. (Rev. 1/1/05; 1/1/09; 12/1/09)

If excerpts of record were filed, costs will be allowed for 5 copies of the excerpts of record plus 1 copy for each party required to be served, unless the Court shall direct a greater number of excerpts to be filed than required under Circuit Rules 30-1.3 and 17-1.3. (Amended effective January 1, 2005; amended effective December 1, 2009.)

#### **Rule 39-1.3. Cost of Reproduction.**

In taxing costs for photocopying documents, the clerk shall tax costs at a rate not to exceed 10 cents per page, or at actual cost, whichever is less. (Amended effective January 1, 2005; amended effective December 1, 2009.)

#### **Rule 39-1.4. Untimely Filing.**

Untimely cost bills will be denied unless a motion showing good cause is filed with the bill.

#### **Rule 39-1.5. Objection to Bill of Costs.**

If a response opposing a cost bill is filed, the cost bill shall be treated as a motion under FRAP 27.

The Clerk or a deputy clerk may prepare and enter an order disposing of a cost bill, subject to reconsideration by the Court if exception is filed within 14 days after the entry of the order. (Amended effective July 1, 1993; amended effective December 1, 2002; amended effective December 1, 2009.)

#### **Rule 39-1.6. Request for Attorneys Fees.**

(a) **Time Limits.** Absent a statutory provision to the contrary, a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for rehearing is filed, the request for attorneys fees shall be filed no later than 14 days after the Court's disposition of the petition.

(b) **Contents.** A request for an award of attorneys fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 (appended to these rules) or a document that contains substantially the same information, along with:

(1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;

- (2) a showing that the hourly rates claimed are legally justified; and
- (3) an affidavit or declaration attesting to the accuracy of the information. All applications must include a statement that sets forth the application's timeliness. The request must be filed separately from any cost bill. (Amended effective July 1, 2001; amended effective July 1, 2007; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 39-1.6.** Forms for attorneys' fees and cost bills are found as Appendices 9 and 10 to these Rules. The forms are also available from the Clerk's Office or may be accessed via the Court's Website ([www.ca9.uscourts.gov](http://www.ca9.uscourts.gov)). (Rev. 7/1/07)

**Calculation of Cost Bill Filing Deadline.** Litigants are reminded that a cost bill must be received by the Clerk in San Francisco by the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25- 2; but see FRAP 25(a)(2)(C) (document filed by inmate timely if deposited in institution's internal

mailing system on or before due date). The deadline is strictly enforced. See *Mollura v. Miller*, 621 F.2d 334 (9th Cir. 1980).

**Equal Access to Justice Act Applications.** Counsel filing applications under 28 U.S.C. § 2412 should carefully review the statutory requirements concerning the timeliness and the contents of the application. In computing the applicable hourly rate under the Equal Access to Justice Act, adjusted for cost-of-living increases, counsel should be aware of the formula set forth in *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005). (New 7/1/07)

#### **Rule 39-1.7. Opposition to Request for Attorneys Fees.**

Any party from whom attorneys fees are requested may file an objection to the request. The party seeking fees may file a reply to the objection. The time periods set forth in FRAP 27(a)(3)(A) and (4) for responses and replies to motions govern the intervals for filing an objection to the request and reply to an objection. (Rev. 7/1/2006) (Amended effective July 1, 2006.)

#### **Rule 39-1.8. Request for Transfer.**

Any party who is or may be eligible for attorneys fees on appeal to this Court may, within the time permitted in Circuit Rule 39-1.6, file a motion to transfer consideration of attorneys fees on appeal to the district court or administrative agency from which the appeal was taken.

#### **Rule 39-1.9. Referral to Appellate Commissioner.**

When the Court has awarded attorneys fees on appeal or on application for extraordinary writ, and a party opposes the amount of attorneys fees requested by the prevailing party, the Court may refer to the Appellate Commissioner the determination of an appropriate amount of attorneys fees. The Court may direct the Appellate Commissioner to make a recommendation to the Court or to issue an order awarding attorneys fees. Any such order issued by the Appellate Commissioner is subject to reconsideration by the Court. (Amended effective January 1, 1997; amended effective December 1, 2009.)



**Rule 39-2. Attorneys Fees and Expenses Under the Equal Access to Justice Act.****Rule 39-2.1. Applications for Fees. [Abrogated July 1, 2007.]****Rule 39-2.2. Petitions by Permission. [Abrogated January 1, 1996.]****Rule 40-1. Format; Number of Copies.**

(a) **Format/Length of Petition and Answer** The format of a petition for panel rehearing or rehearing en banc and any answer shall be governed by FRAP 32(c)(2). The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text. An answer, when ordered by the Court, shall comply with the same length limitations as the petition.

If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with FRAP 32.

The petition or answer must be accompanied by the completed certificate of compliance found at Form 11.

(b) **Number of Copies.** If the petition is not required to be filed electronically, an original shall be filed.

(c) **Copy of Panel Decision.** The petition for panel or en banc rehearing shall be accompanied by a copy of the panel's order, memorandum disposition or opinion being challenged. (Adopted effective July 1, 2000; amended effective July 1, 2006; amended effective December 1, 2009.)

**STATUTORY NOTES**

**Compiler's Notes.** A previous text of Rule 40-1 was abrogated January 1, 1999.

**Cross References.** FRAP 32, Form of Briefs, Appendices, and Other Papers; Circuit Rule 32-5, Unrepresented Litigants; Circuit Rule 28-1, Briefs, Applicable Rules.

**Circuit Advisory Committee Note to**

**Rule 40-1.** Litigants are reminded that a petition for rehearing must be received by the Clerk in San Francisco on the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25-2; see also *United States v. James*, 146 F.3d 1183 (9th Cir. 1998). (Rev. 12/1/02; 12/1/09; 1/1/12)

**Rule 40-2. Publication of Previously Unpublished Disposition.**

An order to publish a previously unpublished memorandum disposition in accordance with Circuit Rule 36-4 extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. If the mandate has issued, the petition for rehearing shall be accompanied by a motion to recall the mandate. (Rev. 1/96) (Amended effective January 1996.)

**Rule 41-1. Stay of Mandate.**

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b),

pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases, including National Labor Relations Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 41-1.** Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such circumstances include cases where a petition for rehearing, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once. The mandate will not be stayed automatically upon the filing of an application to the Supreme Court for writ of certiorari. However, a stay may be granted upon motion.

A motion to stay or recall the mandate will not be routinely granted; it will be denied if

the Court determines that the application for certiorari would be frivolous or is made merely for delay.

In general, a party has 90 days from the entry of judgment or the denial of a timely petition for rehearing, whichever is later, in which to petition for a writ of certiorari. A circuit court cannot enlarge this period; application for an extension must be made to the Supreme Court. Counsel should be mindful that the judgment is entered on the day of the Court's decision and not when the mandate — i.e., a certified copy of the judgment — is issued.

#### Rule 41-2. Timing of Mandate.

In cases disposed of by an order of a motions panel, a mandate will issue 7 days after the time to file a motion for reconsideration expires pursuant to Circuit Rule 27-10, or 7 days after entry of an order denying a timely motion for such relief, whichever is later (Adopted January 1, 2004; amended effective December 1, 2009.)

#### STATUTORY NOTES

**Cross References.** Circuit Rule 27-10, Motions for Reconsideration; FRAP 35, En Banc Determination; FRAP 40, Petition for Panel Rehearing.

#### Rule 42-1. Dismissal for Failure to Prosecute.

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

#### Rule 42-2. Termination of Bail Following Dismissal.

Upon dismissal of an appeal in any case in which an appellant has obtained a release from custody upon a representation that he is appealing the judgment of the district court, the Clerk will notify the appropriate

district court that the appeal has been dismissed and that the basis for the continued release on bail or recognizance no longer exists.

### **Rule 46-1. Attorneys.**

#### **Rule 46-1.1. Forms for Written Motions.**

Written motions for admission to the bar of the Court shall be on the form approved by the Court and furnished by the Clerk. (Rev. 7/93)

#### **Rule 46-1.2. Time for Application.**

Any attorney who causes a case to be docketed in this Court or who enters an appearance in this Court, and who is not already admitted to the Bar of the Court, shall simultaneously apply for admission. (Rev. 7/93)

### **Rule 46-2. Attorney Suspension, Disbarment or Other Discipline.**

(a) **Conduct Subject to Discipline.** This Court may impose discipline on any attorney practicing before this Court who engages in conduct violating applicable rules of professional conduct, or who fails to comply with rules or orders of this Court. The discipline may consist of disbarment, suspension, reprimand, counseling, education, a monetary penalty, restitution, or any other action that the Court deems appropriate and just.

(b) **Initiation of Disciplinary Proceedings Based on Conduct Before This Court.** The Chief Judge or a panel of judges may initiate disciplinary proceedings based on conduct before this Court by issuing an order to show cause under this rule that identifies the basis for imposing discipline.

(c) **Reciprocal Discipline.** An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction. When this Court learns that a member of the bar of this Court has been disbarred or suspended from the practice of law by any court or other competent authority or resigns during the pendency of disciplinary proceedings, the Clerk shall issue an order to show cause why the attorney should not be suspended or disbarred from practice in this Court.

(d) **Response.** An attorney against whom an order to show cause is issued shall have 28 days from the date of the order in which to file a response. The attorney may include in the response a request for a hearing pursuant to FRAP 46(c). The failure to request a hearing will be deemed a waiver of any right to a hearing. The failure to file a timely response may result in the imposition of discipline without further notice.

(e) **Hearings on Disciplinary Charges.** If requested, the Court will hold a hearing on the disciplinary charges, at which the attorney may be represented by counsel. In a matter based on an order to show cause why reciprocal discipline should not be imposed, an appellate commissioner will conduct the hearing. In a matter based on an order to show cause based on



conduct before this Court, the Court may refer the matter to an appellate commissioner or other judicial officer to conduct the hearing. In appropriate cases, the Court may appoint an attorney to prosecute charges of misconduct.

(f) **Report and Recommendation.** If the matter is referred to an appellate commissioner or other judicial officer, that judicial officer shall prepare a report and recommendation. The report and recommendation shall be served on the attorney, and the attorney shall have 21 days from the date of the order within which to file a response. The report and recommendation together with any response shall be presented to a three-judge panel.

(g) **Final Disciplinary Action.** The final order in a disciplinary proceeding shall be issued by a three-judge panel. If the Court disbars or suspends the attorney, a copy of the final order shall be furnished to the appropriate courts and state disciplinary agencies. If the order imposes a sanction of \$1,000 or more, the Court may furnish a copy of the order to the appropriate courts and state disciplinary agencies. If a copy of the final order is distributed to other courts or state disciplinary agencies, the order will inform the attorney of that distribution.

(h) **Reinstatement.** A suspended or disbarred attorney may file a petition for reinstatement with the Clerk. The petition shall contain a concise statement of the circumstances of the disciplinary proceedings, the discipline imposed by this Court, and the grounds that justify reinstatement of the attorney.

(i) **Monetary Sanctions.** Nothing in the rule limits the Court's power to impose monetary sanctions as authorized under other existing authority. (Adopted effective January 1, 2002; amended effective December 1, 2009; January 1, 2012.)

#### STATUTORY NOTES

**Circuit Advisory Committee Note to Rule 46-2.** The Court may impose monetary sanctions as follows:

(1) Against a party, its counsel, or both under FRAP 38, where the Court determines that "an appeal is frivolous, it may award just damages and single or double costs to the appellee."

(2) Against a party, its counsel, or both under 28 U.S.C. § 1912, "[w]here a judgment is affirmed by . . . a court of appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

(3) Under 28 U.S.C. § 1927, where counsel "so multiplies the proceedings in any case unreasonably or vexatiously," counsel "may be required by the Court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

(4) Under Circuit Rules 17-2 and 30-2, against counsel who "vexatiously and unrea-

sonably increases the cost of litigation by inclusion of unnecessary material in the excerpts of record."

(5) Under Circuit Rule 42-1, against counsel for "failure to prosecute an appeal to hearing as required by FRAP and the Circuit Rules."

(6) Against counsel for failure to comply with the requirements of FRAP 28 and Circuit Rules 28-1 through 28-3, dealing with the form and content of briefs on appeal. See, e.g., *Mitchel v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982).

(7) Against counsel for conduct that violates the orders or other instructions of the Court, or for failure to comply with the Federal Rules of Appellate Procedure or any Circuit Rule.

(8) Under the inherent powers of the Court. See, e.g., *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-50 (1991).

(9) As a form of discipline under FRAP 46(c) and Circuit Rule 46-2, with notice of such



sanctions provided to the appropriate courts and state disciplinary agencies when the Court deems such notice to be justified. (Rev. 1/1/2002)

**Rule 46-3. Change of Address.**

Changes in the address of counsel and pro se litigants registered for the Appellate ECF system must be reported by updating their account at: <https://pacer.psc.uscourts.gov/psco/cgi-bin/cmecf/ea-login.pl>. Changes in the address of counsel and pro se litigants who are exempt from or who are not registered for the Appellate ECF system must be reported to the Clerk of this Court immediately and in writing. (Amended effective December 1, 2009.)

**Rule 46-4. Participation of Law Students.**

An eligible law student acting under the supervision of a member of the bar of this Court may appear on behalf of any client in a case before this Court with the written consent of the client if the Requirements for Student Practice before this Court are met. The Requirements for Student Practice are available from the Clerk of Court and on the website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov).

**Rule 46-5. Restrictions on Practice by Former Court Employees.**

No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule.

An attorney who is a former employee may apply to the Court for an exemption. The application must demonstrate that there has been a strict compliance with the rule with reference to the particular case, that the attorney had no direct or indirect involvement with the case during employment with the Court, and that the attorney was not employed or assigned in the chambers of any judge who participated in the case during the attorney's employment with the Court. (Amended effective January 1, 2011.)

**Rule 47-1. Effective Date of Rules.**

The Clerk shall cause these rules to be republished on January 1 and July 1 of each year. Amendments to these rules shall be effective on January 1 or July 1 following their adoption, unless otherwise directed by the Court.

**STATUTORY NOTES**

**Circuit Advisory Committee Note to Rule 47-1.** If members of the bar or public have suggestions for new rules or amend-

ments to the rules, such suggestions should be directed to the Clerk of Court who shall take appropriate action. (New 7/1/ 2000)

**Rule 47-2. Advisory Committee on Rules.**

(a) **Function.** Pursuant to 28 U.S.C. § 2077(b), the Chief Judge shall appoint an advisory committee on Ninth Circuit Court of Appeals rules and internal operating procedures. The committee shall generally provide a forum for ongoing study of the Court's rules and internal operating procedures, including:

(1) proposing rule changes and commenting on changes proposed by the Court,

(2) considering public comments, including comments from the bar, and

(3) conducting periodic meetings with members of the bar throughout the circuit and reporting back to the committee and the Court the results and any recommendations arising from such meetings. (Rev. 7/1/2000)

(b) **Membership.** The Chief Judge shall appoint three judges, twelve practitioners and one member of a law faculty to serve on the committee for three years. The attorney members shall be selected in a manner that seeks both representation of the various geographic areas in the circuit and the distinct types of litigation considered by the Court. A member of the Lawyer Representatives Coordinating Committee (LRCC) shall be appointed to a two-year term on the Rules committee. That member shall serve as a liaison between the LRCC and Advisory Rules Committee. In addition, if a member of the national Advisory Committee on Appellate Rules is appointed from within the jurisdiction of the Ninth Circuit, that member shall be invited to participate as an ex-officio voting member of the Advisory Rules Committee. (Rev. 7/1/2000)

(c) **Meetings.** The committee shall meet at least once a year and shall have additional meetings as the committee deems appropriate. (New 1/96) (Adopted effective January 1996; amended effective July 1, 2000.)

## APPENDIX OF FORMS

### Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.

United States District Court for the \_\_\_\_\_

District of \_\_\_\_\_

File Number \_\_\_\_\_

A.B., Plaintiff

v.

C.D., Defendant

)  
)  
)  
)  
)  
)  
)

Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal), (plaintiffs) (defendants) in the above named case\*, hereby appeal to the United States Court of Appeals for the \_\_\_\_ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(s) \_\_\_\_\_  
Attorney for \_\_\_\_\_

(Address) \_\_\_\_\_

\*See Rule 3(c) for permissible ways of identifying appellants.

### Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court.

UNITED STATES TAX COURT  
Washington, D.C.

A.B., Petitioner

v.

Commissioner of Internal Revenue,  
Respondent

)  
)  
)  
)  
)  
)  
)

Docket No. \_\_\_\_\_

Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal)\* hereby appeal to the United States Court of Appeals for the \_\_\_\_ Circuit

from (that part of) the decision of this court entered in the above captioned proceeding on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_(relating to \_\_\_\_\_).

(s) \_\_\_\_\_  
Counsel for  
\_\_\_\_\_  
(Address)  
\_\_\_\_\_

\*See Rule 3(c) for permissible ways of identifying appellants.

**Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer.**

United States Court of Appeals for the \_\_\_\_\_ Circuit

A.B., Petitioner )  
 ) Petition for Review  
v. )  
 )  
XYZ Commission, Respondent )

(here name all parties bringing the petition)\*  
hereby petition the court for review of the Order of the XYZ Commission  
(describe the order) entered on \_\_\_\_\_, 20\_\_\_\_.

(s) \_\_\_\_\_  
Attorney for Petitioners  
\_\_\_\_\_  
Address:  
\_\_\_\_\_  
\_\_\_\_\_

\*See Rule 15

**Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis.**

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellant or Petitioner,  
v.  
Appellee or Respondent, Case No. \_\_\_\_\_



<p><b>Affidavit in Support of Motion</b></p> <p>I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. 28 U.S.C. sec. 1746; 18 U.S.C. sec. 1621.</p> <p>Signed: _____</p>	<p><b>Instructions</b></p> <p>Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.</p> <p>Date: _____</p>
---	--

My issues on appeal are: \_\_\_\_\_

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ _____	\$ _____	\$ _____	\$ _____
Self-Employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and Dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child Support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____

Unemployment

Payments \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

Public-Assistance

(such as welfare) \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

Other (specify): \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

**TOTAL****MONTHLY****INCOME:** \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

2. List your employment history, most recent employer first. (*Gross monthly pay is before taxes or other deductions.*)

Employer	Address	Dates of Employment	Gross Monthly Pay
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____

3. List your spouse's employment history, most recent employer first. (*Gross monthly pay is before taxes or other deductions.*)

Employer	Address	Dates of Employment	Gross Monthly Pay
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____
_____	_____	From _____ To _____	_____

4. How much cash do you and your spouse have? \$ \_\_\_\_\_  
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of Account	Amount You Have	Amount Your Spouse Has
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and

balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	Value	Other Real Estate	Value
	\$		\$
Motor Vehicle 1: Make & Year	Model	Registration #	Value
			\$
Motor Vehicle 2: Make & Year	Model	Registration #	Value
			\$
Other Assets		Value	
		\$	
		\$	
		\$	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	Amount owed to you	Amount owed to your spouse
	\$	\$
	\$	\$
	\$	\$

7. State the persons who rely on you or your spouse for support. If a dependent minor, list only the initials and not the full name.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$	\$
Are real-estate taxes included?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Is property insurance included?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____
Transportation (not including motor vehicle payments)	\$ _____	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)	\$ _____	\$ _____
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in mortgage payments)	\$ _____	\$ _____
(specify): _____	\$ _____	\$ _____
Installment payments	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Credit Card (name): _____	\$ _____	\$ _____
Department Store (name): _____	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for the operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
<b>Total Monthly Expenses:</b>	\$ _____	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this



form? Yes ☐ No ☐

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number.

Name \_\_\_\_\_

Address \_\_\_\_\_

City\_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Telephone Number (ex., 4153558000)

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? Yes ☐ No ☐

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number.

Name \_\_\_\_\_

Address \_\_\_\_\_

City\_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Telephone Number (ex., 4153558000)

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

\_\_\_\_\_

13. State the city and state of your legal residence.

City \_\_\_\_\_

State \_\_\_\_\_

Your daytime phone number (ex., 4153558000) \_\_\_\_\_

Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_

Last four digits of your Social-Security Number (ex., 6789) \_\_\_\_\_

**Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel.**

United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_

In re  
\_\_\_\_\_  
Debtor  
\_\_\_\_\_  
Plaintiff  
v.  
\_\_\_\_\_  
Defendant

)  
)  
) File No. \_\_\_\_\_  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Notice of Appeal to United States Court of Appeals for the \_\_\_\_\_ Circuit  
\_\_\_\_\_, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the \_\_\_\_\_ Circuit from the final judgment [or order or decree] of the district court for the district of \_\_\_\_\_ [or bankruptcy appellate panel or the \_\_\_\_\_ circuit], entered in this case on \_\_\_\_\_, 20\_\_\_\_ [here describe the judgment, order, or decree]  
\_\_\_\_\_.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated \_\_\_\_\_  
Signed \_\_\_\_\_  
Attorney for Appellant  
Address: \_\_\_\_\_  
\_\_\_\_\_

(As added Apr. 25, 1989, eff. Dec. 1, 1989; April 1, 1993, eff. Dec. 1, 1993.)

Form 6.



Form 6. Civil Appeals Docketing Statement

USCA DOCKET # (IF KNOWN)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:	DISTRICT:	JUDGE:
	DISTRICT COURT NUMBER:	
	DATE NOTICE OF APPEAL FILED:	IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):	
BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:		
PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:		
PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):		
DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING: <input type="checkbox"/> Possibility of settlement <input type="checkbox"/> Likelihood that intervening precedent will control outcome of appeal <input type="checkbox"/> Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) _____ <input type="checkbox"/> Any other information relevant to the inclusion of this case in the Mediation Program _____ <input type="checkbox"/> Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges		

<b>LOWER COURT INFORMATION</b>				Page 2 of 2
JURISDICTION		DISTRICT COURT DISPOSITION		
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF	
<input type="checkbox"/> <b>FEDERAL QUESTION</b>  <input type="checkbox"/> <b>DIVERSITY</b>  <input type="checkbox"/> <b>OTHER (SPECIFY):</b>	<input type="checkbox"/> <b>FINAL DECISION OF DISTRICT COURT</b>  <input type="checkbox"/> <b>INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT</b>  <input type="checkbox"/> <b>INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):</b>  <input type="checkbox"/> <b>OTHER (SPECIFY):</b>	<input type="checkbox"/> <b>DEFAULT JUDGMENT</b> <input type="checkbox"/> <b>DISMISSAL/JURISDICTION</b> <input type="checkbox"/> <b>DISMISSAL/MERITS</b> <input type="checkbox"/> <b>SUMMARY JUDGMENT</b> <input type="checkbox"/> <b>JUDGMENT/COURT DECISION</b> <input type="checkbox"/> <b>JUDGMENT/JURY VERDICT</b> <input type="checkbox"/> <b>DECLARATORY JUDGMENT</b> <input type="checkbox"/> <b>JUDGMENT AS A MATTER OF LAW</b> <input type="checkbox"/> <b>OTHER (SPECIFY):</b>	<input type="checkbox"/> <b>DAMAGES:</b> <b>SOUGHT \$</b> _____ <b>AWARDED \$</b> _____  <input type="checkbox"/> <b>INJUNCTIONS:</b> <input type="checkbox"/> <b>PRELIMINARY</b> <input type="checkbox"/> <b>PERMANENT</b> <input type="checkbox"/> <b>GRANTED</b> <input type="checkbox"/> <b>DENIED</b>  <input type="checkbox"/> <b>ATTORNEY FEES:</b> <b>SOUGHT \$</b> _____ <b>AWARDED \$</b> _____  <input type="checkbox"/> <b>PENDING</b>  <input type="checkbox"/> <b>COSTS: \$</b> _____	

<b>CERTIFICATION OF COUNSEL</b>
<p><b>I CERTIFY THAT:</b></p> <ol style="list-style-type: none"> <li>1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.</li> <li>2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).</li> <li>3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.</li> <li>4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.</li> </ol> <div style="text-align: center; margin-top: 20px;"> <div style="display: inline-block; width: 45%; border-bottom: 1px solid black; margin-bottom: 5px;"></div> <div style="display: inline-block; width: 45%; border-bottom: 1px solid black; margin-bottom: 5px;"></div> </div> <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <span>Signature</span> <span>Date</span> </div>

<b>COUNSEL WHO COMPLETED THIS FORM</b>
NAME:
FIRM:
ADDRESS:
E-MAIL:
TELEPHONE:



FAX: \_\_\_\_\_

**\*THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL\***  
**\*IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS\***

**Form 7. Notice of Joint Brief Under Ninth Circuit Rule 28-4.**

9th Cir. No. \_\_\_\_\_

Case name: \_\_\_\_\_

\_\_\_\_\_ v. \_\_\_\_\_

**We certify that all**☐ Appellants☐ Appellees☐ Appellants/cross-appellees☐ Appellees/cross-appellants**1. Will file a joint**☐ Opening brief☐ Answering brief☐ Opening brief on cross-appeal☐ Answering/opening brief on  
cross-appeal☐ Reply brief☐ Cross-appeal reply brief**2. Are responding to a joint or multiple brief.**

We further certify that no previous extensions of time to file this brief or enlargements of brief length have been obtained.

Pursuant to Rule 28-4, the brief's due date will be extended for 21 days and the size enlarged by 5 monotype pages of 1,400 words.

Subsequent briefing will proceed as follows:

•The answering brief will be due 30 days from service of the joint operating brief.

•The reply brief will be due 14 days from service of the joint answering brief.

•The answering/opening brief will be due 40 days from service of the joint opening brief on cross-appeal.

•The reply/answering brief will be due 30 days from service of the joint answering/opening brief on cross-appeal.

•The cross-appeal reply brief will be due 14 days from service of the joint reply/answering brief.

\_\_\_\_\_  
Counsel for \_\_\_\_\_\_\_\_\_\_  
Counsel for \_\_\_\_\_\_\_\_\_\_  
Counsel for \_\_\_\_\_

Additional sheets may be attached for the signatures of additional counsel.

THIS NOTICE MUST BE FILED WITH THE COURT AND SERVED ON  
OPPOSING COUNSEL AND ACCOMPANIED BY PROOF  
OF SUCH SERVICE.

7/1/97

**Form 8. Certificate of Compliance Pursuant to Fed. R. App.  
32(a)(7)(C) and Circuit Rule 32-1 for Case Number  
\_\_\_\_. (see next page)**

**Form Must Be Signed by Attorney or  
Unrepresented Litigant  
and Attached to the Back of Each Copy of  
the Brief**

I certify that (**check appropriate options(s)**)

\_\_\_\_ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

\_\_\_\_ 2. The attached is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated \_\_\_\_\_ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words,

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ pages or \_\_\_\_\_ words or \_\_\_\_\_ lines of text.

\_\_\_\_ 3. *Briefs in Capital Cases.*

☐ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

☐ Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

4. *Amicus Briefs.*

☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains not more than 7000 words or 650 lines of text,

or is

☐ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)-(5).

Date

Signature of Attorney or Unrepresented Litigant

Form 9. Application for Attorney Fees under Ninth Circuit Rule 39-1.6.

DESCRIPTION OF SERVICES	HOURS
Interviews & Conferences	
Obtaining & Reviewing Records	
Legal Research	
Preparing Briefs	
Preparing for & Attending Oral Argument	
Other: (specify below)	
TOTAL Hours Claimed	

TOTAL COMPENSATION REQUESTED: \_\_\_\_\_

Signature

Date

A request for an award of attorneys fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 or a document that contains substantially the same information, along with:

(1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;

(2) a summary for each lawyer and paralegal of the total hours spent in the categories set forth above;

(3) a showing that the hourly rates claimed are the prevailing rates in the relevant market; and

(4) an affidavit attesting to the accuracy of the information submitted.

**Form 10. Bill of Costs.**

United States Court of Appeals for the Ninth Circuit

**BILL OF COSTS**

**Note:**

If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service within 14 days of the date of entry of judgment, and in accordance with 9th Cir. R. 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Cir. R. 39-1 when preparing your bill of costs.

\_\_\_\_\_ v. \_\_\_\_\_

9th Cir. No. \_\_\_\_\_

The Clerk is requested to tax the following costs against \_\_\_\_\_

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the CLERK			
	No. of Docs.*	Pages per Doc	Cost per Page**	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST



Excerpt of Record									
Open- ing Brief									
Answer- ing Brief									
Reply Brief									
Other									
TOTAL				\$	TOTAL				\$

**Other:** Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees cannot be requested on this form.

\*If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must e submitted.

\*\*Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, \_\_\_\_\_, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Counsel (printed or typed): \_\_\_\_\_

Attorney for: \_\_\_\_\_

Date: \_\_\_\_\_ Costs are taxed in the amount of \$ \_\_\_\_\_

Clerk of Court  
By: \_\_\_\_\_, Deputy Clerk

(Amended effective Jan. 1, 2005.)

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1.**

**Form 11**      **Certificate of Compliance Pursuant to**  
**Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant  
and Attached to the Back of Each Copy of the Petition or Answer**

\_\_\_\_\_  
(signature block below)  
\_\_\_\_\_

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

\_\_\_\_\_ Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (petitions and answers must not exceed 4,200 words)

or

\_\_\_\_\_ Monospaced, has 10 5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text)

or

\_\_\_\_\_ In compliance with Fed R App 32(c) and does not exceed 15 pages

\_\_\_\_\_  
Signature of Attorney or  
Unrepresented Litigant

(New Form 7/1/2000)

**Form 12. Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under § 2255.****Form 12: Appendix to the Rules**

**UNITED STATES COURT of APPEALS for the NINTH CIRCUIT**  
**95 Seventh Street**  
**San Francisco, California 94103**

**Application for Leave to File Second or Successive Petition**  
**Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255**

Docket Number \_\_\_\_\_  
(to be provided by court)

Petitioner's name \_\_\_\_\_

Prisoner registration number \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

**Instructions - Read Carefully**

- (1) This application, whether handwritten or typewritten, must be legible and signed by the petitioner under penalty of perjury. An original and five (5) copies must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.
- (2) All questions must be answered concisely. Add separate sheets if necessary.
- (3) The petitioner shall serve a copy of this application and any attachments on respondent and must complete and file a proof of service with this application.
- (4) The petitioner shall attach to this application copies of the magistrate judge's report and recommendation and the district court's opinion in any prior federal habeas proceeding under 28 U.S.C. § 2254 or § 2255 or state why such documents are unavailable to petitioner.

**You Must Answer the Following Questions:**

- (1) What conviction(s) are you challenging?

\_\_\_\_\_  
\_\_\_\_\_



- (2) In what court(s) were you convicted of these crime(s)?

---

---

- (3) What was the date of each of your conviction(s) and what is the length of each sentence?

---

**For questions (4) through (9), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.**

- (4) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U S C § 2254 or § 2255?

Yes ☐ No ☐

- (a) In which federal district court did you file a petition or motion?

---

- (b) What was the docket number? 

---

- (c) On what date did you file the petition/motion? 

---

- (5) What grounds were raised in your previous habeas proceeding?  
(list all grounds and issues previously raised in that petition/motion)

---

---

---

- (6) Did the district court hold an evidentiary hearing? Yes ☐ No ☐

- (7) How did the district court rule on your petition/motion?

☐ District court **dismissed** petition/motion  
if yes, on what grounds? 

---

☐ District court **denied** petition/motion;

- ☐ District court **granted** relief;  
if yes, on what claims and what was the relief?
- 

**(Attach copies of all reports and orders issued by the district court.)**

- (8) On what date did the district court decide your petition/motion?
- 

- (9) Did you file an appeal from that disposition? Yes ☐ No ☐

(a) What was the docket number of your appeal? \_\_\_\_\_

(b) How did the court of appeals decide your appeal? \_\_\_\_\_

- (10) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief Summarize briefly the facts supporting each ground or issue
- 
- 
- 
- 

- (11) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when?
- 

- (12) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)
- 
- 

- (13) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (list each ground separately and give case name and citation for each new rule of law)
- 
- 
-

- (14) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately) \_\_\_\_\_

---

---

---

- (15) For each ground/issue raised, does the newly discovered evidence establish your innocence? How?

---

---

- (16) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

---

---

- (17) Provide any other basis for your application not previously stated

---

---

---

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

**Proof of Service on Respondent MUST be Attached.**





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# **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## **REVISED PROVISIONS FOR THE REPRESENTATION ON APPEAL OF PERSONS FINANCIALLY UNABLE TO OBTAIN REPRESENTATION**

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Adopted by the Judicial Council of the Ninth Circuit, pursuant  
to the provisions of the Criminal Justice Act of 1964,  
as amended. (The Act)

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[ABROGATED.]



# **RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS**

INDEX FOLLOWS THESE PROVISIONS.

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### **Local Rules for Misconduct Proceedings**

## **Preface**

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

## **ARTICLE I. GENERAL PROVISIONS**

### **Rule 1. Scope.**

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious

administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

### COMMENTARY ON RULE 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the “Breyer Committee,” presented a report, known as the “Breyer Committee Report,” 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act’s implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. *Id.* at 212-15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the “Illustrative Rules

Governing Complaints of Judicial Misconduct and Disability,” discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on March 11, 2008.

### Rule 2. Effect and Construction.

(a) **Generally.** These Rules are mandatory; they supersede any conflicting judicial council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) **Exception.** A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

### COMMENTARY ON RULE 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils re-

tain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.



**Rule 3. Definitions.**

(a) **Chief Judge.** “Chief judge” means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) **Circuit Clerk.** “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) **Complaint.** A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) **Court of Appeals, District Court, and District Judge.** “Courts of appeals,” “district court,” and “district judge,” where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) **Disability.** “Disability” is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(f) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa–12(c).

(h) **Misconduct.** Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge’s office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) **Subject Judge.** "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

#### COMMENTARY ON RULE 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, in-

stead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Con-

duct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Even where specific, mandatory rules exist -- for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations -- the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related -- in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had in-

correctly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" -- of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper *ex parte* communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, *inter alia*, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand -- for example a statement that a claim is legally or factually "frivolous" -- then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge -- in other words, assigning a low



priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit

motive, is not merits-related.

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

#### **Rule 4. Covered Judges.**

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

#### **COMMENTARY ON RULE 4**

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the

Act, such as other court personnel, or against both covered judges and noncovered persons.

### **ARTICLE II. INITIATION OF A COMPLAINT**

#### **Rule 5. Identification of a Complaint.**

(a) **Identification.** When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) **Noncompliance with Rule 6(d).** Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

#### **COMMENTARY ON RULE 5**

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to

begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter



may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief judge to identify a com-

plaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfilled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

## Rule 6. Filing a Complaint.

(a) **Form.** A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) **Brief Statement of Facts.** A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and

(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) **Complainant's Address and Signature; Verification.** The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).

(e) **Number of Copies; Envelope Marking.** The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

#### COMMENTARY ON RULE 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

#### STATUTORY NOTES

**Editor's Note:** See Appendix for Local Rules of the 9th Circuit related to Filing a Complaint.

### Rule 7. Where to Initiate Complaints.

(a) **Where to File.** Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) **Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

#### COMMENTARY ON RULE 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit

executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term “the circuit” in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act’s emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge’s future

behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar -- *ex parte* contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

## **Rule 8. Action by Clerk.**

(a) **Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint’s receipt.

(b) **Distribution of Copies.** The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) **Complaints Against Noncovered Persons.** If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) **Receipt of Complaint about a Judge and Another Noncovered Person.** If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

### **COMMENTARY ON RULE 8**

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking

cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

## **Rule 9. Time for Filing or Identifying a Complaint.**

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).



## COMMENTARY ON RULE 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

**Rule 10. Abuse of the Complaint Procedure.**

(a) **Abusive Complaints.** A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) **Orchestrated Complaints.** When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

## COMMENTARY ON RULE 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of

such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

**ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE****Rule 11. Review by the Chief Judge.**

(a) **Purpose of the Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the



complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) **Inquiry by Chief Judge.** In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) **Dismissal.**

(1) **Allowable grounds.** A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) **Disallowed grounds.** A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) **Corrective Action.** The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) **Intervening Events.** The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) **Appointment of Special Committee.** If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) **Notice of Chief Judge's Action; Petitions for Review.**

(1) **When special committee is appointed.** If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(2) **When chief judge disposes of complaint without appointing special committee.** If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) **Right of petition for review.** If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) **Public Availability of Chief Judge's Decision.** The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

#### COMMENTARY ON RULE 11

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions pe-

riods during a trial when the judge was asleep must be treated as a complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any

factual foundation or are conclusively refuted by objective evidence.” 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that “[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” These two statutory standards should be read together, so that a matter is not “reasonably” in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not “refuted” simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant’s word against the subject judge’s -- in other words, there is simply no other significant evidence of what happened or of the complainant’s unreliability -- then there must be a special-committee investigation. Such a credibility issue is a matter “reasonably in dispute” within the meaning of the Act.

However, dismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id.* The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id.* In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that “might affect the outcome of the suit under the governing law,” and a dispute is “genuine” if “the evidence is such that a reasonable jury could return a

verdict for the nonmoving party.” Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation.” 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as “frivolous,” under Rule 11(c)(1)(C), will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge’s proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer’s statement that he or she had an improper *ex parte* contact with a judge, the lawyer’s denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. *Id.* The subject judge denies it. The chief judge requests that the complainant



(who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. *Id.* The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. *Id.* at 243-44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on the identical con-

duct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. *Id.*

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D. at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. *Id.*

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.



Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired

for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also Commentary on Rule 24, dealing with public availability.

Rule 11(g) provides that the complainant and subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. A copy of a chief judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

## ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

### Rule 12. Composition of Special Committee.

(a) **Membership.** Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) **Presiding Officer.** When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) **Provision of Documents.** The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) **Continuing Qualification of Committee Members.** A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position

of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) **Inability of Committee Member to Complete Service.** If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) **Voting.** All actions by a committee must be by vote of a majority of all members of the committee.

#### COMMENTARY ON RULE 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another committee member as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge.

Subsection (c) also provides that the adviser will have all the privileges of a committee member except a vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings, and write a separate statement to accompany the special committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally

consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

#### Rule 13. Conduct of an Investigation.

(a) **Extent and Methods of Special-Committee Investigation.** Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the

scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) **Criminal Conduct.** If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) **Staff.** The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) **Delegation of Subpoena Power; Contempt.** The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

#### COMMENTARY ON RULE 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. *Id.* Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under

the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. See Rule 12(g).

#### Rule 14. Conduct of Hearings by Special Committee.

(a) **Purpose of Hearings.** The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) **Committee Evidence.** Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.



(c) **Counsel for Witnesses.** The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) **Witness Fees.** Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) **Oath.** All testimony taken at a hearing must be given under oath or affirmation.

(f) **Rules of Evidence.** The Federal Rules of Evidence do not apply to special committee hearings.

(g) **Record and Transcript.** A record and transcript must be made of all hearings.

#### COMMENTARY ON RULE 14

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges

the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

#### Rule 15. Rights of Subject Judge.

##### (a) Notice.

(1) **Generally.** The subject judge must receive written notice of:

- (A) the appointment of a special committee under Rule 11(f);
- (B) the expansion of the scope of an investigation under Rule 13(a);
- (C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) **Suggestion of additional witnesses.** The subject judge may suggest additional witnesses to the committee.

(b) **Report of the Special Committee.** The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) **Presentation of Evidence.** At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The



subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) **Presentation of Argument.** The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) **Attendance at Hearings.** The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) **Representation by Counsel.** The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

#### COMMENTARY ON RULE 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that “the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.” 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the judge the right to attend any hearing held for the purpose of

receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings - for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

#### Rule 16. Rights of Complainant in Investigation.

(a) **Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee’s report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) **Opportunity to Provide Evidence.** If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) **Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) **Representation by Counsel.** A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) **Cooperation.** In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant’s cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

## COMMENTARY ON RULE 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be

present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

**Rule 17. Special-Committee Report.**

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

## COMMENTARY ON RULE 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee

report and accompanying statement to the Judicial Conference Committee is new.

**ARTICLE V. JUDICIAL-COUNCIL REVIEW****Rule 18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).**

(a) **Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) **When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked

“Misconduct Petition” or “Disability Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed.

(c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge’s order disposing of the complaint;

(D) any memorandum in support of the chief judge’s order;

(E) the petition for review; and

(F) an appropriate ballot;

(3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) **Untimely Petition.** The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) **Timely Petition Not in Proper Form.** When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the clerk must acknowledge its receipt, call the filer’s attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk’s letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

#### COMMENTARY ON RULE 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge’s order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised

by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge’s order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a sub-



ject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it

does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

### STATUTORY NOTES

**Editor's Note:** See Appendix for Local Rules of the 9th Circuit related to Petitions for Review of Chief Judge Dispositions.

### **Rule 19. Judicial-Council Disposition of Petitions for Review.**

(a) **Rights of Subject Judge.** At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) **Judicial-Council Action.** After considering a petition for review and the materials before it, a judicial council may:

- (1) affirm the chief judge's disposition by denying the petition;
- (2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;
- (3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or
- (4) in exceptional circumstances, take other appropriate action.

(c) **Notice of Council Decision.** Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) **Memorandum of Council Decision.** If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) **Review of Judicial-Council Decision.** If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to



seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) **Public Availability of Judicial-Council Decision.** Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

#### COMMENTARY ON RULE 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practi-

cal purposes as an appeal. The judicial council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

### **Rule 20. Judicial-Council Consideration of Reports and Recommendations of Special Committees.**

(a) **Rights of Subject Judge.** Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

#### **(b) Judicial-Council Action.**

(1) **Discretionary actions.** Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351–364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.

(2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) **Council Vote.** Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) **Recommendation for Fee Reimbursement.** If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) **Council Action.** Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on

which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

#### COMMENTARY ON RULE 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

Rule 20(c) provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28

U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) (A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

## ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

### Rule 21. Committee on Judicial Conduct and Disability.

(a) **Review by Committee.** The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

#### (b) **Reviewable Matters.**

(1) **Upon petition.** A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:



(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) **Upon Committee's initiative.** At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) **Committee Vote.** Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

(d) **Additional Investigation.** Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) **Oral Argument; Personal Appearance.** There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) **Committee Decisions.** Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) **Finality.** All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.



## COMMENTARY ON RULE 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion,

whether or not such a dissent occurred, and only as to the appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

**Rule 22. Procedures for Review.**

(a) **Filing a Petition for Review.** A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability  
Attn: Office of General Counsel  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) **Form and Content of Petition for Review.** No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) **Time.** A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) **Copies.** Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) **Action on Receipt of Petition for Review.** The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

#### COMMENTARY ON RULE 22

Rule 22 is self-explanatory.

### ARTICLE VII. MISCELLANEOUS RULES

#### Rule 23. Confidentiality.

(a) **General Rule.** The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) **Files.** All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) **Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) **Availability to Judicial Conference.** On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.

(e) **Availability to District Court.** If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) **Impeachment Proceedings.** If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) **Subject Judge's Consent.** If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) **Disclosure in Special Circumstances.** The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) **Disclosure of Identity by Subject Judge.** Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) **Assistance and Consultation.** Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

#### COMMENTARY ON RULE 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief

judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that



certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness

(as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

## **Rule 24. Public Availability of Decisions.**

(a) **General Rule; Specific Cases.** When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.



(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) **Manner of Making Public.** The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, [www.uscourts.gov](http://www.uscourts.gov), selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) **Orders of Judicial Conference Committee.** Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, [www.uscourts.gov](http://www.uscourts.gov). When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) **Complaints Referred to the Judicial Conference of the United States.** If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

#### COMMENTARY ON RULE 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have signifi-

cant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's

public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders.” Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject

judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest -- particularly if a judicial officer resigns in the course of an investigation -- to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

## **Rule 25. Disqualification.**

(a) **General Rule.** Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) **Subject Judge.** A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) **Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order.** If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

(d) **Member of Special Committee Not Disqualified.** A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) **Subject Judge's Disqualification After Appointment of a Special Committee.** Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding

arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) **Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) **Judicial-Council Action When Multiple Judges Are Disqualified.** Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) **Disqualification of Members of the Judicial Conference Committee.** No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fairminded participation.

#### COMMENTARY ON RULE 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge

is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For



example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate

members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., *In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would



normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation be-

tween members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

### **Rule 26. Transfer to Another Judicial Council.**

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

#### **COMMENTARY ON RULE 26**

Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less in-

volved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint -- for example, reference to the transferee chief judge, appointment of a special committee, etc.

### **Rule 27. Withdrawal of Complaints and Petitions for Review.**

(a) **Complaint Pending Before Chief Judge.** With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) **Complaint Pending before Special Committee or Judicial Council.** After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) **Petition for Review.** A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

**COMMENTARY ON RULE 27**

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

**Rule 28. Availability of Rules and Forms.**

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

**Rule 29. Effective Date.**

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

## APPENDIX

### COMPLAINT FORM

A two-page complaint form follows.

If the complaint is about a single judge, the complainant must file five copies of (1) the complaint form, (2) the statement of facts, and (3) any documents submitted. If the complaint is about more than one judge, one extra copy must be filed for each additional subject judge.

These materials should be mailed to:

Clerk, United States Court of Appeals  
P.O. Box 193939  
San Francisco, CA 94119-3939.

Judicial Council of the \_\_\_\_\_ Circuit

#### COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' Web sites, and on [www.uscourts.gov](http://www.uscourts.gov).

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: \_\_\_\_\_

Contact Address: \_\_\_\_\_

\_\_\_\_\_

Daytime telephone: (\_\_\_\_) \_\_\_\_\_

2. Name(s) of Judge(s): \_\_\_\_\_

IDAHO COURT RULES

Court: \_\_\_\_\_

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

☐ Yes    ☐ No

If "yes" give the following information about each lawsuit:

Court: \_\_\_\_\_

Case number: \_\_\_\_\_

Docket Number of any appeal to the \_\_\_\_ Circuit: \_\_\_\_\_

Are (were) you a party or lawyer in the lawsuit?

☐ Party    ☐ Lawyer    ☐ Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Have you filed any lawsuits against the judge? ☐ Yes    ☐ No

If yes, give the following information about each lawsuit:

Court: \_\_\_\_\_

Case number: \_\_\_\_\_

Present status of lawsuit: \_\_\_\_\_

Name, address, and telephone number of your lawyer for the lawsuit against the judge:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Court to which any appeal has been taken in the lawsuit against the judge:

\_\_\_\_\_

Docket number of the appeal: \_\_\_\_\_



APPENDIX

Present status of appeal: \_\_\_\_\_

5. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

6. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature) \_\_\_\_\_ (Date) \_\_\_\_\_

## IDAHO COURT RULES

### Local Rules for Misconduct Proceedings

The Ninth Circuit Judicial Council adopted the following local rules for misconduct proceedings:

Local Rule 6.1(a): Name of Subject Judge. Complainant must either use the form appended to the local rules, or shall identify any and all subject judge(s) on the first page of the complaint. If complainant fails to so identify the subject judge(s), the complaint will be returned to complainant with a request to do so.

Local Rule 6.1(b): Page Limit. The statement of facts must not be longer than five pages (five sides), or 1,200 words, whichever is less. The complaint must be submitted on standard 8.5x11 size paper. A complainant may petition the Chief Judge for permission to submit additional pages if extraordinary circumstances exist, and the Chief Judge may delegate the consideration of these requests to the Circuit Executive.

Local Rule 6.1(d): Acknowledgment. The complaint must include the following written acknowledgment: "I understand that even if I successfully prove that the judge engaged in misconduct or is disabled, this procedure cannot change the outcome of the underlying case." Complainant may either write this acknowledgment in the space provided in Section 6 of the complaint form, or complainant must write out the acknowledgment on the first page of the complaint. If complainant fails to write out the acknowledgment, the complaint will be returned to complainant with a request to do so.

Local Rule 6.1(e): Number of Copies. If the complaint is about a single judge, the complainant must file five copies of (1) the complaint form, (2) the statement of facts, and (3) any documents submitted. If the complaint is about more than one judge, one extra copy must be filed for each additional judge.

Local Rule 18.1(b): Page Limit and Number of Copies: A petition for review must not be longer than five pages (five sides), or 1,200 words, whichever is less. A complainant may petition the Chief Judge for permission to submit additional pages if extraordinary circumstances exist, and the Chief Judge may delegate the consideration of these requests to the Circuit Executive. The complainant must file an original and fifteen copies of the petition for review, along with ten copies of the original complaint.

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# JUDICIAL COUNCIL OF THE NINTH CIRCUIT — AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

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## Rule

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3. Election to District Court — Separate Written Statement Required.
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## Rule

6. Membership of Bankruptcy Appellate Panels.
7. Chief Judge.
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### **Rule 1. Continuing the Bankruptcy Appellate Panel Service.**

(a) Pursuant to 28 U.S.C. § 158(b)(1) as amended by the Bankruptcy Reform Act of 1994, the judicial council hereby reaffirms and continues a bankruptcy appellate panel service which shall provide panels to hear and determine appeals from judgments, orders and decrees entered by bankruptcy judges from districts within the Ninth Circuit.

(b) Panels of the bankruptcy appellate panel service may hear and determine appeals originating from districts that have authorized such appeals to be decided by the bankruptcy appellate panel service pursuant to 28 U.S.C. § 158(b)(6).

(c) All appeals originating from those districts shall be referred to bankruptcy appellate panels unless a party elects to have the appeal heard by the district court in the time and manner and form set forth in 28 U.S.C. § 158(c)(1) and in paragraph 3 below.

(d) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders and decrees entered by bankruptcy judges and, with leave of bankruptcy appellate panels, appeals from interlocutory orders and decrees entered by bankruptcy judges.

(e) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders and decrees entered after the district court from which the appeal originates has issued an order referring bankruptcy cases and proceedings to bankruptcy judges pursuant to 28 U.S.C. 157(a). (Amended May 9, 2002.)

### **Rule 2. Immediate Reference to Bankruptcy Appellate Panels.**

Upon filing of the notice of appeal, all appeals are immediately referred to the bankruptcy appellate panel service. (Amended May 9, 2002.)

**Rule 3. Election to District Court — Separate Written Statement Required.**

A party desiring to transfer the hearing of an appeal from the bankruptcy appellate panel service to the district court pursuant to 28 U.S.C. § 158(c)(1) shall timely file a separate written statement of election expressly stating that the party elects to have the appeal transferred from the bankruptcy appellate panel service to the district court.

(a) **Appellant:** If the appellant wishes to make such an election, appellant must file a separate written statement of election with the clerk of the bankruptcy court at the time of filing the notice of appeal. Appellant shall submit the same number of copies of the statement of election as copies of the notice of appeal. See Bankruptcy Rule 8001(a). When such an election is made, the clerk of the bankruptcy court shall forthwith transfer the case to the district court. The clerk of the bankruptcy court shall give notice to all parties and the clerk of the bankruptcy appellate panels of the transfer at the same time and in the same manner as set forth for serving notice of the appeal in Bankruptcy Rule 8004.

(b) **All Other Parties:** In all appeals where appellant does not file an election, the clerk of the bankruptcy court shall forthwith transmit a copy of the notice of appeal to the clerk of the bankruptcy appellate panels. If any other party wishes to have the appeal heard by the district court, that party must, within thirty (30) days after service of the notice of appeal, file with the clerk of the bankruptcy appellate panels a written statement of election to transfer the appeal to the district court. Upon receipt of a timely statement of election filed under this section, the clerk of the bankruptcy appellate panels shall forthwith transfer the appeal to the appropriate district court and shall give notice of the transfer to the parties and the clerk of the bankruptcy court. Any question as to the timeliness of an election shall be referred by the clerk of the bankruptcy appellate panels to a bankruptcy appellate panel motions panel for determination. (Amended May 9, 2002.)

**Rule 4. Motions During Election Period.**

All motions relating to an appeal shall be filed with the bankruptcy appellate panels service unless the case has been transferred to a district court. The bankruptcy appellate panels may not dismiss or render a final disposition of an appeal within thirty (30) days from the date of service of the notice of appeal, but may otherwise fully consider and dispose of all motions. (Amended May 9, 2002.)

**Rule 5. Panels.**

Each appeal shall be heard and determined by a panel of three judges from among those appointed pursuant to paragraph 6, provided however that a bankruptcy judge shall not participate in an appeal originating in a district for which the judge is appointed or designated under 28 U.S.C. § 152. (Amended May 9, 2002.)

**Rule 6. Membership of Bankruptcy Appellate Panels.**

The bankruptcy appellate panel shall consist of seven members serving seven-year terms (subject to reappointment to one additional three-year term). The judicial council shall periodically examine the caseload of the bankruptcy appellate panel service to assess whether the number of bankruptcy judges serving should change. Appointment of regular and pro tem bankruptcy judges to service on the bankruptcy appellate panel shall be governed by regulations promulgated by the Judicial Council.

(a) When a three-judge panel cannot be formed from the judges designated under subparagraph (a) to hear a case because judges have recused themselves, are disqualified from hearing the case because it arises from their district, or are otherwise unable to participate, the Chief Judge of the Ninth Circuit may designate one or more other bankruptcy judge(s) from the circuit to hear the case.

(b) In order to provide assistance with the caseload or calendar relief, or otherwise to assist the judges serving, or to afford other bankruptcy judges with the opportunity to serve on the bankruptcy appellate panels, the Chief Judge of the Ninth Circuit may designate from time to time one or more other bankruptcy judge(s) from the circuit to participate in one or more panel sittings. (Amended May 9, 2002.)

**Rule 7. Chief Judge.**

The members of the bankruptcy appellate panel service by majority vote shall select one of their number to serve as chief judge. (Amended May 9, 2002.)

**Rule 8. Rules of Procedure.**

(a) Practice before the bankruptcy appellate panels shall be governed by Part VIII of the Federal Rules of Bankruptcy Procedure, except as provided in this order or by rule of the bankruptcy appellate panel service adopted under subparagraph (b).

(b) The bankruptcy appellate panel service may establish rules governing practice and procedure before bankruptcy appellate panels not inconsistent with the Federal Rules of Bankruptcy Procedure. Such rules shall be submitted to, and approved by, the Judicial Council of the Ninth Circuit. (Amended May 9, 2002.)

**Rule 9. Places of Holding Court.**

Bankruptcy appellate panels may conduct hearings at such times and places as it determines to be appropriate. (Amended May 9, 2002.)

**Rule 10. Clerk and Other Employees.**

(a) **Clerk's Office.** The members of the bankruptcy appellate panel service shall select and hire the clerk of the bankruptcy appellate panel. The clerk of the bankruptcy appellate panel may select and hire staff attorneys and other necessary staff. The chief judge shall have appointment authority

for the clerk, staff attorneys and other necessary staff. The members of the bankruptcy appellate panel shall determine the location of the principal office of the clerk.

(b) **Law Clerks.** Each judge on the bankruptcy appellate panel service shall have appointment authority to hire an additional law clerk. (Amended May 9, 2002.)

**Rule 11. Effective Date.**

This Order shall be effective as to all appeals originating in those bankruptcy cases that are filed after the effective date of this Order. For all appeals originating in those bankruptcy cases that were filed before October 22, 1994, the Judicial Council's prior Amended Order, as revised October 15, 1992, shall apply. This Order, insofar as just and practicable, shall apply to all appeals originating in those bankruptcy cases that were filed after the effective date of the Bankruptcy Reform Act of 1994, October 22, 1994, but before the date of this Order. (Amended May 9, 2002.)



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# RULES OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

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## PREAMBLE.

### Rule

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**Adoption of Interim Interim Procedural Rules 8001(f) and 8003(d).** General Order No. 2005-1 of the United States Bankruptcy Appellate Panel of the Ninth Circuit, effective October 17, 2005, provides that:

“Whereas, on April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) was enacted into law; and

Whereas, most provisions of BAPCPA are effective on October 17, 2005; and

Whereas, the Advisory Committee on Bankruptcy Rules has prepared Interim Rules designed to implement the substantive and procedural changes mandated by BAPCPA; and

Whereas, the Committee on Rules of Practice and Procedure of the United States Judi-

cial Conference (the ‘JCUS Standing Rules Committee’), and the Judicial Conference of the United States, have approved these Interim Rules and recommended the adoption of the Interim Rules to provide uniform procedures for implementing BAPCPA; and

Whereas, included in the Interim Rules are Rules 8001(f) and 8003(d), both of which pertain to direct appeals to the court of appeals as authorized by 28 U.S.C. [§] 158(d)(2) (the ‘Direct Appeals Provision’); and

Whereas, the Bankruptcy Appellate Panel of the Ninth Circuit (‘BAP’) needs interim procedural rules in place as of October 17, 2005 in order to implement the Direct Appeals Provision; and

Whereas, the October 17, 2005 effective date of BAPCPA has not provided sufficient time to promulgate rules after appropriate public notice and an opportunity for comment;

NOW THEREFORE, pursuant to 28 U.S.C. section 2071, and Paragraph 8 of the Amended Order Continuing Bankruptcy Appellate Panel of the Ninth Circuit (Amended May 9, 2002), the final versions of Interim Rules 8001(f) and 8003(d), as recommended by the JCUS Standing Rules Committee, are adopted in their entirety without change by the BAP, to conform with BAPCPA, for appeals arising out of bankruptcy cases filed on or after October 17, 2005.

Interim Rules 8001(f) and 8003(d) shall remain in effect until further order of the court.”

The interim rules cited in General Order No. 2005-1 read as follows:

**“Rule 8001. Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals.**

\* \* \* \* \*

(f) **CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS**

(1) *Timely Appeal Required.* A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be treated as a certification entered on the docket within the meaning of § 1233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in

the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

(2) *Court Where Made.* A certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be filed in the court in which a matter is pending for purposes of 28 U.S.C. § 158(d)(2) and this rule. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3). A matter is pending in a district court appellate panel after the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3).

(A) *Certification by Court on Request or Court's Own Initiative.*

(i) *Before Docketing or Grant of Leave to Appeal.* Only a bankruptcy court may make a certification on request or on its own initiative while the matter is pending in the bankruptcy court.

(ii) *After Docketing or Grant of Leave to Appeal.* Only the district court or bankruptcy appellate panel involved may make a certification on request of the parties or on its own initiative while the matter is pending in the district court or bankruptcy appellate panel.

(B) *Certification by All Appellants and Appellees Acting Jointly.* A certification by all the appellants and appellees, if any, acting jointly may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in subdivision (f)(3)(C) of this rule.

(3) *Request for Certification; Filing; Service; Contents.*

(A) A request for certification shall be filed, within the time specified by 28 U.S.C. § 158(d)(2), with the clerk of the court in which the matter is pending.

(B) Notice of the filing of a request for

certification shall be served in the manner required for service of a notice of appeal under Rule 8004.

(C) A request for certification shall include the following:

(i) the facts necessary to understand the question presented;

(ii) the question itself;

(iii) the relief sought;

(iv) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U.S.C. § (d)(2)(A)(i)-(iii) exists; and

(v) an attached copy of the judgment, order, or decree complained of and any related opinion or memorandum.

(D) A party may file a response to a request for certification or a cross-request within 10 days after the notice of the request is served, or another time fixed by the court.

(E) The request, cross request, and any response shall not be governed by Rule 9014 and shall be submitted without oral argument unless the court otherwise directs.

(F) A certification of an appeal under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties.

(4) *Certification on Court's Own Initiative.*

(A) A certification of an appeal on the court's own initiative under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8004. The certification shall be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(3)(C)(i)-(iv) of this rule.

(B) A party may file a supplementary short statement of the basis for certification within 10 days after the certification.

**Rule 8003. Leave to Appeal.**

\* \* \* \* \*

(d) If leave to appeal is required by 28 U.S.C. § 158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal."

## PREAMBLE.

These rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit are promulgated under the authority of Federal Rule of Bankruptcy Procedure 8018.

### Rule 8001(a)-1. Notice of Appeal.

**Order Being Appealed.** The appellant shall attach to the notice of appeal filed in bankruptcy court a copy of the entered judgment, order or



decree from which the appeal was taken. The clerk of the bankruptcy court shall forward these items to the BAP Clerk. If the notice of appeal is filed before entry of the order being appealed, it is appellant's duty to forward to the BAP Clerk a copy of the judgment or order immediately upon entry. (Adopted February 24, 2000.)

**Rule 8001(e)-1. Election to Transfer Appeal to District Court.**

(a) **Transfer.** The Panel may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate.

(b) **Election procedure when motion for leave to appeal is pending.** If appellant moves for leave to appeal pursuant to FRBP 8003, and fails to file a separate notice of appeal concurrently with filing the motion for leave, the motion for leave shall be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election. (Adopted February 24, 2000.)

**Rule 8006-1. Transcripts.**

The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. The Panel is required to consider only those portions of the transcript included in the excerpts of the record. Parties shall consult local bankruptcy rules with regard to the proper procedure for ordering transcripts or for indicating that transcripts are not necessary. (Adopted February 24, 2000.)

**Explanatory Note:**

This rule addresses two problems. The first occurs when appellants challenge the oral tentative rulings, and/or the oral findings of fact and conclusions of law of the bankruptcy court, and do not include sufficient transcripts in the excerpts of the record to allow the Panel to properly review the bankruptcy court's decision. If findings of fact and conclusions of law were made orally on the record, a transcript of those findings is mandatory. *In re McCarthy*, 230 B.R. 414, 416, 1999 Bankr. LEXIS 135 (9th Cir. BAP 1999).

The second problem arises when an appellant challenges a factual finding. In order to review a factual finding for clear error, the record should usually include the entire transcript and all other relevant evidence considered by the bankruptcy court. *See In re Friedman*, 126 B.R. 63, 68, 1991 Bankr. LEXIS 534 (9th Cir. BAP 1991) (failure to provide an adequate record may be grounds for affirmance); *In re Burkhardt*, 84 B.R. 658, 1988 Bankr. LEXIS 626 (9th Cir. BAP 1988).

**Rule 8007(b)-1. Docketing Appeal and Appellate Record.**

As soon as the statement of issues, designation of record, and any transcripts that have been designated are filed with bankruptcy court, the clerk of the bankruptcy court shall transmit to the BAP Clerk a certificate that the record is complete. The BAP Clerk shall forthwith notify the parties of the date the certificate is filed at the BAP, and this date shall constitute the date of entry of the appeal on the docket for purposes of FRBP 8009. The record shall be retained by the clerk of the bankruptcy court. The BAP Clerk

may request a copy of the record from the clerk of the bankruptcy court. (Adopted February 24, 2000.)

**Rule 8008(a)-1. Communications.**

All communications to the BAP shall be addressed to the Clerk of the United States Bankruptcy Appellate Panel of the Ninth Circuit, Richard H. Chambers Court of Appeals Building, 125 South Grand Avenue, Pasadena, California 91105. (Adopted February 24, 2000.)

**Rule 8008(a)-3. Fax Filing.**

The BAP does not accept for filing documents transmitted by telephone facsimile machine ("fax"), except in emergency circumstances. Permission of the BAP Clerk, prior to the transmittal of the document, is always required.

Any document transmitted to the BAP by fax must be served on all other parties by fax or hand delivery, unless another form of service is authorized by the BAP Clerk, and the method of service shall be expressly stated on the proof of service. Within three days after the fax transmittal, the filing party shall file a signed original and the necessary copies with the BAP. (Adopted February 24, 2000.)

**Rule 8009(a)-1. Briefs; Number of Copies; Extensions of Time.**

(a) **Number.** A party filing briefs shall file an original and four (4) copies with covers, bound separately from the excerpts of the record. At the direction of the BAP the parties may be required to provide additional copies.

(b) **Motion for extension of time for filing brief.**

(1) **Requirements.** A motion for extension of time to file a brief shall be filed within the time limit prescribed by these rules for the filing of such brief and shall be accompanied by a proof of service. The motion shall be supported by a declaration stating:

- (A) When the brief was initially due;
- (B) How many extensions of time, if any, have been granted;
- (C) Reasons why this extension is necessary;
- (D) The specific amount of time requested; and

(E) The position of the opponent(s) with respect to the motion or why the moving party has been unable to obtain a statement of such position(s).

(2) **BAP Clerk Authority.** The BAP Clerk is authorized to grant extensions of time under the direction and guidelines of the Panel.

(3) **Consequences.** Appellant's failure to file a brief timely may result in the dismissal of the appeal. A brief received after the due date will not be accepted for filing unless it is accompanied by a motion for an extension of time and the motion is granted. The Panel has no obligation to consider a late brief. Sanctions may be imposed, such as the waiver of oral argument, monetary sanctions or dismissal. (Adopted February 24, 2000.)

**Rule 8009(b)-1. Appendix (Excerpts of the Record).**

(a) **Number and form.** A party filing excerpts of the record shall file an original and four (4) copies bound separately from the briefs.

(1) Each copy shall be reproduced on white paper by any duplicating process capable of producing a clearly legible image.

(2) Each copy shall be bound with a white cover.

(3) The cover of the excerpts shall contain the caption information specified by 9th Cir. BAP Rule 8010(a)-1(a)(2).

**(b) Organization of Appendix.**

(1) Documents in the appendix shall be divided by tabs.

(2) The pages of the excerpts shall be continuously paginated.

(3) The appendix shall contain a complete table of contents listing the documents and identifying both the tab and page number where each document is located. If the appendix has more than one volume, the table of contents shall also identify the volume in which each document is located. (Adopted February 24, 2000.)

**Explanatory Note:**

The Panel generally limits its review to an examination of the excerpts of the record as provided by the parties. The Panel is not obligated to examine portions of the record not included in the excerpts. See *In re Kritt*, 190 B.R. 382, 386-87, 1995 Bankr. LEXIS 1846 (9th Cir. BAP 1995); *In re Anderson*, 69 B.R. 105, 109, 1986 Bankr. LEXIS 4899 (9th Cir. BAP 1986).

The parties are further referred to FRBP 8010(a)(1)(D) and (a)(2) which address the

related problem created by appellants who do not make explicit references to the parts of the record that support their factual allegations and arguments. Opposing parties and the court are not obliged to search the entire record unaided for error. See *Dela Rosa v. Scottsdale Memorial Health Systems, Inc.*, 136 F.3d 1241, 1998 U.S. App. LEXIS 2654 (9th Cir. 1998); *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169, 1991 U.S. App. LEXIS 810 (9th Cir. 1991); FRAP Rule 10(b)(2).

**Rule 8010(a)-1. Form of Briefs and Certification Requirements.**

(a) **Form.** Briefs shall be produced by a standard typographic printing process that produces a clear black image on white paper, 8 ½ inches by 11 inches, with one-inch margins, in at least 14 point proportional type, or 10.5 point monospaced type, doublespaced, on opaque, unglazed paper.

(1) **BRIEF COVER COLORS:**

Appellant's opening brief:	BLUE
Appellee's opening brief:	RED
Appellant's reply brief:	GREY

(2) **COVER INFORMATION:**

Name of court

Case numbers (BAP, bankruptcy court case, and if applicable, adversary numbers)

Name of Debtor

Names of appellant(s) and appellee(s)

Title of document

Name, address, telephone number, and bar number of counsel filing document

(b) **Certification as to Interested Parties.** To enable the judges of a Panel to evaluate possible disqualification or recusal, all parties, other than governmental parties, shall attach to the inside back cover of their initial briefs, a list of all persons, associations of persons, firms, partnerships and corporations that have an interest in the outcome of the case. The certification should be in substantially the following form:

Certification Required by BAP Rule 8010(a)-1(b)

[BAP NUMBER, DEBTOR’S NAME ]

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal [list the names of all such parties and identify their connection and interest]:

Signed

Dated

(c) **Certification of Related Cases.** The appellant shall attach to the inside back cover of each copy of the opening brief a statement of all known related cases and appeals before the United States Court of Appeals, the United States District Court, or the BAP. A related case is defined as one which involves substantially the same litigants, substantially the same factual pattern or legal issues, or arises from a case previously heard by the Panel. The certification should be in substantially the following form:

Certification Required by BAP Rule 8010(a)-1(c)

[BAP NUMBER, DEBTOR’S NAME]

The undersigned certifies that the following are known related cases and appeals [list the case name, court and status of all related cases and appeals]:

Signed

Dated

(Adopted February 24, 2000; amended, effective January 1, 2010.)

**Explanatory Note:**  
Failure to comply with the Briefing Rules may result in striking the brief and dismissing the appeal, *N/S Corp., v. Liberty Mutual Ins. Co.*, 127 F.3d 1145 (9th Cir 1997) or

imposing sanctions, *In re MacIntyre*, 181 B.R. 420, 422 (9th Cir. BAP 1995), *aff’d*, 77 F.3d 489 (9th F.3d 489) (9th Cir. 1996).  
Briefs and excerpts of the record shall be securely fastened by any appropriate means.

**Rule 8010(c)-1. Length of Briefs.**

Except with leave of the Panel, appellant’s and appellee’s initial briefs shall not exceed thirty (30) pages, and reply briefs shall not exceed twenty (20) pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or



similar materials. (Adopted February 24, 2000.)

**Explanatory Note:**

Motions for leave to exceed page limitations

are rarely granted. Motions should be filed well in advance of the due date for the brief.

**Rule 8011(d)-1 Emergency Motions.**

(a) **Form and number.** An emergency motion must have a cover page bearing the legend “Emergency Motion” in large, bold type. The motion must be filed with the BAP Clerk in an original and three copies.

(b) **Contents.** The motion and supporting declarations(s) must set forth the facts showing the existence and nature of the alleged immediate and irreparable harm.

(c) **Appendix.** The emergency motion must be accompanied by an appendix containing:

(1) A conformed copy of the notice of appeal, and

(2) A copy of the entered judgment, order or decree from which the appeal was taken.

(3) If the emergency motion concerns a stay pending appeal, the appendix must also contain:

(i) a conformed copy of the court’s order denying or granting the stay and any explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable; and

(ii) copies of all papers regarding the stay filed in bankruptcy court.

(d) **Service.** The motion and appendix must be accompanied by a proof of service showing service on all parties. (Adopted February 24, 2000.)

**Explanatory Note:**

When the emergency motion concerns a stay pending appeal, the parties are directed

to *In re Wymer*, 5 B.R. 802, 805-07, 1980 Bankr. LEXIS 5083 (9th Cir. BAP 1980), for standards in granting a stay pending appeal.

**Rule 8011(e)-1. Delegation of Authority to Act on Motions.**

The BAP judges may delegate to the BAP Clerk authority to act on motions that are subject to disposition by a single judge pursuant to FRBP 8011(e), upon the condition that the order entered on the motion does not dispose of the appeal or resolve a motion for stay pending appeal. The order disposing of the motion is subject to reconsideration by a judge if a written request for judicial review is received within fourteen (14) days of the entry of the order. (Adopted February 24, 2000; amended, effective January 1, 2010.)

**Rule 8012-1. Oral Argument.**

The BAP Clerk will provide notice of the time and place of argument. Once the hearing date is scheduled, a motion for continuance will be granted only under exceptional circumstances.

The Panel may determine that oral argument is not needed either *sua sponte* or on motion for submission of the appeal on the briefs. If the Panel determines that oral argument is not needed, it will issue an order to that effect. (Adopted February 24, 2000.)

**Rule 8012-2. En Banc Hearing and Determination of Appeals.**

(a) **En Banc Hearing and Disposition Authorized; Not Favored.** The Panel may hear and dispose of an appeal by sitting en banc as authorized in this rule. An en banc hearing or decision of an appeal is not favored and ordinarily will not be ordered unless it appears that it is necessary to secure or maintain uniformity of the Panel's decisions including, without limitation, when there is a challenge to an existing precedent of the Panel.

(b) **Procedure for a Party to Request an En Banc Hearing.**

(1) **Motion.** A party may request that the Panel hear and decide an appeal en banc. The request must be made by motion filed with the Clerk and served upon the other parties to the appeal (including any party appearing amicus curiae). Such motion should be filed and served not later than the date set for the filing of that party's opening brief. If made, the motion must be accompanied by a brief setting forth the reasons why an en banc hearing and decision of an appeal is appropriate under the standard set forth in subsection (a).

(2) **Response.** Any other party to the appeal (including any party appearing amicus curiae) may file and serve a response to the motion and brief not later than fourteen (14) days after the motion is filed. No reply brief is authorized.

(3) **Page Limit.** The motion or response, together with the brief in support thereof, must not exceed a combined total of 15 pages.

(c) **Procedure for the Panel Initially Assigned to Appeal to Request an En Banc Hearing.** Two or more of the judges assigned to hear and decide the merits of an appeal, including any pro tem judge, may request that the Panel should hear and decide an appeal en banc. The request should be made prior to the disposition of the appeal.

(d) **Procedure for Determining Whether Appeal Should be Heard En Banc**

(1) **Vote of the Panel.** If a timely request for an en banc hearing and decision is made under either subsection (b) or (c), the Clerk will promptly poll the regular members of the Panel eligible to participate in the disposition of that appeal.

(2) **Affirmative Vote; Minimum Number of Judges Who Must Participate.** The appeal will be heard (or, as appropriate, reheard) and decided en banc if:

(a) at least five regular members of the Panel are eligible to participate, and do participate, in the vote; or, if less than five members of the Panel are eligible to participate in the en banc call, the Chief Judge of the Ninth Circuit, after consultation with the Presiding Judge, shall designate such pro tem judges as may be necessary to bring the number of the judges considering the en banc call to five, and all five judges vote; and

(b) a majority of the judges polled vote in favor of the request.

(3) **Negative Vote.** If a timely request for an en banc hearing and decision is made under subsection (b) or (c), and no affirmative vote as

required by paragraph (2) is obtained within fourteen (14) days of the initial polling, the matter will not be heard en banc.

(e) **PROCEDURE AFTER REQUEST AND VOTE.**

(1) **Constituting the En Banc Panel.** If the Panel votes to hear and decide a matter en banc, the en banc panel shall consist of all members of the Panel eligible to participate in the appeal's disposition, but in no event may an en banc panel consist of fewer than five judges. If fewer than five members of the Panel are eligible to participate in the en banc hearing, the Chief Judge of the Ninth Circuit, after consultation with the Presiding Judge, shall designate such pro tem judges as may be necessary to bring the membership of the en banc panel to five.

(2) **Order Regarding Vote; Procedure Thereafter.** The Presiding Judge of the Panel shall promptly cause an order to be entered that is consistent with the results of any vote taken in accordance with subsection (d), and with the actions required by subsection (e). Thereafter, the Clerk, in consultation with the Presiding Judge, will take such actions as are necessary or appropriate to carry out such order. (Adopted, effective January 1, 2010.)

**Rule 8013-1. Disposition of Appeal.**

(a) **Disposition.** The Panel will dispose of all appeals by entry of an Opinion, Memorandum or Order.

(b) **Designation.**

(1) *Opinion.* A disposition of an appeal may be designated as an Opinion if it:

- (A) Establishes, alters, modifies or clarifies a rule of law;
- (B) Calls attention to a rule of law which appears to have been generally overlooked;
- (C) Criticizes existing law; or
- (D) Involves a legal or factual issue of unique interest or substantial public importance.

(2) *Memorandum or Order.* A disposition of an appeal not designated as an Opinion will be designated as either a Memorandum or an Order.

(3) *Manner of Designation.* A disposition shall be designated an Opinion if:

(A) two of the three judges assigned to hear and dispose of the appeal, including the author of the disposition, agree that the disposition shall be designated an Opinion at the time such disposition is filed with the Clerk, or within 28 days thereof; or

(B) an interested party, or any member of the Panel, requests, in writing, that a Memorandum or Order be redesignated as an Opinion, and that it be published. The request must be received no later than 28 days after the filing of the Memorandum or Order and must state concisely the reasons for publication. The judges assigned to hear and dispose of the appeal shall vote on whether to change the initial designation and, if two of the three judges assigned to hear and dispose



of the appeal, including the author of the disposition, agree that the disposition shall be designated an Opinion.

**(c) Citation And Effect.**

(1) *Opinions.* Opinions shall be published. They shall bind the Panel as precedent unless they are modified or reversed in an Opinion issued by the Panel sitting en banc, or unless they no longer are precedent due to changes in the law, whether by act of Congress or by decision of the Ninth Circuit Court of Appeals or the Supreme Court.

(2) *Memoranda and Orders.* Except as provided in subsection (d), Memoranda and Orders will not be published, shall have no precedential value, and may not be cited except when relevant under the doctrine of law of the case, or under rules of claim or issue preclusion.

**(d) Publication.**

(1) *Opinions.* If the disposition is to be published, the BAP Clerk will release a copy to recognized channels for dissemination to the public.

(2) *Orders.* An Order may be designated for publication if so designated by the process provided in subsection (b)(3), with the following changes: (i) only two judges, one of whom is the author of the Order, need to agree as to publication; and (ii) the Order shall be treated as if it were a disposition of the appeal for all other purposes of applying that subsection. When so published, the Order may be used for any purpose for which an Opinion may be used. Upon designation as published, the BAP Clerk will release a copy to recognized channels for dissemination to the public. (Adopted February 24, 2000; amended, effective January 1, 2010.)

**Rule 8014-1. Costs.**

Costs under FRBP 8014 are taxed by filing a bill of costs with the clerk of the bankruptcy court.

**Rule 8018(b)-1. Silence of Local Rules.**

In cases where Part VIII of the Federal Rules of Bankruptcy Procedure and these rules are silent as to a particular matter of practice, a Panel may apply the Rules of the United States Court of Appeals for the Ninth Circuit and the Federal Rules of Appellate Procedure. (Adopted February 24, 2000.)

**Rule 8018-2. Citation to Rules.**

These rules shall be cited as: “9th Cir. BAP R. \_\_\_\_.” (Adopted February 24, 2000.)

**Rule 8070-1. Dismissal for Failure to Prosecute.**

When an appellant fails to file an opening brief timely, or otherwise fails to comply with rules or orders regarding processing the appeal, the BAP Clerk, after notice, may enter an order dismissing the appeal. The order dismissing the appeal is subject to reconsideration by the Panel if a written request for judicial review is received within fourteen (14) days of the entry of the order. (Adopted February 24, 2000; amended, effective January 1, 2010.)



**Rule 9001-1. Definitions.**

(a) The words “BAP Clerk” as used in these rules mean the Clerk of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(b) The word “Judge” as used in these rules, unless otherwise designated, means a member of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(c) The word “Panel” as used in these rules means a panel of judges of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(d) The acronym “BAP” as used in these rules means United States Bankruptcy Appellate Panel of the Ninth Circuit.

(e) The acronym “FRBP” as used in these rules means Federal Rules of Bankruptcy Procedure.

(f) The acronym “FRAP” as used in these rules means Federal Rules of Appellate Procedure. (Adopted February 24, 2000.)

**Rule 9010-1. Attorneys — Duties, Withdrawal, Substitution.**

(a) **Duties.** Counsel must ensure that the appeal is perfected on behalf of the represented party in a manner and within the times prescribed in these rules and must prosecute the appeal with diligence. Counsel must provide counsel’s name, bar number, address, and telephone number on all documents filed with the BAP. Changes in address of counsel or client must be reported to the BAP Clerk in writing.

(b) **Admission.** Any attorney admitted to practice before a District Court of the Ninth Circuit or the Court of Appeals for the Ninth Circuit and who is in good standing before such court shall be deemed admitted to practice before the BAP. An attorney not so admitted may apply to the BAP for permission to appear in a particular appeal.

(c) **Withdrawal and substitution.** No attorney who has appeared in an appeal before the BAP may withdraw without either:

(1) Filing and serving a Notice of Substitution of Attorney. The notice shall contain substitute counsel’s name, bar number, address, telephone number and signature; or

(2) Obtaining an order of the BAP allowing the attorney to withdraw. The BAP may grant such an order if an attorney files and serves on opposing counsel and the attorney’s client a motion to withdraw as counsel. Any motion to withdraw shall include the client’s current address and telephone number.

(d) **Notice of appearance.** Immediately upon undertaking the representation, any attorney who represents a party in an appeal, and who is not identified in either the notice of appeal or a notice of substitution of attorney, shall file and serve a notice of appearance containing counsel’s name, bar number, address, and telephone number. (Adopted February 24, 2000.)

**Rule 9010-2. Pro Se Parties.**

Parties unrepresented by counsel and appearing before the Panel are considered to be “pro se parties” representing themselves. Only individuals

are permitted to appear pro se. Pro se parties must ensure their appeal is perfected in a manner and within the time limits prescribed in these rules and must prosecute the appeal with diligence. Changes in address must be reported to the BAP Clerk in writing. (Adopted February 24, 2000.)

**Explanatory Note:**

See *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 1996 U.S. App. LEXIS 2519 (9th Cir. 1996); *In re Eisen*, 14 F.3d 469, 1994 U.S. App. LEXIS 554 (9th Cir. 1994). Corporations, partnerships and associations are not permitted to appear in federal court except through

a licensed attorney. *Rowland v. California Men's Colony*, 506 U.S. 194, 113 S. Ct. 716, 121 L. Ed. 2d 656, 1993 U.S. LEXIS 827 (1993); *In re America West Airlines, Inc.*, 40 F.3d 1058, 1994 U.S. App. LEXIS 33278 (9th Cir. 1994).

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